

TIME'S UP: A CALL TO BAN THE USE OF SEX AS AN INVESTIGATORY TACTIC IN ALASKA

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ABSTRACT

Sex workers in Alaska are facing sexual violence at the hands of the people whose job it is to protect them: the police. Astonishingly, it is legal in Alaska for undercover police officers to use sexual intercourse and other sexual contact as investigative tools. In 2017, House Bill 112 and Senate Bill 73 were introduced in the Alaska State Legislature to make it illegal for law enforcement officers to have any sexual contact with people under investigation. Upon resistance from the Anchorage Police Department, these bills stalled and were not re-introduced. This Note argues that the use of sex in investigations is a violation of due process and urges Alaska lawmakers to reintroduce and pass these bills.

I. INTRODUCTION

In January 1981, John H. Chandler, a volunteer reserve officer for the Anchorage Police Department (APD) in Alaska, came across an advertisement for the “North Star Dating Service.”¹ Officer Chandler, with the approval of his vice squad officers, went to the establishment posed as a prospective customer.² Upon arrival, Officer Chandler made arrangements for sex worker³ Lynda Flanagan to engage in both oral and

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

2. *Id.*

3. Throughout this Note, people who work in prostitution are referred to as “sex workers.” The term “prostitute” dehumanizes women who engage in prostitution and has negative connotations in modern society. See Phillip Walters, *Would a Cop Do This: Ending the Practice of Sexual Sampling in Prostitution Stings*, 29 *LAW & INEQ.* 451, 455-56 (2011). The term “sex worker” is less euphemistic and acknowledges that prostitution is a job, not an identity. *Id.*

vaginal sexual intercourse with him and paid her sixty dollars.⁴ Instead of arresting Flanagan after the payment, the officer undressed and got on the bed.⁵ Undressed as well, Flanagan gave Officer Chandler a back massage and then instructed him to turn over.⁶ At this request, Officer Chandler turned over and Flanagan stroked his penis several times.⁷ After several seconds, Officer Chandler interrupted Flanagan and placed her under arrest for assignation for the purpose of prostitution.⁸ The district court entered an order dismissing this charge on grounds of entrapment.⁹ On appeal by the government, Flanagan maintained that the dismissal must be upheld on the grounds that her due process rights were violated.¹⁰ The Court of Appeals of Alaska subsequently reversed this dismissal, finding neither a viable entrapment defense nor a due process violation.¹¹

Over thirty years later, sex worker Monica¹² experienced an eerily similar encounter—an encounter that is still deemed legal in Alaska and in almost every state in the United States.¹³ Monica and an undercover state trooper met up at a hotel in Anchorage.¹⁴ After a fifteen-minute massage, Monica removed his clothes and began rubbing his penis.¹⁵ After about ten seconds, a handful of detectives and a camera crew burst into the room.¹⁶ As she tried to cover up, she was arrested for prostitution, all while being filmed for the documentary series “Alaska State Troopers.”¹⁷

Although such incidents of “state-sponsored sexual assault”¹⁸ by deceit are not uncommon, they are very seldom reported. Sex workers

4. *Flanagan*, 649 P.2d at 959.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 958–59.

10. *Id.* at 962.

11. *Id.* at 962–63.

12. Monica is a pseudonym.

13. Jenavieve Hatch, *Sex Workers in Alaska Say Cops are Abusing Power to Solicit Sex Acts*, HUFFPOST (Aug. 17, 2017, 12:50 PM), https://www.huffpost.com/entry/sex-workers-in-alaska-say-cops-are-abusing-their-power-to-solicit-sex_n_596e1d26e4b010d77673e488.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Michelle Theriault Boots, *Bills to Ban Police Sexual Contact with Prostitutes They Investigate Met with Opposition*, ANCHORAGE DAILY NEWS (May 7, 2017), <https://www.adn.com/alaska-news/crime-courts/2017/05/07/bills-to-ban-police-sexual-contact-with-prostitutes-they-investigate-met-with-opposition/> (noting that it is not necessary for police officers to use deceit to engage in sexual acts with suspects).

throughout Alaska have started to come forward with stories of investigative tactics that range from unnecessary groping to “completed” sexual intercourse.¹⁹ A recent research study at the University of Alaska Fairbanks found that of the forty sex workers surveyed, twenty-six percent reported they had been sexually assaulted by a law enforcement officer.²⁰ This high incidence of sexual violence is even more disturbing given that sex workers make up one of the most vulnerable populations. Research shows that globally, forty-five to seventy-five percent of sex workers have experienced workplace violence at some point in their lifetime, with thirty-two to fifty-five percent having experienced it over the past year.²¹

Astonishingly, it is legal in Alaska for police officers to use sexual intercourse or sexual contact as investigative tools.²² It is illegal, however, for police officers to have any type of sexual contact with people *in custody*.²³ Alaska Statute § 11.41.425 defines sexual assault in the third degree as when an offender,

while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.²⁴

Section 11.41.427 defines sexual assault in the fourth degree in identical terms, except “sexual penetration” is replaced with “sexual contact.”²⁵ Proposed in February of 2017, House Bill No. 112 (H.B. 112)²⁶ and Senate Bill No. 73 (S.B. 73)²⁷ would add specific language to both sections to

19. See Hatch, *supra* note 13 (describing multiple personal accounts from Alaska’s sex workers of investigative officers “finding themselves in legal trouble after providing sexual favors to a man presumed to be a client, but who is actually a cop”). See also *Rachel’s Story*, SEX TRAFFICKING IN ALASKA, <http://sextraffickingalaska.com/rachels-story/> (last visited Oct. 5, 2020) (recounting a former sex worker’s experience having sexual intercourse with an undercover Alaskan police officer in which she “felt completely violated”).

20. Matt Claman, HOUSE BILL 112 SPONSOR STATEMENT, 30th Leg., at 1 (Alaska 2017).

21. Kathleen N. Deering et al., *A Systematic Review of the Correlates of Violence Against Sex Workers*, 104(5) AM. J. PUB. HEALTH e42, e42 (2014).

22. CMTY. UNITED FOR SAFETY AND PROT., EXPANDING PROTECTION FOR SEXUAL ASSAULT VICTIMS: A REPORT IN SUPPORT OF AK HOUSE BILL 112, 30th Leg., at 3 (Alaska 2017).

23. ALASKA STAT. §§ 11.41.425, 11.41.427 (2020).

24. § 11.41.425.

25. Compare § 11.41.425, with § 11.41.427.

26. H.B. 112, 30th Leg. (Alaska 2017) [hereinafter *H.B. 112*].

27. S.B. 73, 30th Leg. (Alaska 2017) [hereinafter *S.B. 73*].

extend these protections to victims, witnesses, and *suspects under active investigation*.

Initially, the public showed overwhelming support for the passing of these bills. By the time of their introductions to the Alaska legislature, over 67,000 people had signed a petition supporting the legislation.²⁸ A survey of 900 Alaskans revealed that 92.9% were unaware that police were permitted to have sex during prostitution stings, and 90.2% felt that this practice should be made illegal.²⁹

Despite broad public support, the bills were neither passed nor reintroduced in 2019 due to opposition from the APD.³⁰ APD Captain Sean Case went as far as to say that “if we make that act (of touching) a misdemeanor we have absolutely no way of getting involved in that type of arrest.”³¹ He falsely claimed that due to a tactic known as the “cop check,” in which a sex worker asks a customer to touch her breast in order to identify officers, it would sometimes be impossible to make arrests of sex workers without using sexual contact.³²

This Note argues that the practice of using sexual contact for investigative purposes violates due process and should be statutorily outlawed through the reintroduction and adoption of H.B. 112 and S.B. 73. First, Part II briefly describes the history and current state of prostitution law in Alaska and the trauma sex workers face at the hands of government officials. Part III argues that the use of sexual contact by law enforcement agents for investigative purposes violates the Due Process Clause because it amounts to “outrageous police conduct, shocking the universal sense of justice and violating the concept of fundamental fairness.”³³ Part III concludes that since the Alaska Court of Appeals last considered this issue in 1982, what is outrageous and shocking to the public has changed substantially and Alaska should follow the precedent set in Minnesota by finding that this behavior is a violation of due process.

Part IV then uses comparisons to illegal acts and other governmental tactics to further argue that investigative sexual contact should be outlawed. First, Section A draws a comparison between law enforcement officers having sexual contact with people in custody, which is currently

28. Claman, *supra* note 20.

29. *Id.*

30. See Telephone Interview with Matt Claman, Representative, Alaska House of Representatives (Nov. 19, 2020) (explaining that he would be unable to get the bill passed due to vocal resistance from the APD).

31. Boots, *supra* note 18.

32. *Id.*; see *infra* Part III (explaining that a sex worker must only agree to exchange sex for money in order to be charged with prostitution).

33. *Municipality of Anchorage v. Flanagan*, 649 P.2d 957, 963 (Alaska Ct. App. 1982) (citing *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).

illegal in Alaska, and the same act with people under investigation. Then, Section B outlines how the principles behind the limitations on searches imposed by the Fourth Amendment can be adapted to establish due process protections for sex workers in these cases.

Next, Part V argues that because consent to sexual contact is not possible when it is procured by deceit, these investigatory tactics should qualify as rape-by-deception. However, because Alaska law still does not recognize deception as a barrier to consent, categorizing undercover police officer sexual contact as per se assault is an effective alternative method to protecting sex workers.

Part VI concludes this Note through examining the proposed bills and explaining why they must be adopted. It weighs the public support for the bills against the resistance from the Anchorage Police Department and argues that the officials' concerns about the proposed amendments are not only unfounded, but disfavored by public policy as well.

II. BACKGROUND

A. History of Prostitution Law in Alaska

Often described as “the world’s oldest profession,”³⁴ prostitution in Alaska is older than the state itself. In 1915, forty-four years before Alaska was admitted as the forty-ninth state, a red-light district called South Addition formed in Anchorage.³⁵ It was quickly destroyed and replaced by a new red-light district called Chester Creek.³⁶ Not much is known about these early red-light districts, but it is believed that the residents were widely respected and played an important part in the local economy.³⁷

34. Forrest Wickman, *Is Prostitution Really the World's Oldest Profession?*, SLATE (Mar. 6, 2012, 5:57 PM), <https://slate.com/news-and-politics/2012/03/rush-limbaugh-calls-sandra-fluke-a-prostitute-is-prostitution-really-the-worlds-oldest-profession.html>.

35. David Reamer, *How South Addition Became Anchorage's First Red-Light District*, ANCHORAGE DAILY NEWS (Feb. 9, 2020), <https://www.adn.com/alaska-life/2020/02/10/how-south-addition-became-anchorage-first-red-light-district/>; see *Alaska Statement*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBR., MUSEUM & BOYHOOD HOME, <https://www.eisenhowerlibrary.gov/research/online-documents/alaska-statehood> (last visited Dec. 8, 2020) (“On January 3, 1959 [President Eisenhower] signed the official proclamation admitting Alaska as the 49th state.”).

36. Reamer, *supra* note 35 (explaining that representatives of the U.S. Forest Service were furious with the Anchorage manager for allowing the district to be built on its land).

37. See *id.* (describing how the women operated independently and were great customers for the local merchants).

Much has changed in the century between Alaska's first red-light districts and today. Currently, prostitution is criminalized nationwide except for in a few counties in Nevada.³⁸ The general justification for this criminalization is that sex work is "exploitative and demeaning to sex workers."³⁹ The federal government has opposed legalizing sex work due to its belief that legalization would lead to increases in human trafficking.⁴⁰ Yet, the criminalization of sex work has had disastrous effects on individual sex workers not involved in human trafficking.⁴¹ Specifically, "the policing of sex work exacerbates stigma, compromises access to resources, justifies violence, and is steeped in racial disparities."⁴² Although all sex workers face a considerable risk of violence,⁴³ women of color, and especially transgender women of color, are particularly vulnerable.⁴⁴ Most acts of violence against sex workers go unreported because sex work is illegal and stigmatized in the U.S.⁴⁵

Further compounding these problems of violence, law enforcement officers are frequently the perpetrators. In a 2003 study conducted in New York City, twenty-seven percent of sex workers reported they had experienced police violence, including officers fondling them and offering not to arrest them in exchange for sexual services.⁴⁶ Although statistics in this area are difficult to accurately assess due to underreporting, the problem appears to be at least as pervasive in Alaska.

38. Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019, 7:30 AM), <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc>.

39. Emily Bazelon, *Why is Prostitution Illegal?*, SLATE (Mar. 10, 2008, 7:12 PM), <https://slate.com/news-and-politics/2008/03/why-is-prostitution-illegal.html>.

40. *Id.*

41. See *Does Legalized Prostitution Increase Human Trafficking?*, HARV. L. & INT'L DEV. SOC'Y (June 12, 2014), <https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/> (summarizing the findings of Seo-Young Cho, Alex Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41(1) WORLD DEV. 67 (2013)).

42. Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT'L (Dec. 12, 2016), <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/>.

43. See *id.* at 3 ("Research shows that globally, 45% to 75% of sex workers have experienced workplace violence at some point in their lifetime, with 32% to 55% having experienced it over the past year.")

44. *Id.*

45. *Sexual Violence Against Sex Workers*, MD. COALITION AGAINST SEXUAL ASSAULT, <https://mcasa.org/assets/files/Sexual-Violence-and-Sex-Workers1.pdf> (last visited Dec. 8, 2020).

46. Urban Justice Ctr., *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, SEX WORKERS PROJECT (2003), <https://sexworkersproject.org/downloads/RevolvingDoorFS.html>.

In a 2014 study conducted by the University of Alaska Fairbanks, twenty-six percent of Alaskan sex workers and sixty percent of Alaskan sex trafficking victims reported sexual assault by a police officer.⁴⁷

The fact that sex workers face so much violence at the hands of law enforcement officers makes it extremely difficult for them to come forward and report when they are victims of other violent crimes.⁴⁸ This distrust contributes to a vicious cycle of violence faced by sex workers. “Despite the frequency of violence, sex workers are reluctant to report incidences to the police, because they do not think the police will take their complaints seriously, and they worry about the legal ramifications.”⁴⁹ Instead of viewing police officers as their protectors, many sex workers in Alaska view them as threats.⁵⁰

This threat by police was further compounded in 2012, when Alaskan lawmakers replaced the word “prostitution” with “sex trafficking” in many of its statutes.⁵¹ The hope was that this change would primarily target legal action on those who profit from others’ work in the sex trade, such as pimps, rather than the sex workers themselves.⁵² In practice, this change has had unintended harmful consequences because many standard prostitution behaviors are now defined as sex trafficking.⁵³ Community United for Safety Protection (CUSP) describes this perverse outcome:

Things that sex workers do to increase their safety, like working together (a prostitution enterprise!), working indoors (maintaining a place of prostitution), facilitating prostitution (buying condoms, advertising, everything sex workers and sex trafficking victims do) and associating with each other are

47. CMTY. UNITED FOR SAFETY AND PROT., *supra* note 22, at 3.

48. See *Policy Brief: The Impact of Criminalisation on Sex Workers’ Vulnerability to HIV and Violence*, NSWP (Dec. 5, 2017), <https://www.nswp.org/resource/the-impact-criminalisation-sex-workers-vulnerability-hiv-and-violence> (“Criminalisation creates a culture of impunity which fosters a variety of human rights abuses, most notably physical and sexual violence. If an individual fears arrest, reporting violence (often to the same institution that perpetrated violence against them) is unlikely.”).

49. Walters, *supra* note 3, at 460.

50. Noah Berlatsky, *Alaska’s Prostitution Law Isn’t Working*, THE ATLANTIC (Dec. 17, 2014), <https://www.theatlantic.com/health/archive/2014/12/alaskas-prostitution-law-isnt-working/383818/>.

51. Julia O’Malley, *Inside Alaska’s World of Sex Work from Someone Who Lived It*, ANCHORAGE DAILY NEWS (Dec. 16, 2016), <https://www.adn.com/alaska-life/2016/12/16/convicted-of-sex-trafficking-amber-batts-gives-her-view-on-prostitution-in-anchorage-2/>.

52. *Id.*

53. *The Laws*, SEX TRAFFICKING IN ALASKA, <http://sextraffickingalaska.com/the-laws/> (last visited Nov. 10, 2020).

confused with media images of kidnapped children being held in sexual bondage.⁵⁴

Despite the legislature's intent, third-party traffickers have not been the primary people charged under this amendment; instead, sex workers have been charged with trafficking *themselves*.⁵⁵ This failed attempt to protect sex workers from unnecessary legal consequences demonstrates that the Alaska legislature needs to do more. Instead of amending statutes to further criminalize sex work, Alaskan lawmakers should create laws that protect this vulnerable population.

B. Trauma of Sex Workers

The deceitful use of power by law enforcement officers against sex workers can cause serious trauma to the victims, resulting in lasting psychological problems.⁵⁶ For instance, in *Commonwealth v. Sun Cha Chon*, psychologist Maryann Layden, Ph.D., the director of a sexual trauma and psychopathology program at the University of Pennsylvania, explained that people who work in prostitution often suffer from posttraumatic stress disorder (PTSD), depression, and substance abuse.⁵⁷ She further explained that, for sex workers who are experiencing mental health conditions, "each instance of being prostituted deepens the damage" and has an "additive effect."⁵⁸ This mental damage is compounded when sex workers are tricked and deceived by law enforcement officers, the very people who are supposed to protect them. Terra Burns, one of the founders of CUSP, explained, "It's incredibly traumatic to be tricked into having sex with someone who stops in the middle and puts you in handcuffs and takes you against your will to be locked up in a jail cell."⁵⁹

The devastating psychological, emotional, and physical effects of sexual violence are well-documented. Some victims experience depression, flashbacks, substance abuse, sleep disorders, and PTSD as results of sexual violence.⁶⁰ While the lifetime prevalence of PTSD among

54. *Id.*

55. *Id.*

56. See *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 791 (Pa. Super. Ct. 2009) (discussing the traumatizing aspects of sex work and the specific impact of officers acting as johns); Hatch, *supra* note 13.

57. *Sun Cha Chon*, 983 A.2d at 791.

58. *Id.*

59. Lilly Dancyger, *Alaska Cops Defend Their 'Right' to Sexual Contact with Sex Workers Before Arresting Them*, GLAMOUR (July 10, 2017), https://www.glamour.com/story/alaska-cops-defend-sexual-contact-sex-workers-arrests?mbid=social_facebook_referral.

60. *Effects of Sexual Violence*, RAINN, <https://www.rainn.org/effects-sexual-violence> (last visited Nov. 12, 2020).

North Americans is estimated at 7.8%, this increases to a staggering fifty percent for women who have been sexually assaulted.⁶¹ Sexual assault is the most frequent cause of PTSD in women, with one study reporting that ninety-four percent of women experienced PTSD symptoms within two weeks of being assaulted.⁶² While PTSD can manifest in a host of symptoms, including increased feelings of stress, fear, anxiety, and nervousness, the three main symptoms of PTSD are re-experiencing, avoidance, and hyperarousal.⁶³

Sex workers experience a significantly higher rate of sexual assault and PTSD than the general population. In a 2008 study, Melissa Farley and Howard Barkan found that sixty-eight percent of the 130 San Franciscan sex workers interviewed met the diagnostic criteria for PTSD.⁶⁴ Along with pervasive childhood sexual assault, sixty-eight percent of the sex workers in the study reported having been raped while working.⁶⁵ The total number of rapes suffered by an individual while engaging in sex work was found to be significantly associated with PTSD severity.⁶⁶

Sex workers in Alaska are experiencing sexual violence by police officers and its resulting trauma. In her statement in support of H.B. 112, sex worker Lily shared: "I still have PTSD symptoms when I see police cars because of these sexual assaults and rape that have taken place in my life as a sex worker."⁶⁷ After a police officer posing as a "john"⁶⁸ had sex to completion with former sex worker Rachel, she told the Huffington Post, "I felt like I was raped . . . I feel like he used his badge as a way to have sex with me."⁶⁹

61. Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9(2) MCGILL J. MED. 111, 112 (2006).

62. *Id.*

63. *Post-Traumatic Stress Disorder*, RAINN, <https://www.rainn.org/articles/post-traumatic-stress-disorder> (last visited Apr. 14, 2021). Re-experiencing is defined as "feeling like you are reliving the event through flashbacks, dreams, or intrusive thoughts." *Id.* Avoidance is defined as "intentionally or subconsciously changing your behavior to avoid scenarios associated with the event or losing interest in activities you used to enjoy." *Id.* Hyperarousal is defined as "feeling 'on edge' all of the time, having difficulty sleeping, being easily startled, or prone to sudden outbursts." *Id.*

64. Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH 37, 37 (1998).

65. *Id.*

66. *Id.*

67. HOUSE BILL 112 SUPPORTING DOCUMENT – SUPPORT LETTERS 22.28.2017, 30th Leg., at 1 (Alaska 2017).

68. *John*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/john> (last visited Apr. 12, 2021) ("a prostitute's client").

69. Hatch, *supra* note 13.

III. USING SEX AS AN INVESTIGATIVE TACTIC IS A VIOLATION OF DUE PROCESS

A. Case Law

Case law throughout the United States demonstrates that the use of sexual contact as an investigative tool against sex workers should be deemed a violation of due process. The Fourteenth Amendment of the U.S. Constitution mandates that no state shall “deprive any person of life, liberty, or property, without due process of law.”⁷⁰ The due process right “protect[s] individuals against abusive governmental action.”⁷¹ This right is breached when governmental action violates “fundamental fairness” and is “shocking to the universal sense of justice.”⁷² The Alaska Constitution’s due process clause⁷³ operates similarly and “is meant to guard against unfair, irrational, or arbitrary state conduct that ‘shock[s] the universal sense of justice.’”⁷⁴

Courts throughout the United States have found that certain investigative tactics are so shocking as to deny the defendants of their rights to due process of law. For example, in *Rochin v. California*,⁷⁵ the United States Supreme Court considered a situation in which three deputy sheriffs burst into Rochin’s house on a narcotics tip and watched him swallow capsules that were on his nightstand.⁷⁶ The officers subsequently jumped on him to try to extract the capsules.⁷⁷ When that proved fruitless, they handcuffed him and brought him to the hospital, where they instructed a doctor to insert an emetic solution through a tube into his stomach, forcing him to vomit and produce the capsules.⁷⁸ The United States Supreme Court overturned Rochin’s conviction, finding that these actions violated his right to due process.⁷⁹ The Court stated that the officers did “more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is

70. U.S. CONST. amend. XIV, § 1.

71. *State v. Burkland*, 775 N.W.2d 372, 374 (Minn. Ct. App. 2009).

72. *United States v. Russell*, 411 U.S. 423, 432 (1973) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 304 (1960)).

73. ALASKA CONST. art. 1, § 7 (“No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.”).

74. *Doe v. Dep’t of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019) (quoting *Church v. Dep’t of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).

75. 342 U.S. 165 (1952).

76. *Id.* at 166.

77. *Id.*

78. *Id.*

79. *Id.* at 172.

conduct that shocks the conscience.”⁸⁰

Although not many courts have specifically examined sexual contact as an investigative tactic, a Minnesota case provides useful guiding precedent. In *State v. Burkland*,⁸¹ the Court of Appeals of Minnesota reversed a conviction of a misdemeanor prostitution charge. The court held that it is “sufficiently outrageous” and a violation of the “concept of fundamental fairness” for a police officer to initiate sexual contact that is not required in a prostitution investigation.⁸² After receiving a tip that prostitution was occurring, an undercover officer arranged a one-hour massage with appellant Betsy Lou Burkland.⁸³ After beginning the massage, Burkland offered to perform it topless for an additional fee, which the officer accepted.⁸⁴ Following the massage and some small talk, which included a discussion of a recent prostitution arrest, Burkland brought up the benefits of a massage with a “happy ending,” and the officer asked her “[d]o you think I can touch your breasts now?”⁸⁵ After answering affirmatively, the officer massaged her breasts with oil while she rubbed his penis.⁸⁶ He then asked for additional sexual services if he put on a condom, which she declined.⁸⁷ At that point, other officers entered the room and arrested Burkland for prostitution.⁸⁸

The Court of Appeals of Minnesota evaluated the officer’s conduct under Minnesota’s legal standard for an investigation, examining “the nature of the officer’s conduct and whether the conduct is justified by the need to gather evidence sufficient to arrest the target of the investigation for the offense.”⁸⁹ The evidence needed to prove the misdemeanor prostitution offense was simply that Burkland “‘agree[d] to engage for hire’ in sexual contact.”⁹⁰ The court found that “there [was] no evidence that the officer considered it necessary for the collection of evidence to initiate sexual contact by asking to touch Burkland’s breasts or permitting her to rub his penis.”⁹¹ The officer could have sought the necessary agreement to engage in sexual contact any time throughout the almost hour-long massage without ever initiating sexual contact with

80. *Id.*

81. 775 N.W.2d 372 (Minn. Ct. App. 2009).

82. *Id.* at 376 (quoting *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978)). Because they are identical, the court interpreted the due process provisions of the United States and Minnesota constitutions coextensively. *Id.* at 374 n. 1.

83. *Id.* at 373.

84. *Id.*

85. *Id.* at 373–74.

86. *Id.* at 374.

87. *Id.*

88. *Id.*

89. *Id.* at 375.

90. *Id.*

91. *Id.*

Burkland.⁹² This initiation of sexual contact “was unnecessary to any reasonable investigation and offensive to due process.”⁹³ After this ruling, a Minnesotan’s due process rights may now be violated when the government uses “sex as a weapon in its investigatory arsenal.”⁹⁴

The Alaska Supreme Court should follow Minnesota’s lead and hold that unnecessary sexual contact by law enforcement agents during prostitution investigations is “shocking to the universal sense of justice” and violates due process.⁹⁵ Similar to the Minnesota prostitution law in *Burkland*,⁹⁶ an individual commits the crime of prostitution in Alaska “if the person (1) engages in or agrees or offers to engage in sexual conduct in return for a fee; or (2) offers a fee in return for sexual conduct.”⁹⁷ It is unnecessary for sex workers to actually engage in sexual acts to be arrested for prostitution—one can commit the crime by simply agreeing or offering to partake in the acts for a fee. It therefore follows that it is also unnecessary for law enforcement officers to engage in sex acts for investigative purposes. As the court stated in *Burkland*, an undercover officer can procure the incriminating agreement at any time before the sexual contact actually takes place. Any sexual contact, therefore, is gratuitous and is solely for the officer’s own sexual gratification. Law enforcement officers engaging in sexual acts under false pretenses for the officers’ own sexual gratification is certainly “shocking to the universal sense of justice,” and therefore violates the sex worker’s due process rights.⁹⁸

The last time an Alaskan court visited this issue was in 1982, when the Court of Appeals of Alaska considered the actions of the volunteer reserve officer discussed previously.⁹⁹ In *Municipality of Anchorage v. Flanagan*, the court held that despite posing as a customer, Officer Chandler’s behavior did not amount to a due process violation because, although “questionable,” it did not rise to the level of “outrageous police conduct, shocking the universal sense of justice and violating the concept

92. *Id.*

93. *Id.*

94. *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 789 (Pa. Super. Ct. 2009) (finding that the defendant’s right to due process was violated when “the police used sex as a weapon in its investigatory arsenal . . . permitted the sex to continue even after having enough evidence for an arrest, and . . . the sexual conduct was entwined with the investigation”).

95. *United States v. Russell*, 411 U.S. 423, 432 (1973) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 304 (1960)).

96. *Burkland*, 775 N.W.2d at 373 (citing MINN. STAT. § 609.324 (2006)).

97. ALASKA STAT. § 11.66.100 (2020) (emphasis added).

98. *Russell*, 411 U.S. at 432 (quoting *Kinsella*, 361 U.S. at 304).

99. *Municipality of Anchorage v. Flanagan*, 649 P.2d 957 (Alaska Ct. App. 1982); *see supra* pp. 1–2.

of fundamental fairness.¹⁰⁰ The court did not provide any reasoning for this conclusion, other than declaring that its decision was bolstered by a Washington Court of Appeals case in which the court did not find a due process violation in a situation involving an undercover civilian agent working as a sex worker, not a john.¹⁰¹ Although the Court of Appeals of Alaska did not consider investigative sexual contact outrageous and shocking enough to amount to a due process violation in 1982, public attitudes change over time, and today, almost forty years later, this conduct should absolutely rise to that level.

B. A Change in Public Perception of Sexual Violence

In today's society, there is a heightened awareness of the nature of sexual violence. Advocates have achieved many important advances in elevating public consciousness around sexual violence in the past few decades.¹⁰² Historically, the most common public perception of rape was a stranger violently attacking a victim outside at night.¹⁰³ Women who were engaged in any "questionable" behavior at the time of the rape, such as prostitution, were seen as illegitimate victims.¹⁰⁴ Many studies conducted as recently as the aughts found that most people still defined rape in terms of force and physical harm.¹⁰⁵

But perceptions of sexual assault are rapidly changing due to advocacy work and the widespread coverage of recent events in the

100. *Flanagan*, 649 P.2d at 963.

101. *Id.* (citing *State v. Putnam*, 639 P.2d 858, 861-62 (Wash. Ct. App. 1982)).

102. Sarah McMahon, *Changing Perceptions of Sexual Violence Over Time*, VAWNET.ORG 1 (Oct. 2011), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ChangingPerceptions.pdf.

103. *Id.* at 2.

104. *See id.* (pointing to alcohol use and dressing suggestively as "questionable" behaviors).

105. *See id.* at 4 (citing Moira O'Neil & Pamela Morgan, *American Perceptions of Sexual Violence: A FrameWorks Research Report*, NAT'L CTR. ON DOMESTIC VIOLENCE (Sept. 2010)

http://ncdsv.org/images/FrameWorks_AmericanPerceptionsofSexualViolence_9-2010.pdf (reporting that "while most respondents understood sexual violence as non-consensual, unwanted and forced, many believed that acts of sexual violence must result in some sort of physical harm"); Robyn McClean & Jane Goodman-Delahunty, *The Influence of Relationship and Physical Evidence on Police Decision-Making in Sexual Assault Cases*, 40 AUSTL. J. FORENSIC SCI. 109, 118 (2008) (finding that "police officers were more likely to believe the complainant was sexually assaulted and recommend that the alleged offender be charged when there was evidence that the victim was physically injured.")).

media. Recent social movements such as Time’s Up¹⁰⁶ and “me too.”¹⁰⁷ have put sexual harassment and violence front and center in the media, changing public opinion and even changing the law.¹⁰⁸ Additionally, a study conducted in October 2018 found that following the news coverage of Justice Brett Kavanaugh’s Supreme Court confirmation, which prompted many women to reveal their own stories of sexual assault, thirty-nine percent of people reported that they now believed sexual assault was more common than they previously thought.¹⁰⁹ Due to the exponential amount of progress society has made and continues to make in how sexual violence is viewed, courts must re-examine what sexual conduct would be shocking to the universal sense of justice *today*.

Sexual contact by undercover police officers is a form of sexual violence. It is an unnecessary invasion of sex workers’ bodies and, as previously discussed, it is a traumatic experience that can cause lasting harm to sex workers.¹¹⁰ It is shocking to the universal sense of justice and a violation of fundamental fairness for police officers—government workers who are hired to protect the public and reduce harm—to engage in avoidable behaviors that cause permanent damage to the health of the very people they are supposedly trying to protect.

The Alaska public overwhelmingly supports the conclusion that sexual contact is an unacceptable investigative tool. A 2016 study conducted by Hays Research Group found that 92.9% of the 900 Alaskans surveyed were unaware that police officers could have sexual contact with sex workers before arresting them, and 90.2% of these respondents believed that this conduct should be made illegal.¹¹¹ Additionally, as of February 2017, over 67,000 people had signed a petition asking the Alaska

106. Time’s Up is a nonprofit organization that seeks to end gender-based discrimination in the workplace by changing culture, companies, and the law. *About, TIME’S UP*, <https://timesupnow.org/about/> (last visited Dec. 8, 2020).

107. The “me too.” movement started when the #metoo hashtag went viral across social media in 2017. *History & Inception, ME TOO.*, <https://metoomvmt.org/get-to-know-us/history-inception/> (last visited Dec. 8, 2020). It helped bring awareness to the magnitude of the global problem of sexual violence, especially toward marginalized groups, and aims to create long-term, systemic change. *Id.*

108. See *#MeToo: Its Impact and What’s Happening Now*, A.B.A. (Sept. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/september-2019/-metoo-its-impact-and-whats-happening-now/> (reporting that due to the “me too.” movement, fifteen states had passed laws to protect workers from sexual harassment between October 2017 and September 2019).

109. *Most Americans Believe Sexual Assault is a Widespread Problem in Society*, NORC U. CHI. (Oct. 25, 2018), <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/most-americans-believe-sexual-assault-is-a-widespread-problem-in-society.aspx>.

110. See *supra* Part II.B.

111. Claman, *supra* note 20, at 1.

legislature to make this practice illegal.¹¹² Amnesty International, a global movement dedicated to protecting individuals from human rights abuses,¹¹³ calls this conduct “an abuse of authority [that] in some instances amounts to rape and/or entrapment.”¹¹⁴

IV. COMPARISONS – SIMILAR ACTS THAT ARE CURRENTLY ILLEGAL

Since few courts have directly addressed the use of sexual contact and intercourse as investigative tactics yet, an examination of similar acts that have been deemed illegal both by courts and lawmakers is illuminating. Specifically, the use of sexual investigatory tactics should be outlawed because of their similarity to the illegal practice of police officers having sex with people in custody. Additionally, these tactics should be outlawed due to their similarities to certain investigatory tactics used in searches, which have been found to violate the more expansive protections of the Fourth Amendment.

A. Sex with a Person in Custody

Since it is illegal for police officers to have sex with individuals in custody, it logically follows that it should be illegal for officers to have sex with people while conducting other aspects of their duties as well. It is considered sexual assault in Alaska for law enforcement officers to engage in sexual penetration or contact with any person in custody or apparent custody.¹¹⁵ The law implies that categorically, people in custody are unable to consent to sexual contact with law enforcement officers because of the power dynamic between police officers and people in custody.¹¹⁶ Since there is a parallel power dynamic between police officers and civilians in other areas of police work, it would logically follow that people are unable to consent to having sexual contact with law enforcement officers in other phases of their duties as well, including investigations.

This conclusion is further supported by the legislative history behind the enactment of sections outlawing sexual contact with individuals in custody in Alaska. During a legislative hearing, Alaska state Senator

112. *Id.*

113. AMNESTY INT’L, <https://www.amnesty.org/en/> (last visited Nov. 10, 2020).

114. TARAH DEMANT, AMNESTY INT’L, HOUSE BILL 112 SUPPORTING DOCUMENT – SUPPORT LETTER 2 3.1.2017, 30th Leg., at 1 (Alaska 2017).

115. ALASKA STAT. §§ 11.41.425, 11.41.427 (2020).

116. *Fedolfi v. Alaska*, 456 P.3d 999, 1000 (Alaska Ct. App. 2019).

Paskvan questioned why the mental culpability required to violate this proposed ban was the higher standard of “reckless disregard,” stating: “if the intent is to send a clear social message that law enforcement officers, in the course and scope of their employment, do not engage in sexual behavior, then [the statute] should be said that way.”¹¹⁷ In response, Alaska Assistant Attorney General Anne Carpeneti stated that this is a very common standard for a culpable mental state, and that “custody” in this case implies someone “who may or may not be under arrest and he or she feels unable to leave the presence of the police officer.”¹¹⁸ If these laws are meant to protect people who feel unable to leave the presence of a police officer due to the officer’s power over them, this should extend to people under investigation as well. If a civilian was under investigation and knew that if she tried to leave or resist the police officer’s advances she could be arrested, most civilians would not feel like they had a real choice in whether or not to stay. Extending the ban to people under investigation would send the same message that the bill originally intended to convey. The legislators did not think it was appropriate for officers in a position of power to have impunity to engage in sex on the job.

The implied rationale behind these current laws is that consent cannot be freely given in circumstances in which one party has power over the other.¹¹⁹ This is commonly recognized in many classes of

117. *Omnibus Crime Bill: Hearing on H.B. 127 Before the S. Judiciary Standing Comm.*, 2011 Leg., 27th Sess. 8 (Alaska 2011) (statement of Sen. Joe Paskvan, Member, S. Judiciary Standing Comm.).

118. *Omnibus Crime Bill: Hearing on H.B. 127 Before the S. Judiciary Standing Comm.*, 2011 Leg., 27th Sess. 8–9 (Alaska 2011) (statement of Anne Carpeneti, Assistant Att’y Gen., Criminal Division, Alaska Department of Law).

119. See Katharine Bodde & Erika Lorshbough, *There’s No Such Thing as ‘Consensual Sex’ When a Person is in Police Custody*, ACLU (Feb. 23, 2018, 9:30 AM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/theres-no-such-thing-consensual-sex-when-person-police> (explaining that the power dynamic between police officers and those in their custody “makes consent impossible”); see also *What Consent Looks Like*, RAINN, <https://www.rainn.org/articles/what-is-consent> (last visited Nov. 12, 2020) (stating that “[u]nequal power dynamics, such as engaging in sexual activity with an employee or student, also mean that consent cannot be freely given.”).

relationships, such as employer-employee¹²⁰ and teacher-student.¹²¹ Like these relationships, the power imbalance between police officers and people in custody is extreme. Consent is therefore impossible, because anyone in police custody knows that if they do not do what the police officer asks, they can suffer serious consequences.¹²²

In fact, these consequences can be even more grave for people under investigation than people already in custody. Unlike those who are already in custody, people under investigation still have their liberty, and can be deprived of this ultimate right if they do not comply with the police officer's wishes. Moreover, this injustice is further compounded by the deceit involved when police officers dress in plain clothes to pose as johns. In these situations, the unequal power dynamic still exists even if the sex worker is unaware that she is interacting with a police officer. Because the police officer is using his power and resources as tools to deceive, the officer is not in the same position as a civilian patron. Instead, the officer knows he is not going to pay and knows that if the sex worker does not comply with his demands, he can end the encounter in an arrest. Additionally, while the average customer may be deterred by the sex worker being hesitant or rejecting a proposition, an officer may feel more emboldened to keep pushing in furtherance of the investigation. Thus, the power dynamic remains, as one party in the encounter is aware of it and using it to his advantage. No officer should be permitted to obtain sex in such circumstances. The police officer is still acting in the course of his duties – just because an undercover officer puts on his street clothes does not mean he is taking off his badge.

120. See *Sexual Harassment Training Courses*, SEXUAL HARASSMENT TRAINING INST., https://www.sexualharassmenttraining.biz/sexual_harassment_training_course_Sexual-Harassment-and-Power-Dynamics.html (last visited Dec. 8, 2020) (explaining that sexual harassment in the workplace is about power); *Sexual Harassment Seminar*, SEXUAL HARASSMENT TRAINING INST., https://www.sexualharassmenttraining.biz/sexual_harassment_training_courses_What-is-Sexual-Harassment.html (last visited Dec. 8, 2020) (stating that “courts have recognized that victims may be afraid to express their discomfort if the harasser is their boss” and victims may be coerced into engaging in sexual activity because they are afraid of repercussions).

121. See ALASKA STAT. § 11.41.434(a)(3)(B) (2020) (stating it is sexual abuse of a minor in the first degree if a person eighteen years or older engages in sexual penetration with a person who is under the age of sixteen and “the offender occupies a position of authority in relation to the victim”); see also § 11.41.470(5) (using a “teacher” as an example of a person in a “position of authority” as used in the statute).

122. Bodde & Lorshbough, *supra* note 119.

B. Fourth Amendment

Although sexual contact probably cannot be defined as an unreasonable search, an examination of tests under the U.S. Constitution's Fourth Amendment¹²³ and the equivalent Section Fourteen of the Alaska Constitution¹²⁴ provides a useful analytical framework. Adequate protections already exist under Alaska law to prevent consent by deceit in the context of warrantless searches and seizures, and to protect individuals' privacy rights in body searches. These Fourth Amendment protections can be used as a framework to determine adequate due process protections under analogous circumstances.

1. *Consent to Warrantless Search Must be Voluntary*

If deceit and trickery that rise to an unfair level are not considered consent in the context of warrantless searches of homes, the same should be true of invading one's bodily autonomy. Under both the Fourth and Fourteenth Amendments to the United States Constitution, a search conducted without a warrant is per se unreasonable subject to a few specific exceptions.¹²⁵ One of these established exceptions, under both federal and Alaska law, is that a search may be conducted without a warrant if consent was freely and voluntarily given.¹²⁶ In *Schneckloth v. Bustamonte*, the United States Supreme Court stated that "[w]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."¹²⁷ When determining voluntariness in Alaska, the factfinder should balance "the need for effective criminal law enforcement" against "'society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.'"¹²⁸

123. U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

124. ALASKA CONST. art. I, § 14 ("The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

125. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

126. *Id.* at 222.

127. *Id.* at 227.

128. *Nix v. State*, 621 P.2d 1347, 1349 (Alaska 1981) (quoting *Schneckloth*, 412 U.S. at 225).

The Supreme Court of Alaska has stated that although law enforcement officials can use deceptive measures in order to detect and apprehend individuals engaged in criminal conduct, “not every ruse or guise is permissible.”¹²⁹ For example, “gaining entry by pretending to be an employee of a gas company acting on the report of a gas leak” is too unfair to be acceptable.¹³⁰ Although the Supreme Court of Alaska has yet to find that an undercover agent’s trickery has risen to this level in the context of using sexual contact in investigations, invasion of someone’s right to bodily autonomy must be held to at least the same standard as the invasion of one’s house. The use of deceit and trickery in order to invade this important right is too unfair to be acceptable.

When balancing the need for criminal law enforcement with this unfairness, this tactic clearly fails. Arresting sex workers for the crime of prostitution is not, and should not be, a top priority for law enforcement officers in Alaska. The Anchorage Police Department has stated that it does not prioritize arresting sex workers for low-level prostitution anymore; rather it focuses on sex trafficking and targeting people who run prostitution rings.¹³¹ In a crime where the foremost potential victim is the person being arrested, the need for criminal law enforcement is exceedingly low.

In contrast, the “possibility of unfair and even brutal police tactics” weighs heavily on the other side of the scale when it comes to using sexual contact as an investigative tool. As discussed previously, these tactics can fairly be viewed as “shocking to the universal sense of justice,” to the point of violating due process.¹³² To the extent that sex workers are regarded “victims” of prostitution, this tactic victimizes them further. When weighed against the limited need for criminal law enforcement here, this tactic does not pass the test set out by the U.S. Supreme Court in *Schneckloth* for voluntary consent. If consent via deceit is not considered voluntary when police officers search one’s house, it clearly should not be considered voluntary when police officers invade one’s bodily autonomy and right to personal privacy either.

2. Other Invasions of Bodily Autonomy – Body Searches

An analysis of another potential state-sanctioned invasion of bodily autonomy—body searches—is also helpful when assessing whether sexual contact in investigations can be justified. In *Florence v. Board of Chosen Freeholders*,¹³³ the U.S. Supreme Court analyzed what limitations

129. *Id.*

130. *Id.* (citing *People v. Jefferson*, 350 N.Y.S.2d 3 (N.Y. App. Div. 1973)).

131. *Boots*, *supra* note 18.

132. *Supra* Part III.

133. 566 U.S. 318 (2012).

the Fourth and Fourteenth Amendments to the U.S. Constitution place on body searches of people being held in jail while their cases are being processed.¹³⁴ Upon arrest in Essex County, New Jersey, Petitioner Albert Florence was held in Burlington County Jail for six days, and Essex County Correctional Facility for one night, until his charges were dismissed.¹³⁵ Upon admission to these facilities, officers checked him for wounds, scars, marks, gang tattoos, and other contraband as he undressed.¹³⁶ In both facilities, apparently without touching him, they looked in his ears, nose, mouth, under his arms, and in other body openings.¹³⁷ In Burlington County he was instructed to lift his genitals, and in Essex County he was instructed to lift his genitals, turn around, and cough in a squatting position.¹³⁸

Florence sued multiple parties asserting that these searches of “the most private areas of [his] bod[y]” without an articulated suspicion that he was concealing contraband were violations of his rights under the Fourth and Fourteenth amendments.¹³⁹ The Court upheld these search procedures, holding that they “struck a reasonable balance between inmate privacy and the needs of the institutions.”¹⁴⁰ The main institutional needs the Court found were avoiding health risks for everyone in the facility, the identification of gang affiliation, and, most importantly, the need to detect and deter the possession of contraband.¹⁴¹ Because jails are uniquely crowded, unsanitary, and dangerous, the Court found that the substantial interest in preventing any new inmate from putting other inmates, staff, and themselves at risk outweighed the inmate’s privacy rights.¹⁴²

The invasion of privacy caused by sexual contact by police officers toward people under investigation can be analyzed similarly by analogizing strip searches to investigative sexual contact. Both are invasions of privacy and bodily autonomy that are claimed to be used for valid governmental purposes. Unlike strip searches, however, investigative sexual contact with sex workers does not pass constitutional muster.

First, the individual privacy concerns are at least as great when it comes to sexual contact with sex workers. In *Florence*, the petitioner was

134. *Id.* at 322.

135. *Id.* at 323–24.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 324–25.

140. *Id.* at 339.

141. *Id.* at 330–32.

142. *Id.* at 333–34.

not touched in his strip search.¹⁴³ Although his privacy was certainly invaded when his private areas were examined, touching is more invasive, so it increases the harm caused. This harm is exponentially increased when police officers go past touching, sometimes as far as sexual penetration. The privacy interests in these situations are clearly greater than the privacy interests examined by the Supreme Court in *Florence* and other strip search cases.

On the other hand, the governmental interests in sex work investigation are vastly lower than the interests identified in *Florence*. First, there are no health risks to others that are mitigated by police sexual contact. If anything, these “investigative” actions could *increase* health risks both to the officer and to the sex worker if the parties engage in risky sex behaviors. Second, these investigations do not occur in places with unique safety risks that these tactics would minimize. Unlike the dirty, crowded, dangerous jails in *Florence*, prostitution investigations usually occur in private places like hotels and cars. Finally, investigating prostitution is simply not a priority in Alaska. As mentioned previously, the Anchorage Police Department has stated that they are not focused on arresting individuals for low-level prostitution offenses, and the lack of arrests in recent years substantiates this.¹⁴⁴ Thus, the governmental interests in using sexual contact in prostitution investigations are severely lacking, and do not outweigh the substantial privacy concerns of individuals when examined through a Fourth Amendment lens.

V. RAPE-BY-DECEPTION

Although not yet recognized as rape in Alaska, the act of police officers posing as johns to have sex with sex workers can be described as “rape-by-deception.”¹⁴⁵ Currently, sexual assault in the first degree is defined in Alaska as when “the offender engages in sexual penetration with another person without consent of that person.”¹⁴⁶ “Without consent” is statutorily defined as when:

a person (A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or (B) is incapacitated as a result of an act of

143. *Id.* at 324.

144. *See supra* p. 24 and accompanying notes.

145. *See* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1395 (2013) (explaining that “fraud vitiates[s] consent” and that sex without consent logically constitutes rape).

146. ALASKA STAT. § 11.41.410 (2020).

the defendant.¹⁴⁷

This definition, however, does not appropriately encompass all aspects of consent. In nearly every other area of law besides sex crimes, consent is not valid if obtained by fraud.¹⁴⁸ In Alaska, for example, a marriage may be declared void if the consent was obtained by fraud,¹⁴⁹ and consent to adoption is also void when attained by fraud.¹⁵⁰ What, then, makes consent in the context of sex different?

In most jurisdictions, including Alaska, “rape requires more than nonconsent; it requires force.”¹⁵¹ This conception of rape is outdated, and virtually all modern rape scholars wish to eliminate the requirement of force.¹⁵² A reasonable person in today’s social climate would likely consider sex-by-deception rape, as evidenced by the first definition of “rape” in a leading modern dictionary: “unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person’s will or with a person who is . . . incapable of valid consent because of . . . deception.”¹⁵³ In some states, deception or fraud are already included statutorily as exceptions to consent for sexual contact,¹⁵⁴ and a number of other states have begun to consider its inclusion.¹⁵⁵

147. § 11.41.470.

148. Rubinfeld, *supra* note 145, at 1376 n.11 (citing *McClellan v. Allstate Ins. Co.*, 247 A.2d 58, 61 (D.C. Cir. 1968) (“[C]onsent obtained on the basis of deception is no consent at all.”); *Johnson v. State*, 921 So. 2d 490, 508 (Fla. 2005) (per curiam) (“Consent obtained by trick or fraud is actually no consent at all”); *Kreag v. Authes*, 28 N.E. 773, 774 (Ind. App. 1891) (“Consent obtained by fraud is, in law, equivalent to no consent.”); *Chatman v. Giddens*, 91 So. 56, 57 (La. 1921) (“Consent induced by fraud is no consent at all.”); *Farlow v. State*, 265 A.2d 578, 580 (Md. Ct. Spec. App. 1970) (“Consent . . . obtained by fraud . . . is the same as no consent so far as trespass is concerned.”); *Murphy v. I.S.K.CON of New Eng., Inc.*, 571 N.E.2d 340, 352 (Mass. 1991) (“Of course, if consent is obtained by fraud or duress, there is no consent.”); *State v. Ortiz*, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) (“[A] consent obtained by fraud, deceit or pretense is no consent at all.”)).

149. § 25.24.030.

150. § 25.23.060.

151. Rubinfeld, *supra* note 145, at 1377-78.

152. *Id.* at 1378.

153. *Rape*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rape> (last visited Dec. 8, 2020).

154. See ALA. CODE § 13A-6-65(a) (2019) (“A person commits the crime of sexual misconduct if he or she does any of the following: . . . (3) engages in sexual contact with another person . . . with consent where consent was obtained by the use of fraud or artifice.”); MO. REV. STAT. § 556.061(14) (2020) (“Assent does not constitute consent if . . . (c) It is induced by force, duress or deception.”); TENN. CODE ANN. § 39-13-503(a) (2020) (“Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances . . . (4) The sexual penetration is accomplished by fraud.”).

155. See Abby Ellin, *Is Sex by Deception a Form of Rape?*, N.Y. TIMES (Apr. 23,

Some worry that criminalizing rape-by-deception creates a slippery slope. For example, Jed Rubenfeld, a professor at Yale Law School, posits, “if a misrepresentation of purpose counts as fraud ‘in fact,’ what about a man who pretends to be in love?”¹⁵⁶ What about misrepresentations such as make-up or cosmetic surgery?¹⁵⁷ These, however, are not the types of misrepresentations prosecutors are bringing charges for in states in which sex-by-deception is illegal. In contrast, a common use of sex-by-deception is to prosecute medical professionals who use their status as doctors to touch patients for what patients believe is necessary medical care, but is actually not.¹⁵⁸ This crime is particularly heinous because people must put their trust in doctors in order to receive adequate medical care. Doctors are trained to know methods that laypeople would not know, so patients must trust that what their doctors do and say is medically accurate and necessary. This creates a power dynamic not unlike the power dynamic between police officers and civilians. Both doctors and police officers are in positions of authority and are meant to use their authority to protect, not to deceive.

Although rape-by-deception is not currently recognized under Alaska law, it has the same traumatic consequences for victims as legally recognized rape and sexual assault. As the modern understanding of consent has developed, Alaska lawmakers should amend the state’s sexual assault statutes to include deception as a per se barrier to consent. Additionally, they should reintroduce and adopt H.B. 112 and S.B. 73 in order to explicitly outlaw rape-by-deception in situations where law enforcement agents are going undercover to have sexual contact with sex workers.

VI. THE CASE FOR REINTRODUCING H.B. 112 AND S.B. 73

House Bill 112 and Senate Bill 73 would have made it statutorily illegal for a law enforcement officer to have sexual contact or intercourse

2019), <https://www.nytimes.com/2019/04/23/well/mind/is-sex-by-deception-a-form-of-rape.html> (describing rape by fraud bills that have been introduced in various states).

156. Rubenfeld, *supra* note 145, at 1399.

157. *Id.* at 1416.

158. *See, e.g., State v. Tizard*, 897 S.W.2d 732, 743 (Tenn. Crim. App. 1994) (“[I]f the physician intends to gain access for nonmedical purposes, uses his position as a treating physician for such purpose, and the patient allows such access because of a belief that it is for medical purposes, we have no problem in concluding that the physician perpetrates a fraud upon the patient as defined in [the statute] Further, when the physician’s intended act is the touching of the patient’s genitals for the purpose of sexual arousal or gratification, we have no problem in concluding that the sexual contact is unlawful and accomplished by fraud so as to constitute the offense of sexual battery.”).

with a person under investigation for anything, including prostitution and sex trafficking.¹⁵⁹ Currently, Alaska Statutes §§ 11.41.425 and 11.41.427 provide that law enforcement agents commit the crime of sexual assault if they engage in sexual penetration or contact (respectively) “with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.”¹⁶⁰ Introduced in 2017, H.B. 112 and S.B. 73 proposed to add “or is the victim, witness, or perpetrator of a crime under investigation by the offender” to the end of each of these sections.¹⁶¹ This change would not only have prohibited police officers from engaging in sexual contact during an investigation, but would also have provided a way for future victims to seek justice.

Although the courts should hold that this behavior is unconstitutional under the due process clauses of both the U.S. Constitution and the Alaska Constitution, it would be more efficient for the Alaska State Legislature to outlaw this practice statutorily. Since *Flanagan* was decided in 1982,¹⁶² no sex worker defendants have raised a due process argument specific to this behavior in any reported cases in Alaska. This scarcity, however, does not accurately represent the frequency of these incidents. As previously mentioned, in a study done by the University of Alaska Fairbanks in 2014, twenty-six percent of Alaskan sex workers and sixty percent of Alaskan sex trafficking victims reported being sexually assaulted in some way by a police officer.¹⁶³ This behavior is so commonplace that the aftermath of one such incident was caught on camera in an episode of the Alaska State Troopers reality show. During that episode, an officer is shown wiping what appears to be semen from a handcuffed woman’s hand, while the officer was still in his underwear.¹⁶⁴ With scarce research on this issue and the stigma against women coming forward, especially when police officers are the perpetrators, it is impossible to accurately estimate the full scope of this problem.

With the current state of the law in Alaska, even when assaulted sex workers occasionally do come forward with complaints about police misconduct, there is no legal redress for them. In 2015, Community United for Safety and Protection (CUSP) attempted to report an officer

159. *Id.*; S.B. 73, 30th Leg., 1st Sess. (Alaska 2017).

160. ALASKA STAT. §§ 11.41.425, 11.41.427 (2020).

161. Alaska H.B. 112; Alaska S.B. 73.

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

163. CMTY. UNITED FOR SAFETY AND PROT., *supra* note 22, at 3.

164. *Id.* at 4 (citing *Alaska State Troopers: Vice Squad* (National Geographic Channel television broadcast Mar. 27, 2011)).

who had sexual intercourse with sex worker Rachel during a prostitution sting.¹⁶⁵ The Sergeant of Internal Affairs at the time, Captain Kenneth McCoy, responded that because she was not under arrest at the time, it was legal and there would be no criminal investigation, but it could be addressed as a personnel issue.¹⁶⁶ This was not an adequate alternative, however, because as a personnel issue, there would have been no privacy or protections for Rachel, and the assaulting officer would have been notified of her name and address.¹⁶⁷ This is in stark contrast to the protections available in the Alaska court system, which include: giving plaintiffs the right to file complaints under pseudonyms,¹⁶⁸ permitting both civil plaintiffs and victims of sexual crimes to use pseudonyms or initials in broadcasts of appellate arguments, and allowing plaintiffs to avoid being shown on camera.¹⁶⁹ The reintroduction and adoption of H.B. 112 and S.B. 73 would not only provide an avenue for redress for victims like Rachel, but would also deter law enforcement officers from committing these acts in the first place.

Both H.B. 112 and S.B. 73 had substantial public support.¹⁷⁰ Additionally, several sex workers, former sex workers, and concerned community members have written moving letters in support of H.B. 112.¹⁷¹ In one such letter, licensed clinical social worker Dirk R. Nelson stated that:

[t]he obvious ethics infractions involved in such misuse of a community relationship and unequal power, or compromising of the standards of policing in Alaska in general, by engaging in or permitting such behavior, or even simply tolerating those officers who would engage in such antics, brings to mind such terms as 'reprehensible,' 'outrageous,' and even 'criminal.'¹⁷²

In another, sex worker Lily recalled a time when a police officer initiated sexual contact with her before she was arrested for solicitation.¹⁷³ She expressed that she "felt very taken advantage of and violated," and urged

165. *Id.* at 6.

166. *Id.*

167. *Id.*

168. See *Filing Pseudonymously: Alaska, WITHOUT MY CONSENT*, <https://withoutmyconsent.org/50state/filing-pseudonymously/by-state/alaska/> (last visited Dec. 8, 2020) (citing to cases brought under pseudonyms in Alaska but explaining that no cases have directly addressed this anonymity).

169. ALASKA ADMIN. R. 50(f)(2)(A)-(B).

170. See Section III.B.

171. HOUSE BILL 112 SUPPORTING DOCUMENT – SUPPORT LETTERS 2.28.2017, 30th Leg. (Alaska 2017).

172. *Id.* at 3.

173. *Id.* at 1.

the legislators to “vote yes on [H]ouse [B]ill 112 to prevent these horrendous occurrences from happening.”¹⁷⁴ The bills also have support from global organizations such as Amnesty International.¹⁷⁵ With this much widespread support and no official statements in opposition, it is difficult to understand why the bills have failed to pass the Alaska House and Senate since 2017.

The only apparent explanation is the resistance from law enforcement agencies themselves. The Anchorage Daily News reported that after the bills were proposed, the Anchorage Police Department sent Deputy Chief Sean Case to Juneau to urge lawmakers not to pass them.¹⁷⁶ Case expounded that in some “very, very limited” circumstances, APD “wants to reserve the right for an undercover officer to have certain forms of sexual contact in the course of an investigation,” because “[a] zero-sexual-contact rule would doom investigations of prostitution.”¹⁷⁷ He explained that sex workers use a technique called “cop checking” to immediately identify officers and terminate an investigation.¹⁷⁸ For example, the sex worker could instruct the officer to touch her breast, and if this act of touching was a misdemeanor, Case claims they would “have absolutely no way of getting involved in that type of arrest.”¹⁷⁹

This rationale is not only flawed, but deeply problematic. First, as previously explained, it is unnecessary for sex workers to engage in sexual acts in order to commit the misdemeanor of prostitution—one must simply agree or offer to partake in the acts for a fee.¹⁸⁰ Video or audio recordings can give proof of an agreement or offer. It is implausible that law enforcement officers cannot think of a way to get sex workers to agree on an exchange without having to make physical contact, particularly when they are allowed to engage in deceit in other respects. Even easier, law enforcement officers can arrest sex workers simply for *offering* to engage in these exchanges. It is therefore incorrect to say that there would be “absolutely no way” of arresting sex workers without touching them.

This defense to investigative sexual contact is also problematic from a public policy perspective. By allowing law enforcement officers to employ these tactics in order to make prostitution arrests, Alaskan lawmakers are signaling that arresting people for prostitution is valued more highly than protecting individuals’ bodily autonomy by prohibiting state-sponsored sexual assault. For a crime in which the primary victim is

174. *Id.*

175. See DEMANT, *supra* note 114.

176. Boots, *supra* note 18.

177. *Id.*

178. *Id.*

179. *Id.*

180. See *supra* Part III.

the perpetrator, inflicting additional pain and trauma is counterproductive and troubling. Law enforcement officers are supposed to protect people, not exploit and further victimize them.

VII. CONCLUSION

Sex workers in Alaska are facing violence at the hands of the people whose job it is to protect them: the police. Law enforcement officers are exploiting one of the most vulnerable groups by using their power to trick sex workers into what they believe is consensual sexual activity, only to turn around and arrest them for prostitution. The Alaska legislature must reintroduce and adopt H.B. 112 and S.B. 73 in order to amend the law to statutorily outlaw this practice by making it illegal for law enforcement officers to engage in sexual penetration or any sexual contact with people who are under investigation. Not only does this practice amount to a due process violation, as it is "shocking to the universal sense of justice," but it goes against public policy as well. The failure to pass this law signals to the public that Alaskan officials care more about ensuring police officers can easily arrest people for prostitution than protecting their citizens' rights to bodily autonomy and to not being sexually assaulted. This is especially problematic as sex workers are the first and most frequently harmed victims of prostitution, and these tactics compound those harms. Alaska lawmakers can ensure that rape-by-deception is no longer legal against sex workers, one of the most vulnerable and exploited groups in Alaska.