

**FINDING THE LINE BETWEEN CHOICE AND COERCION: AN ANALYSIS OF
MASSACHUSETTS'S ATTEMPT TO DEFINE SEX TRAFFICKING**

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CONTENT WARNING

The following article engages critically with issues of prostitution and sex trafficking. This may be difficult for some readers.

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INTRODUCTION

*“No one defends trafficking. There is no pro-sex-trafficking position any more than there is a public pro-slavery position The only issue is defining these terms so that nothing anyone wants to defend is covered.”*¹

Sex trafficking is an extreme permutation of gender-based violence.² However, its definition is often contested because of the long-standing dispute as to whether prostitution is a profession and, therefore, not encompassed in the definition of sex trafficking or sexual exploitation.³ At the international level, the formation of two rival coalitions depicts this schism. In 1988, feminist activists formed the Coalition Against Trafficking in Women (CATW).⁴ In 1994, human rights activists formed the Global Alliance Against Traffic in Women (GAATW).⁵ At the Palermo Protocol,⁶ CATW—which equates prostitution with slavery—and GAATW—which recognizes prostitution as a profession—attempted to define sex trafficking.⁷ The result was a definition encompassing broad means of “abuse of power or of a position of vulnerability” that notably did not limit the means to

1 Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 271 (2011).

2 *Human Trafficking Fuels Violence Against Women*, UNITED NATIONS OFFICE ON DRUGS & CRIME (Nov. 25, 2009), <https://www.unodc.org/unodc/en/frontpage/2009/November/human-trafficking-fuels-violence-against-women.html> (“Human trafficking is . . . one of the worst forms of violence against women and girls.”). This Note does not assert that men, non-binary folks, and gender non-conforming folks are not affected by sex trafficking. However, this Note focuses on female victims because they are at the heart of trafficking legislative efforts and feminist theories. *Id.*

3 Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 101 (2017); MacKinnon, *supra* note 1, at 271; Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT’L. L. REV. 23, 24–25 (1995) (discussing the debate whether prostitution is a profession or slavery).

4 *About*, COALITION AGAINST TRAFFICKING IN WOMEN, <https://catwinternational.org/about/> (last visited June 28, 2020).

5 *History*, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, <https://www.gaatw.org/about-us/history> (last visited Mar. 23, 2020).

6 The Palermo Protocol is a protocol adopted by the United Nations to combat trafficking of women and children. *See* United Nations Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Preamble, *adopted by United Nations* Nov. 15, 2000, S. TREATY DOC. NO. 108–16 (2004), 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

7 Sanja Milivojevic & Sharon Pickering, *Trafficking in People, 20 Years On: Sex, Migration and Crime in the Global Anti-Trafficking Discourse and the Rise of the ‘Global Trafficking Complex’*, 25 CURRENT ISSUES CRIM. JUST. 585, 587, 593–94 (2013); *History*, *supra* note 5.

solely force, fraud, or coercion.⁸

Concurrently, the U.S. federal government criminalized sex trafficking with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA).⁹ Its aim was to define trafficking, enhance penalties for traffickers, and provide government assistance to victims.¹⁰ Notably, this statute is limited by a force, fraud, or coercion element.¹¹ After the federal government enacted its definition of trafficking, state legislatures followed with their own definitions of the crime, often mirroring the federal statute.¹² However, in 2011, Massachusetts passed a statute without the limiting force, fraud, or coercion element, thus differing significantly from its federal counterpart.¹³ There are several reasons why the legislature felt that the state statute must have a broader scope.¹⁴ However, the survey of court cases analyzed throughout this Note suggest that this new statute is not successfully aiding the fight against sex trafficking.¹⁵

The focus of this Note is primarily on sex trafficking,¹⁶ basing the analysis on the position that sex trafficking and sex work should not be conflated. This Note finds that the Massachusetts statute is not successfully fighting sex trafficking and is inherently problematic in its nature. As it stands, the Massachusetts statute is so overbroad that it damages women's agency and does not hold actual traffickers accountable.¹⁷ When applied, the law has not been used to punish traffickers for trafficking but to persuade them into taking pleas for other, lesser crimes involving prostitution, such as solicitation or assisting prostitution.¹⁸ Arguably, this shows that the

8 Palermo Protocol, *supra* note 6, at art. 3(a) (adopting a broad definition encompassing any “means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits”).

9 Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464.

10 Melissa Dess, *Walking the Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute and Its Potential to Combat Child Sex Trafficking*, 33 B.C. J.L. & SOC. JUST. 147, 150 (2013).

11 18 U.S.C. § 1591(a) (2012) (limiting applicability to “[s]ex trafficking of children or by force, fraud, or coercion”).

12 See Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 101–02 (2009).

13 MASS. GEN. LAWS ch. 265, § 50(a) (2012).

14 See *infra* Part III(B).

15 See *infra* Part IV.

16 Even though this Note will focus only on sex trafficking, Polaris has identified a total twenty-five different types of human trafficking. *The Typology of Modern Slavery*, POLARIS (Mar. 1, 2017), <https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf>.

17 See *infra* Part V(A).

18 *Id.*

legislature sees prostitution as an inherently immoral crime because sex traffickers end up being convicted of crimes involving prostitution rather than those involving trafficking. The statute simply acts as a band-aid to fix sex trafficking without addressing the inherent societal issues that are at the root of the sex trafficking pandemic. The statute's language should be amended and sex work should be decriminalized in order to address these root issues.

Part I frames the discussion by examining the fundamental debates over sex work and sex trafficking. Primarily, this part looks at the main arguments for the two principal groups involved in the debates: the pro-sex work and the abolitionist positions. Part II provides an overview of sex trafficking in the United States. Part III analyzes how the Massachusetts sex trafficking statute differs from the federal statute by examining the state statute's legislative history. This part also focuses on a review of *Commonwealth v. McGhee*, the seminal Supreme Judicial Court ("SJC") case analyzing the statute. Part IV presents the landscape of the Massachusetts sex trafficking cases. This part surveys sixty-three sex trafficking cases that were brought in various Massachusetts superior courts from 2012 to 2019, analyzing trends in conviction rates, prosecutorial decisions, and defendant demographics. Part V discusses the implications of the results of the surveyed cases and potential future areas of research in this specific field. Part VI concludes with recommendations on how to amend the statute to more successfully address the problem at hand.

I. FRAMING THE DISCUSSION

Efforts to end sex trafficking are plagued with constant debates surrounding the definition of the term.¹⁹ The two main groups involved in these debates are abolitionist and pro-work advocates.²⁰ The former movement equates and “conflate[s] sex work with trafficking [by] view[ing] sex work as inherently harmful and exploitive.”²¹ Prabha Kotiswaran, a legal scholar specializing in sex work, stated: “Abolitionists adopting a sexual subordination approach are against the commodification of sex and view sex work as a paradigmatic form of violence against women, embodying gender inequality. For them, sex workers are victims and lack agency in the context of pervasive institutional violence.”²² The latter movement recognizes sex work as a profession and strongly opposes its criminalization.²³ Kotiswaran describes “[s]ex work advocates . . . [as] agnostic to the commodification of sex per se and . . . view[ing] sex workers as agents with some ability to negotiate within the sex industry. Thus, their emphasis is on protecting and promoting the rights of sex workers.”²⁴

Abolitionists see sex work as the oldest form of oppression.²⁵ They believe that all “prostitution is intrinsically abusive.”²⁶ They argue that prostitution is necessarily physically and mentally damaging:

In prostitution, no woman stays whole. It is impossible to use a human body in the way women’s bodies are used in prostitution and to have a whole human being at the end of it, or in the middle of it, or close to the beginning of it And no woman gets whole again later, after.²⁷

Research has been compiled to support this idea, ranging from studies that indicate “sexual and physical abuse against sex workers is common, severe,

19 See Barnhart, *supra* note 12, at 88–89; see also MacKinnon, *supra* note 1, at 273.

20 See Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1730 (2010).

21 Stephanie M. Berger, *No End in Sight: Why the “End Demand” Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J.L. & GENDER 523, 527 (2012).

22 PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 10 (2011).

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

24 KOTISWARAN, *supra* note 22, at 10.

25 MacKinnon, *supra* note 1, at 273.

26 Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER & L. 1, 2–3 (1993); see also Barnhart, *supra* note 12, at 89 (“[Abolitionists believe that b]oth prostitution and sex trafficking must be eradicated in order to free women from male dominance.”).

27 Dworkin, *supra* note 26, at 3.

and widespread” and “sex workers suffer ‘devastating’ effects on their physical and mental health,” to studies that show sex buyers “have heightened violent inclinations.”²⁸ Abolitionists hold the opinion that a “prostituted woman”²⁹ cannot willingly give consent for paid sex.³⁰ They believe that if a victim has consented, it is because she has convinced herself that that is what she voluntarily needs to do in order to survive.³¹ This ideology brings about the possible danger of patronizing and victimizing women, which is largely representative of the way society thinks about women’s place in society.³² In fact, historically, “regulation of prostitution was based on restrictive attitudes regarding female sexuality, which aimed to prevent ‘promiscuous unchastity.’”³³

On the other side, pro-work advocates argue that sex workers enter the profession for a variety of reasons, and that looking at sex-work on a spectrum better suits the needs of the women involved.³⁴ Advocates argue that “treating all sex work as forced removes women’s agency and infantilizes them.”³⁵ Agency is a woman’s right to privacy, sexual freedom, economic freedom, and control of her body.³⁶ In fact, sex work is an expression of agency: “[A]gentic actors, sex workers, . . . control the sexual interaction, are compensated for what is usually expected from women for free, and have independent lives and anonymous sex with many partners – behaviors usually monopolized by men, hence liberating for women.”³⁷

The harmful aspects of sex work result not from selling sex in and

28 Berger, *supra* note 21, at 529–30.

29 Abolitionists refer to sex workers as “prostituted women” because it implies that prostitution is something done to a woman against her will. Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEX RES. & SOC. POL’Y 15, 17 (2010).

30 Berger, *supra* note 21, at 530. See MacKinnon, *supra* note 1, at 300 (“You cannot traffic yourself, which separates it from prostitution. Sexual exploitation can also be slavery. Right there, in the international definition, is what is sometimes criticized as a ‘conflation’ of slavery with trafficking. You cannot enslave yourself either. For her prostitution to be exploited, she has to be sold to someone.”).

31 Berger, *supra* note 21, at 530.

32 See GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 129–30 (2007), http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf (alluding to the consideration that viewing all sex work as forced patronizes and infantilizes women).

33 Berger, *supra* note 21, at 532.

34 *Id.* at 531.

35 *Id.* at 531–32.

36 Elizabeth M. Donovan, *Same as It Ever Was: In Support of the Rights of Sex Trafficking Victims*, 36 QUINNIPIAC L. REV. 489, 592 (2018).

37 MacKinnon, *supra* note 1, at 273.

of itself but rather from external factors such as violence. Victimization is another such factor that “varies across time, place, and echelon.”³⁸ Violence in sex work also comes in many forms.³⁹ It is possible that violence may happen as a result of several societal issues such as white supremacy and police brutality.⁴⁰ Violence can be minimized by creating programs that reduce stigma, improving the conditions of voluntary sex workers, implementing health and safety guidelines created with and by sex-working communities, and developing sensitivity training and education for police regarding crimes against and by sex workers.⁴¹ Pro-sex work advocates find that “although harms will always exist in prostitution, efforts to eliminate prostitution – especially outdoor/street sex work – do not encourage women to leave sex work. Rather, it pushes the most desperate women further underground into more dangerous, less controllable situations where harm is even more likely.”⁴²

In response to abolitionists’ views, pro-sex work advocates argue that abolitionists conflate the definitions of trafficking and prostitution, thus producing a “‘chilling effect’ on the public discourse around sex work.”⁴³ This conflation occurs when abolitionists fail to acknowledge other forms of trafficking and fail to understand that prostitution falls on a spectrum.⁴⁴ In fact, it is both under- and over-inclusive: it does not adequately acknowledge other forms of trafficking or the possibility of voluntary sex work.⁴⁵ While abolitionists believe that efforts to end trafficking and prostitution cannot be separated,⁴⁶ pro-work advocates find that equating trafficking and prostitution is problematic because “[p]rostitution per se as the exclusive purpose of trafficking is an untenable definition as not all victims are prostitutes and

38 Weitzer, *supra* note 29, at 16.

39 Graham Hudson & Emily van der Meulen, *Sex Work, Law, and Violence: Bedford v. Canada and the Human Rights of Sex Workers*, 31 WINDSOR Y.B. ACCESS JUST. 115, 116 (2013).

40 WORLD HEALTH ORG. ET. AL., IMPLEMENTING COMPREHENSIVE HIV/STI PROGRAMMES WITH SEX WORKERS: PRACTICAL APPROACHES FROM COLLABORATIVE INTERVENTIONS 22–23 (2013), https://apps.who.int/iris/bitstream/handle/10665/90000/9789241506182_eng.pdf?sequence=1.

41 Emily van der Meulen & Elya Maria Durisin, *Why Decriminalize? How Canada’s Municipal and Federal Regulations Increase Sex Workers’ Vulnerability*, 20 CAN. J. WOMEN & L. 289, 310 (2008) (listing recommendations for improving sex workers’ conditions).

42 Berger, *supra* note 21, at 533; see also Katie Tastrom, *Want to Reduce Sex Trafficking? Decriminalize Sex Work*, REWIRE NEWS (July 18, 2019), <https://rewire.news/article/2019/07/18/want-to-reduce-sex-trafficking-decriminalize-sex-work/>.

43 Berger, *supra* note 21, at 535, 537.

44 *Id.*

45 *Id.*

46 See MacKinnon, *supra* note 1, at 299–300.

nor have all the prostitutes been trafficked.”⁴⁷ A background understanding of these debates surrounding the definition of sex trafficking is important in order to fully grasp the complexity of the problem of sex trafficking and the actors involved.

47 Lin Lean Lim, *Trafficking, Demand, and the Sex Market*, INT’L INST. FOR LAB. STUD. (Mar. 12, 2007), <http://lastradainternational.org/lsideocs/334%20Lin%20Lean%20Lim%20TraffickingDemand%20Sex%20market.pdf>.

II. OVERVIEW OF SEX TRAFFICKING

A. *The Problem*

Sex trafficking⁴⁸ is a pervasive problem that encompasses a wide spectrum of behavior ranging from sexual assault, false promises, and dehumanizing conditions to physical violence.⁴⁹ It is one of the largest and fastest growing criminal enterprises in the world.⁵⁰ The nature of the crime and the isolation of its victims make statistical research difficult, but experts estimate that there are as many as 24.9 million victims of human trafficking worldwide at any given time,⁵¹ including 4.8 million victims of sex trafficking.⁵²

Trafficking involves the illegal trade of people for exploitation or commercial gain⁵³ and allows perpetrators to “earn[] profits of roughly \$150 billion a year.”⁵⁴ It is not required that a victim be transported from one location to another, across state or international borders, for the crime of trafficking to occur.⁵⁵ Sex trafficking is also a “market-driven criminal industry.”⁵⁶ Human beings, unlike drugs or other illegal products, are a reusable resource: “[W]omen and girls sold into sex trafficking earn profits

48 Trafficking differs from human smuggling. Trafficking centers on exploitation, while human smuggling centers on transportation. See *Human Trafficking and Smuggling*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 16, 2019), <https://www.ice.gov/factsheets/human-trafficking>.

49 *Human Trafficking*, POLARIS, <https://polarisproject.org/human-trafficking> (last visited Mar. 22, 2020).

50 Ewelina U. Ochab, *The World’s Fastest Growing Crime*, FORBES (July 29, 2017), <https://www.forbes.com/sites/ewelinaochab/2017/07/29/the-worlds-fastest-growing-crime/#2c2511c93aae>.

51 *Human Trafficking*, *supra* note 49. See generally *The Traffickers*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/traffickers> (last visited Mar. 31, 2020) (identifying human trafficking as a high profit low risk enterprise).

52 *Forced Labour, Modern Slavery and Human Trafficking*, INT’L LAB. ORG., <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited Mar. 29, 2020).

53 *Human Trafficking*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/type-trafficking/human-trafficking> (last visited July 19, 2020).

54 *Human Trafficking by the Numbers*, HUM. RTS. FIRST (Sept. 7, 2017), <https://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf> (\$99 billion of this \$150 billion is from commercial sexual exploitation).

55 MacKinnon, *supra* note 1, at 299–300 (“Movement across jurisdictional lines is not . . . an element of the international definition of trafficking The sine qua non [essential, crucial, or indispensable ingredient] of trafficking is thus neither border crossing nor severe violence. It is third-party involvement.”).

56 *Human Trafficking*, *supra* note 53.

for their pimps and traffickers over a great number of years.”⁵⁷ Traffickers can often earn more money by prostituting women than they could by committing other crimes because the commodity of humans can be sold repeatedly.⁵⁸

Sex trafficking is a prominent problem in Massachusetts.⁵⁹ Trafficking takes place all throughout the state, “from Allston/Brighton and East Boston, to Worcester, Lowell, and affluent suburbs.”⁶⁰ Boston, in particular, is considered a major hub for sex trafficking in the Northeastern region of the United States.⁶¹ The National Human Trafficking Hotline reports that in 2019, 107 human trafficking cases were reported in Massachusetts.⁶² Of those reports, 80 were related to sex trafficking.⁶³ Between 2007 and 2019, the hotline received 2,976 contacts (phone calls, texts, online chats, and emails) about human trafficking crimes in Massachusetts.⁶⁴ A 2018 investigative journalism series identified approximately 185 illicit massage parlors in Massachusetts on a “popular [sex-buyer] board dedicated to erotic massage.”⁶⁵ These reports and investigative discoveries document the prevalence of sex trafficking in Massachusetts.

B. *The Perpetrators*

Perpetrators of sex trafficking generally range from a diverse variety of organized criminal groups to lone individuals.⁶⁶ These groups “vary in terms of their leadership structure, level of organizational sophistication,

57 Neha A. Deshpande & Nawal M. Nour, *Sex Trafficking of Women and Girls*, 6 REVS. OBSTETRICS & GYNECOLOGY 22, 25 (2013).

58 *Who Are Human Traffickers?*, HUM. RTS. FIRST 1 (June 10, 2014), <https://www.humanrightsfirst.org/sites/default/files/Who%20are%20human%20traffickers.pdf>.

59 *See* MASS. INTERAGENCY HUMAN TRAFFICKING POLICY TASK FORCE, FINDINGS AND RECOMMENDATIONS 15 (Aug. 19, 2013), <http://www.mass.gov/ago/docs/ihttf/ihttf-findings.pdf> [hereinafter TASK FORCE REPORT].

60 Dess, *supra* note 10, at 155.

61 *Id.*

62 *Massachusetts*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/state/massachusetts> (last visited Mar. 29, 2020). It is important to note that this is an underreported crime, thus the real statistics are likely to be much higher. *See Myths, Facts, and Statistics*, POLARIS, <https://polarisproject.org/myths-facts-and-statistics/> (last visited Mar. 31, 2020).

63 *Massachusetts*, *supra* note 62.

64 *Id.*

65 Jenifer McKim & Phillip Martin, *Illicit Massage Parlors Are Across Massachusetts. Why Is Police Action So Rare?*, WGBH NEWS (Jan. 16, 2018), <https://news.wgbh.org/2018/01/16/local-news/illicit-massage-parlors-are-across-massachusetts-why-police-action-so-rare>.

66 *Who Are Human Traffickers?*, *supra* note 58. For an understanding of the perpetrators in Massachusetts, see *infra* Part IV(B)(iv).

transnational reach, membership size, ethnic and social composition, dependence on human trafficking as a primary source of profit, [and] use of violence”⁶⁷ Sex trafficking can take place on the street, through escort services, and at strip clubs, massage parlors, hotels, and brothels.⁶⁸ Depending on the type of sex trafficking, the ways by which traffickers exploit victims differ greatly.⁶⁹ “Most trafficking operations in the Northeast are transient, are mobile, and operate under layers of deception.”⁷⁰ There are also secondary profiteers, such as “hotels, restaurants, taxi services, property owners who rent to pimps, and other businesses that provide support services to the sex industry.”⁷¹ Additionally, because of the widespread nature of the internet and technology,⁷² traffickers can now reach a wider client base and connect more quickly with clients.⁷³ This expansion in technology has led to an expansion of the sex trafficking market.⁷⁴

C. *The Victims*

Sex trafficking can affect anyone.⁷⁵ While it is unfair to generalize the experiences of sex trafficking victims, this Note acknowledges that most traffickers target victims that are particularly vulnerable due to a myriad of characteristics.⁷⁶ These characteristics include poverty, limited education,

67 ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 5 (Feb. 19, 2013), <https://fas.org/sgp/crs/row/RL34317.pdf>.

68 ANDREA J. NICHOLS, SEX TRAFFICKING IN THE UNITED STATES 140 (2016); Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L. J. 28, 35, 40 (2008).

69 “From sex trafficking within escort services to labor trafficking of farmworkers, the ways humans are exploited differ greatly. Each type has unique strategies for recruiting and controlling victims, and concealing the crime.” POLARIS, *supra* note 16, at 5.

70 Brief of the Massachusetts Attorney General as Amicus Curiae at 6, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

71 Hughes, *supra* note 68, at 40.

72 *See generally* U.N. INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERSONS, HUMAN TRAFFICKING AND TECHNOLOGY: TRENDS, CHALLENGES AND OPPORTUNITIES 1 (July 2019), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/07/report/human-trafficking-and-technology-trends-challenges-and-opportunities/Human-trafficking-and-technology-trends-challenges-and-opportunities-WEB...-1.pdf>.

73 *See id.*; *Technology and Trafficking*, EQUALITY NOW (Aug. 14, 2019), https://www.equalitynow.org/technology_and_trafficking_the_need_for_a_stronger_gendered_and_cooperative_response.

74 *Technology and Trafficking*, *supra* note 73.

75 However, it is important to note that, as described *supra* in note 2, most victims of sex trafficking are women.

76 DARAGOODMAN ET AL., REPRESENTING VICTIMS OF HUMAN TRAFFICKING IN MASSACHUSETTS:

lack of employment opportunities, lack of family support, mental health problems, substance abuse, and history of physical or sexual abuse.⁷⁷ Traffickers exploit these vulnerabilities in order to gain a profit.⁷⁸ Victims may be enticed by traffickers through promises of “protection, love, marriage . . . or a better lifestyle.”⁷⁹ Traffickers also recruit victims through fraud and manipulation, such as threats of violence to the victims and their families, forced drug use, or threats of shaming.⁸⁰ Once involved, it is difficult for victims to escape because they often face physical and psychological harms.⁸¹

An analysis of this problem is not complete without acknowledging the sensationalism that is apparent in the debates surrounding the trafficking definition. Abolitionists, in fact, often use selective “horror stories” and tragic depictions of victims to advance their position:⁸² “BEATEN. Burned. Branded with a bar code or with a pimp’s name carved into her thigh. Thrown into the trunk of a car for punishment. Forced to provide sexual services for countless callous and violent men.”⁸³ These tactics serve to arouse indignation and “fuel[] deeply flawed campaigns against prostitution.”⁸⁴ The way something is defined and described greatly impacts the way it is perceived by outsiders. This sensationalism conflates sex work with other practices that are generally condemned, such as rape and domestic violence.⁸⁵ Calling prostitution “paid rape” has enormous shock value.⁸⁶ This “categorical terminology obscures the empirically documented relationships between workers and customers, which are complex and varied.”⁸⁷

Through categorical terminology, abolitionists have created unsubstantiated and dubious generalizations,⁸⁸ further infantilizing women.

A GUIDE FOR ATTORNEYS 5 (Seth Orkland & Julie Dahlstorm eds., 1st ed. 2013), https://docs.wixstatic.com/ugd/6d5c12_e4e8c12d8ea3487fbebfa0f7d3eabdb0.pdf.

77 Heather J. Clawson et al., *Human Trafficking into and Within the United States: A Review of the Literature*, U.S. DEP’T HEALTH & HUM. SERVS. 7–8 (Aug. 30, 2009), <https://aspe.hhs.gov/system/files/pdf/75891/index.pdf>.

78 ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 2, 5 (2013), <https://fas.org/sgp/crs/row/RL34317.pdf>.

79 GOODMAN ET AL., *supra* note 76, at 6.

80 *Id.*

81 *See id.* at 5.

82 Weitzer, *supra* note 29, at 17–18.

83 Noy Thrupkaew, *A Misguided Moral Crusade*, N.Y. TIMES (Sept. 22, 2012), <https://www.nytimes.com/2012/09/23/opinion/sunday/ending-demand-wont-stop-prostitution.html>.

84 *See id.*

85 *See* Weitzer, *supra* note 29, at 17.

86 *Id.*

87 *Id.*

88 *Id.* at 18.

These tactics are intentional and have political consequences. In fact, abolitionists have crafted a “prototypical victim” that serves perfectly to advance their agenda.⁸⁹ “[This] victim—an abused teenage girl raised in the blight of the inner city and forced into the sex trade by an older man—does exist.”⁹⁰ However, this prototypical victim disregards the fact that individuals enter sex work for a variety of reasons. Additionally, true victims do not need to be made into symbolic figures used as pawns to color the public’s perception of sex work; they need access to government services and real protection.⁹¹ Generalizing victim experiences is self-serving; it simply helps abolitionists gain support without actually addressing any of the inherent issues at the root of the sex trafficking problem. To do so, advocates need to prioritize ensuring shelter, job opportunities, and other social services for all victims.⁹²

As previously stated, this Note advocates for the pro-sex work position through the lens of acceptance of the profession as the best way of reducing harms against women while simultaneously respecting their agency. It is imperative to recognize “the varied and intersectional experiences of [sex] trafficking victims” in order to initiate an effective response to trafficking.⁹³ In fact, abolitionists largely erase the distinct experiences of women by combining them into a single theory that all women are oppressed, which disregards the contextual reasons why the women initially decided to get involved in sex work.⁹⁴ In order to fully recognize the varied reasons for entering sex work and to respect women’s agency, it is important to understand the goals and effects of the implementation of various different statutory schemes.

89 Thrupkaew, *supra* note 83.

90 *Id.*

91 *Id.*

92 *See id.*

93 Barnhart, *supra* note 12, at 103–04 (“[Scholars] critique[] the underlying assumption of many feminists that essentializes women’s gender as a force that binds women together under similar oppression. This criticism finds its weight in the race and class conflicts surrounding discussions of women’s work in domestic and market spheres.”).

94 *Id.* at 103.

III. SEX TRAFFICKING STATUTORY SCHEME

A. *Fighting Trafficking at the Federal Level*

The U.S. federal government criminalized human trafficking, including sex trafficking, with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA).⁹⁵ Its aim was to “define[] and criminalize[] human trafficking, enhance[] penalties for traffickers, [and] provide[] government assistance to victims”⁹⁶ Subsequently, Congress reauthorized the TVPA in 2003, 2005, 2008, and 2013.⁹⁷

The current statute states in pertinent part:

Whoever knowingly—

. . . [R]ecruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of **force, threats of force, fraud, coercion** . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, . . . shall be punished⁹⁸

The federal statute is divided into three main elements: methods used to gain control over the victim, means the trafficker uses to exploit the victim, and the specific purpose of the exploitation.⁹⁹ The key aspect of this statute is the limiting means, requiring force, fraud, or coercion. Coercion is defined as: “(A) threats of serious harm . . . ; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm . . . ; or (C) the abuse . . . of law or the legal process.”¹⁰⁰

In 2007, the House of Representatives passed the William Wilberforce Trafficking Victims Protection Reauthorization Act, which sought to create a broader offense of sex trafficking that would not require a finding of force, fraud, or coercion.¹⁰¹ This change was driven by the recognition that “[p]imps typically recruit . . . vulnerable individuals through

95 Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 1464–66.

96 Dess, *supra* note 10, at 150.

97 GOODMAN ET AL., *supra* note 76, at 16.

98 18 U.S.C. § 1591(a) (2018) (emphasis added).

99 *Id.*

100 *Id.* at (e)(2).

101 H.R. 3887, 110th Cong. (2007) (as referred to Senate, Dec. 5, 2007) <https://www.congress.gov/bill/110th-congress/house-bill/3887>.

use of persuasive tactics that do not rise to the level of the force, fraud, or coercion.”¹⁰² However, the bill failed to pass the Senate¹⁰³ due in part to criticism from pro-work advocates for “improperly equating all prostitution with sex trafficking” and for “assuming that no individual could choose to engage in prostitution of [their] own will.”¹⁰⁴ As a result, the scope of the TVPA remains limited.

The TVPA provided for a federal response to trafficking through prosecution but also improved access to protection for victims.¹⁰⁵ However, many recognize that the statute has failed to fully address the problem at hand.¹⁰⁶ For example, between 2000 and 2010, the U.S. Department of Justice (“DOJ”) only convicted 607 individuals for human trafficking.¹⁰⁷ Recognizing the limitations of the TVPA, in 2004 the DOJ published a Model State Anti-Trafficking Criminal Statute for state legislators to use as a guide to create laws that address human trafficking.¹⁰⁸ The U.S. Senate endorsed this model legislation.¹⁰⁹

State laws are important not only because criminal law is primarily a state function¹¹⁰ but also because they supplement federal law in the fight

102 John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 980 (2015).

103 H.R. 3887.

104 Elrod, *supra* note 102, at 984.

105 Increased benefits include access to a T-visa (a non-immigrant status visa which protects the victims from being removed from the United States) and federal victim services such as health benefits and witness protection. See U.S. DEP’T HEALTH & HUM. SERVS., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE GUIDE TO SOCIAL SERVICE PROVIDERS 1, 6–7, 10, 12–14, 23–24 (May 2012), https://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf.

106 See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3020 (2006) (“[Despite] an increase in the prosecution of sex and labor trafficking prosecutions when compared to the numbers prior to the enactment of the TVPA . . . these numbers remain troublingly low.”); *id.* at 2978 (arguing consensus exists that the TVPA failed to sufficiently address human trafficking); see also Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 384 (2005) (discussing how victim protection under the TVPA has not been extremely effective).

107 Dess, *supra* note 10, at 165-66.

108 See Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 414, 425 (2006). The Model Statute largely mirrored the federal statute. Barnhart, *supra* note 12, at 101–02.

109 S. Res. 414, 108th Cong. 2d Sess., 3–4 (2004) (“[E]nactment of comprehensive State laws criminalizing human trafficking . . . may be necessary to ensure that Federal efforts are accompanied by robust efforts at the State and local levels.”).

110 See Barnhart, *supra* note 12, at 97.

against human trafficking.¹¹¹ “Comprehensive state legislation specifically addressing this crime is critical to” combatting sex trafficking.¹¹² There are several more specific reasons why state laws regulating sex trafficking are critical: (1) federal resources cannot keep up with the number of trafficking cases; (2) state and local law enforcement are more likely to make the first contact with victims; and (3) state laws can provide additional resources for victims.¹¹³

Before 2011, forty-seven states enacted anti-trafficking laws¹¹⁴ through varying approaches.¹¹⁵ As of 2020, all fifty states have enacted some form of sex trafficking statute.¹¹⁶ In drafting their sex trafficking statutes, state legislatures often mirrored the federal definition of the crime.¹¹⁷ However, a few states omitted the force, fraud, or coercion element from their statutes, which could signal an effort to make the scope broader.¹¹⁸ One of these states is Massachusetts.¹¹⁹

B. *Unusual Characteristics of the Massachusetts Statute*

On February 19, 2012, sex trafficking was officially criminalized in Massachusetts.¹²⁰ State Attorney General (AG) Martha Coakley and Suffolk

111 See Jim Finckenauer & Min Liu, *State Law and Human Trafficking*, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 3, 7 (Dessi Dimitrova ed., 2007); see also Michelle Crawford Rickert, *Though the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 236 (2010).

112 John Tanagho, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895, 918 (2007); see also Barnhart, *supra* note 12, at 86–87.

113 Dess, *supra* note 10, at 151–52. See Tanagho, *supra* note 112.

114 Massachusetts, West Virginia and Wyoming did not have criminal human trafficking laws in 2011. GOODMAN ET AL., *supra* note 76, at 17.

115 Chacón, *supra* note 3, at 99 (“Some [states] were more concerned with antitrafficking as a means of regulating migration through state criminal law, while others were more concerned with the criminal regulation of prostitution or the protection of victims of sexual exploitation.”).

116 *2014 State Ratings on Human Trafficking Laws*, POLARIS (Sept. 1, 2014), <https://polarisproject.org/wp-content/uploads/2019/09/2014-State-Ratings.pdf>.

117 See Barnhart, *supra* note 12, at 101–02.

118 Illinois, Minnesota, and Maine have also chosen to omit the requirement of force, fraud or coercion in their human trafficking statutes. See 720 ILL. COMP. STAT. 5/10-9 (LexisNexis 2020); ME. STAT. tit. 17, § 853 (Westlaw 2019); MINN. STAT. ANN. § 609.322 (Westlaw 2020). However, these will not be discussed in detail in this Note.

119 See MASS. GEN. LAWS ANN. ch. 265, § 50 (Westlaw 2020).

120 See An Act Relative to the Commercial Exploitation of People, ch. 178, § 23, 2011 Mass. Acts ch. 178 (codified at MASS. GEN. LAWS ANN. ch. 265, §§ 49–50 (Westlaw 2012)).

County District Attorney Daniel Conley strongly advocated for the bill.¹²¹ The current statute states, in pertinent part:

Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means . . . another person to engage in commercial sexual activity . . . or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude¹²²

Similarly to the federal statute, the Massachusetts statute separates the definition of trafficking into three main elements: the methods of gaining control over the victim, the means used to exploit the victim, and the purpose of the exploitation.¹²³ However, the means are much broader than those in the federal statute, as this statute lacks the additional element of force, fraud, or coercion.¹²⁴ Likely due to this omission, the Massachusetts law is considered one of the toughest sex-trafficking laws in the nation.¹²⁵ In addition to broadening the scope of offenses, the statute also increased the penalty for sex-buyers to 2.5 years of imprisonment.¹²⁶

In order to achieve its goals of expanding the types of behavior covered by the statute, the legislature “purposefully chose [this] language . . . so that [it] would focus appropriately on the offending mental intent and conduct of the defendant rather than just certain means by which that conduct could be committed.”¹²⁷ “[T]his way, the statute [covers] offensive forms of [sex] trafficking that may not involve obvious physical coercion or force.”¹²⁸ For example, victims often experience homelessness, substance abuse problems, and/or lack of familial support, and are thus unable to remove themselves from a harmful situation regardless of physical coercion

121 Brief and Appendix for the Commonwealth on Appeal at 30, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

122 MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020). The phrase “[c]ommercial sexual activity” is defined as “any sexual act on account of which anything of value is given, promised to or received by any person.” *Id.* § 49.

123 *See id.* § 50.

124 *See id.*

125 Matt Murphy, *Massachusetts Among Last States to Adopt Anti-Human Trafficking Law*, ST. HOUSE NEWS SERV., (Nov. 21, 2011), <https://www.statehousenews.com.ezproxy.neu.edu/?login=yes&trial=yes&path=cms/news.aspx&yr=2011&select=2011187>.

126 MASS. GEN. LAWS ANN. ch. 272, § 8 (Westlaw 2020). Previously, the penalty was one year in prison. MASS. GEN. LAWS ANN. ch. 272, § 8 (Westlaw 2011) (amended by An Act Relative to the Commercial Exploitation of People, 2011 Mass. Acts ch. 178).

127 Brief of the Massachusetts Attorney General as Amicus Curiae at 12, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

128 *Id.*

or force.¹²⁹ Victims may feel helpless and rely on their traffickers to give them food and shelter or to support their addictions.¹³⁰ To require a finding of force or coercion could make the prosecution of these cases more challenging.¹³¹ The legislature chose not to impose such a requirement so that the statute would encompass these types of sex trafficking schemes.¹³²

During the legislative process, AG Coakley offered testimony regarding the goals of the statute.¹³³ She stated that the proposed law would “go after the [trafficking] supply” by creating the crime of sex trafficking, “address the demand that feeds this industry” by increasing the penalty for sex buyers, and “support its victims” by creating a task force to study the problem and recommend further solutions.¹³⁴ One tactic employed by the Massachusetts legislature to meet these goals is known as demand reduction,¹³⁵ which focuses on shaming and punishing sex buyers (“johns”) in an effort to discourage them from buying sex.¹³⁶ Advocates of this tactic often refer to the need to end demand for prostitution as the most effective way to end sex trafficking: “[T]he male demand for . . . prostitution is the most immediate cause of the expansion of the sex industry without which it would be highly unprofitable for pimps and traffickers to seek out a supply of women. . . . [A] prostitution market without male consumers would go broke.”¹³⁷ Advocates of this position make oversimplified claims about supply and demand in this industry:

Without the demand for commercial sex, there would be no

129 *Id.*

130 *Id.* at 12–13.

131 *Id.* at 13; *see also Force, Fraud or Coercion*, U.N. WOMEN: VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN & GIRLS (Jan. 25, 2011), <https://www.endvawnow.org/en/articles/549-force-fraud-or-coercion.html> (highlighting an element that could be hard to prove because of the need to rely on victim testimony); *see also* Philip Marcelo, *State Prosecutors Struggle with Human Trafficking Case*, AP NEWS (May 26, 2019), <https://apnews.com/a27f0cb72b4a48ca96f9b8249480d579> (indicating a conviction rate of just over 8% in Massachusetts in 2011).

132 Brief of the Massachusetts Attorney General, *supra* note 127, at 13.

133 *See* Testimony of Attorney General Martha Coakley on S. 827/H. 2850, An Act Relative to the Commercial Exploitation of People (May 18, 2011), <https://www.mass.gov/files/documents/2016/08/qa/ht-testimony-for-judiciary.pdf> [hereinafter Coakley Testimony].

134 *Id.* at 2–3.

135 TASK FORCE REPORT, *supra* note 59, at 32.

136 *Id.* at 32–33; GLOBAL NETWORK OF SEX WORK PROJECTS, THE IMPACT OF END DEMAND LEGISLATION ON WOMEN SEX WORKERS 1 (2018), https://www.nswp.org/sites/nswp.org/files/pb_impact_of_end_demand_on_women_sws_nswp_-_2018.pdf.

137 COAL. AGAINST TRAFFICKING IN WOMEN, PRIMER ON THE MALE DEMAND FOR PROSTITUTION 15–16 (Ilvi Jõe-Cannon ed., 2006), <http://media.virbcdn.com/fies/b0/FileItem-149956-PRIMERonmaledemand.pdf>.

market forces producing and sustaining the roles of pimps and traffickers as ‘distributors,’ nor would there be a force driving the production of a ‘supply’ of people to be sexually exploited. *Supply and distribution are symptoms; demand is the cause.*¹³⁸

These proponents see increased law enforcement action against johns as a very effective method to stop both prostitution and sex trafficking.¹³⁹ In support of this position, AG Coakley stated in her testimony, “[t]o stem the demand side, the bill increases penalties for current ‘john’ crimes. Simply put, if no one were buying sex, traffickers and pimps wouldn’t be supplying an endless stream of victims.”¹⁴⁰ However, this position commodifies workers and largely ignores “the very real fact that trafficked persons . . . are people who are trying to access labour . . . opportunities for themselves and their families, and who often try to resist or escape exploitative situations.”¹⁴¹

Despite this new statute with a claimed increased focus on sex buyers rather than sex workers, selling sex remains a crime.¹⁴² Where there is no force, fraud, or coercion element in a statute, it is possible for the statute to be used in instances where ‘victims’ are not being trafficked at all but instead have chosen sex work of their own volition. Without the limiting element, the statute does not differentiate between sex work and sexual exploitation, thus taking the choice, the agency, away from women. The law does nothing to ensure that prosecutions of sex workers will not continue.¹⁴³ It also does little to increase access to social services needed by victims that actually do wish to leave sex work. In fact, it is likely that since these tactics expand criminalization to anyone that assists sex workers, sex workers may find it “harder to protect themselves . . . or hir[e] security, because those actions could be interpreted as ‘promoting prostitution’ or running a brothel”¹⁴⁴

138 Berger, *supra* note 21, at 542. *But see* GAATW, MOVING BEYOND ‘SUPPLY AND DEMAND’ CATCHPHRASES 7 (2011), https://www.gaatw.org/publications/MovingBeyond_SupplyandDemand_GAATW2011.pdf (listing reasons why End Demand strategies are limited and, therefore, not effective).

139 TASK FORCE REPORT, *supra* note 59, at 32; *The Issue*, DEMAND ABOLITION, <https://www.demandabolition.org/the-issue/> (last visited Mar. 31, 2020).

140 Coakley Testimony, *supra* note 133, at 2.

141 GAATW, *supra* note 138, at 16.

142 MASS. GEN. LAWS ANN. ch. 272, § 53A (Westlaw 2020).

143 “Criminalization of sex work, as opposed to decreasing demand, may create a stronger underground market that enables trafficking.” Berger, *supra* note 21, at 543.

144 Sebastian Kohn, *The False Promise of “End Demand” Laws*, OPEN SOC’Y FOUNDS. (June 2, 2017), <https://www.opensocietyfoundations.org/voices/false-promise-end-demand-laws>.

C. *Massachusetts's Seminal Sex Trafficking Case: Commonwealth v. McGhee*

In 2015, the SJC reviewed the new sex trafficking legislation in *Commonwealth v. McGhee*, the seminal case that significantly impacted sex trafficking jurisprudence in Massachusetts.¹⁴⁵ This case upheld the constitutionality of the new statute, thus allowing prosecutors to be more confident in their prosecutions.¹⁴⁶

The case reached the SJC after a Suffolk County grand jury indicted Tyshaun McGhee and Sidney McGee in 2012¹⁴⁷ for aggravated rape,¹⁴⁸ trafficking persons for sexual servitude,¹⁴⁹ and deriving support from prostitution.¹⁵⁰ The victims alleged “that the defendants approached them, took their photographs to post . . . on Backpage.com,¹⁵¹ drove them to various locations to have sex with men . . . and then retained . . . the money that the women received as payment”¹⁵² Following the trial, the defendants were convicted on all sex trafficking indictments.¹⁵³ On appeal, the defendants sought to overturn their convictions on the basis that MASS. GEN. LAWS ch. 265, § 50(a), the Massachusetts sex trafficking statute used to convict them, was unconstitutionally vague and overbroad.¹⁵⁴ One basis for their appeal was that the Massachusetts statute is in all aspects identical to its federal counterpart except for the fact that it lacks the element of force, fraud or coercion.¹⁵⁵ They argued that because the Massachusetts statute lacks this element, it failed to give defendants fair warning about the prohibited conduct.¹⁵⁶

145 *Commonwealth v. McGhee*, 35 N.E.3d 329, 333 (Mass. 2015).

146 *Id.* at 339.

147 *Id.* at 333.

148 MASS. GEN. LAWS ANN. ch. 265, § 22(a) (Westlaw 2020).

149 *Id.* § 50(a).

150 *Id.* ch. 272, § 7; *McGhee*, 35 N.E.3d at 333.

151 Backpage.com was a classified advertising website that used to be the largest marketplace for buying and selling sex until April 2018, when federal law enforcement agencies seized it. Sarah Lynch & Lisa Lambert, *Sex Ads Shut Down by U.S. Authorities*, REUTERS (Apr. 6, 2018), <https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP>.

152 *McGhee*, 35 N.E.3d at 333.

153 *Id.* at 334.

154 Redacted Brief and Record Appendix for the Defendant on Appeal at 21, 27–28, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

155 *Id.* at 22; *Compare* MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020), *with* 18 U.S.C. § 1591(a) (2018).

156 *See* Redacted Brief and Record Appendix for the Defendant on Appeal, *supra* note 154, at 23, 25, 27–28 (“[W]here our state statute is clearly modeled after its federal counterpart but for the essential element of coercion and force, the defendant is entitled to the resolution of vagueness in his favor.”).

The SJC held that the sex trafficking statute is not unconstitutionally vague because it sufficiently defines the prohibited conduct to give the defendant fair notice.¹⁵⁷ Specifically, the statute provided notice to the defendants that their conduct was the conduct prohibited by the legislature.¹⁵⁸ The SJC further noted that the omission of specific language included in the analogous federal statute “reflect[s] a conscious decision by the legislature to deviate from the standard embodied in the federal statute.”¹⁵⁹ The Court concluded that the deliberate aim of the statute, and intent of the legislature, was to focus on the “intent of the perpetrator, not the means they used . . . to accomplish . . . [their] intent.”¹⁶⁰ The Court found the determining question is “whether the perpetrator has engaged in the enumerated proscribed conduct with the requisite mens rea.”¹⁶¹ The mens rea requirement outlined in the statute, requiring knowledge of the illegal conduct, tends to narrow and clarify the scope of a criminal statute.¹⁶²

The *Commonwealth v. McGhee* decision was significant because it cemented the fact that, in Massachusetts, there is no requirement that a defendant use force, fraud or coercion upon a person to be convicted under the sex trafficking statute.¹⁶³ However, while the SJC determined that the statute is constitutional, it does not necessarily mean that the statute, as it is currently drafted, is the most effective way to solve the sex trafficking problem in Massachusetts.

157 *McGhee*, 35 N.E.3d at 339–40, 342 (also holding that the statute is not overbroad as it does not infringe on the right of freedom of association).

158 *Id.* at 339. The defendant’s argument that the statute “as written, permits the Commonwealth to decline to prosecute a taxicab driver who transports a known prostitute to an appointment to engage in commercial sexual activity, but to prosecute the defendants who provide the same service[.]” was dismissed. *Id.* at 338 n.9.

159 *Id.* at 338 n.8 (citations omitted).

160 *Id.* at 339.

161 *Id.*

162 *See id.* Additionally, the “[Supreme] Court has long recognized that the constitutionality of a vague [statute] is closely related to whether that [statute] incorporates a requirement of *mens rea*.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

163 In 2018, the Court reaffirmed the *McGhee* holding in the case *Commonwealth v. Dabney*, 90 N.E.3d 750, 763 (Mass. 2018).

IV. TRIAL COURT LANDSCAPE: THE COURT STUDY

A major concern regarding the Massachusetts statute is that since it was passed recently in 2012, individuals assessing its impact are unsure of the daily, on-the-ground application of the law by police, prosecutors, and judges. Without accurate information about court practice, it is hard for attorneys, government officials, and scholars to assess the implications of the new law. This study surveys trial courts in Massachusetts in order to understand some of the case-by-case implications of the statute. More specifically, the study analyzes the conviction rates on sex trafficking charges, the change in conviction rates over time, the demographics of sex trafficking defendants, the type of sex trafficking cases that are prosecuted, and the reason why certain charges are dropped. This study finds that the current day-to-day operation of the statute achieves problematic results.

A. *Data Collection and Methodology*

The study is based upon data collected in the following Massachusetts Superior Courts: Suffolk, Middlesex, Essex, Bristol, Norfolk, and Hampshire counties.¹⁶⁴ No data was collected from courts in Barnstable, Berkshire, Dukes, Franklin, Hampden, Nantucket, Plymouth, and Worcester counties. The primary sources of data are the dockets of all cases involving a sex trafficking charge between 2012 and 2019. All cases involving sex trafficking charges that were prosecuted by the Attorney General's Office (AGO) in

¹⁶⁴ These counties were chosen because they had sex trafficking cases that had already been litigated to some dispositive conclusion as of October 31, 2019.

Bristol,¹⁶⁵ Norfolk,¹⁶⁶ Suffolk,¹⁶⁷ Middlesex,¹⁶⁸ Essex,¹⁶⁹ and Hampshire¹⁷⁰ are in the sample. Cases involving sex trafficking charges that were prosecuted by the District Attorney's Offices (DAOs) in Essex,¹⁷¹ Suffolk,¹⁷² and

165 The Bristol County case is *Commonwealth v. Lara*, No. 1473CR00174 (Mass. Super. Ct. filed Mar. 6, 2014).

166 The Norfolk County cases are: *Commonwealth v. Dong*, No. 1382CR00100 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Girouard*, No. 1382CR00101 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Lai*, No. 1382CR00099 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Sanchez*, No. 1382CR01206 (Mass. Super. Ct. filed Dec. 9, 2013).

167 The Suffolk County cases are: *Commonwealth v. Berdet*, No. 1784CR00202 (Mass. Super. Ct. filed Mar. 23, 2017); *Commonwealth v. Xu*, No. 1684CR00621 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Tang*, No. 1684CR00620 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Wong*, No. 1784CR00619 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Alicea*, No. 1684CR00511 (Mass. Super. Ct. filed July 7, 2016); *Commonwealth v. Pompilus*, No. 1584CR11238 (Mass. Super. Ct. filed Nov. 30, 2015); *Commonwealth v. Leoney*, No. 1384CR10947 (Mass. Super. Ct. filed Oct. 3, 2013); *Commonwealth v. Leony*, No. 1384CR10294 (Mass. Super. Ct. filed Mar. 28, 2013); *Commonwealth v. Lopez-Martinez*, No. 1284CR10496 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Suarez*, No. 1284CR10497 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Henriquez*, No. 1284CR10492 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Hernandez*, No. 1284CR10491 (Mass. Super. Ct. filed May 24, 2012).

168 The Middlesex County cases are: *Commonwealth v. Lucas*, No. 1681CR00174 (Mass. Super. Ct. filed Apr. 6, 2016); *Commonwealth v. Andino*, No. 1581CR00122 (Mass. Super. Ct. filed Mar. 27, 2015); *Commonwealth v. Cipriano*, No. 1481CR01309 (Mass. Super. Ct. filed Sept. 30, 2014); *Commonwealth v. Chen*, No. 1381CR00816 (Mass. Super. Ct. filed June 26, 2013); *Commonwealth v. Keplin*, No. 1381CR00817 (Mass. Super. Ct. filed June 26, 2013).

169 The Essex County cases are: *Commonwealth v. Campbell*, No. 1477CR00965 (Mass. Super. Ct. filed July 31, 2014); *Commonwealth v. Diaz*, No. 1477CR00966 (Mass. Super. Ct. filed July 31, 2014).

170 The Hampshire County cases are: *Commonwealth v. Liu*, No. 1780CR00012 (Mass. Super. Ct. filed Feb. 15, 2017); *Commonwealth v. Yin*, No. 1780CR00020 (Mass. Super. Ct. filed Feb. 15, 2017).

171 The Essex County cases are: *Commonwealth v. Deras*, No. 1777CR00640 (Mass. Super. Ct. filed Dec. 14, 2017); *Commonwealth v. Beeson*, No. 1777CR00186 (Mass. Super. Ct. filed May 1, 2017); *Commonwealth v. Toney*, No. 1777CR00185 (Mass. Super. Ct. filed May 1, 2017); *Commonwealth v. Garcia*, No. 1677CR00255 (Mass. Super. Ct. filed June 13, 2016); *Commonwealth v. Davis*, No. 1577CR00591 (Mass. Super. Ct. filed Sept. 24, 2015); *Commonwealth v. Morse*, No. 1577CR00377 (Mass. Super. Ct. filed May 15, 2015); *Commonwealth v. Morse*, No. 1377CR01479 (Mass. Super. Ct. filed Dec. 2, 2013); *Commonwealth v. Barron*, No. 1377CR00846 (Mass. Super. Ct. filed June 27, 2013).

172 The Suffolk County cases are: *Commonwealth v. Shea*, No. 1884CR00779 (Mass. Super. Ct. filed Sept. 25, 2018); *Commonwealth v. Walker*, No. 1884CR00452 (Mass. Super. Ct. filed June 8, 2018); *Commonwealth v. Hernandez*, No. 1684CR00421 (Mass. Super. Ct. filed June 10, 2016); *Commonwealth v. Barbosa*, No. 1584CR10598 (Mass. Super. Ct. filed June 30, 2015); *Commonwealth v. Acevedo*, No. 1584CR10226 (Mass. Super. Ct.

Middlesex¹⁷³ are also in the sample.¹⁷⁴ In sum, the sample includes sixty-three cases.¹⁷⁵ One case represents one defendant. It is possible that two or more defendants were involved in the same incident, but for docket purposes, they are considered different cases. It should also be noted that court records are adequate for identifying charges, dispositions, and penalties, but they lack the detail necessary for a complete analysis. The following tables represent the sample of cases and charges.¹⁷⁶

filed Mar. 25, 2015); *Commonwealth v. Dew*, No. 1584CR10164 (Mass. Super. Ct. filed Mar. 11, 2015); *Commonwealth v. Dabney*, No. 1584CR10064 (Mass. Super. Ct. filed Feb. 4, 2015); *Commonwealth v. Gallego*, No. 1384CR10924 (Mass. Super. Ct. filed Oct. 1, 2013); *Commonwealth v. Smith*, No. 1384CR10808 (Mass. Super. Ct. filed Aug. 27, 2013); *Commonwealth v. Ahmed*, No. 1384CR10625 (Mass. Super. Ct. filed June 25, 2013); *Commonwealth v. McGhee*, No. 1284CR11187 (Mass. Super. Ct. filed Dec. 19, 2012); *Commonwealth v. McGee*, No. 1284CR11188 (Mass. Super. Ct. filed Dec. 19, 2012).

173 The Middlesex County cases are: *Commonwealth v. Acevedo*, No. 1881CR00417 (Mass. Super. Ct. filed Sept. 6, 2018); *Commonwealth v. Crawley*, No. 1881CR00108 (Mass. Super. Ct. filed Mar. 15, 2018); *Commonwealth v. McNeill*, No. 1781CR00050 (Mass. Super. Ct. filed Feb. 14, 2017); *Commonwealth v. Lowery*, No. 1681CR00128 (Mass. Super. Ct. filed Mar. 17, 2016); *Commonwealth v. Simpkins*, No. 1681CR00115 (Mass. Super. Ct. filed Mar. 8, 2016); *Commonwealth v. Elibox*, No. 1681CR00025 (Mass. Super. Ct. filed Jan. 22, 2016); *Commonwealth v. Lattimore*, No. 1681CR00024 (Mass. Super. Ct. filed Jan. 22, 2016); *Commonwealth v. Sagastizado*, No. 1581CR00486 (Mass. Super. Ct. filed Dec. 1, 2015); *Commonwealth v. Hall*, No. 1581CR00470 (Mass. Super. Ct. filed Nov. 17, 2015); *Commonwealth v. Burleigh*, No. 1581CR00249 (Mass. Super. Ct. filed June 23, 2015); *Commonwealth v. Pierre-Louis*, No. 1581CR00232 (Mass. Super. Ct. filed June 9, 2015); *Commonwealth v. Gustave*, No. 1581CR00218 (Mass. Super. Ct. filed June 2, 2015); *Commonwealth v. Smith*, No. 1581CR00217 (Mass. Super. Ct. filed June 2, 2015); *Commonwealth v. Hughes*, No. 1581CR00066 (Mass. Super. Ct. filed Mar. 13, 2015); *Commonwealth v. Kirnon*, No. 1481CR01676 (Mass. Super. Ct. filed Dec. 18, 2014); *Commonwealth v. Edwards*, No. 1481CR01218 (Mass. Super. Ct. filed Sept. 18, 2014); *Commonwealth v. Streety*, No. 1381CR01261 (Mass. Super. Ct. filed Oct. 3, 2013).

174 After discussing this Note with several state trafficking prosecutors, they concluded that these counties are the only ones where the District Attorney's office has prosecuted most cases.

175 Cases involving other crimes, such as keeping a house of prostitution, are not included in the sample unless a charge for sex trafficking was also brought at the same time.

176 This sample is not comprehensive and representative of every single case that prosecutors have prosecuted statewide. As the dockets can only be manually searched month-by-month in the online database, this process required a lot of time. Because of lack of resources, the author only manually searched counties where experts indicated most of the cases were.

Table 1: Cases/Defendants in the Survey Sample

	AGO CASES	DAO CASES	<i>Total Cases</i>
SUFFOLK	12	12	24
MIDDLESEX	5	17	22
ESSEX	2	8	10
BRISTOL	1	0	1
NORFOLK	4	N/A ¹⁷⁷	4
HAMPSHIRE	2	N/A	2
<i>Total</i>	26	37	63

Table 2: Charges in the Survey Sample

	AGO TRAFFICKING CHARGES	DAO TRAFFICKING CHARGES
SUFFOLK	55	26
MIDDLESEX	17	27
ESSEX	2	13
BRISTOL	3	0
NORFOLK	5	N/A
HAMPSHIRE	2	N/A
<i>Total</i>	84	66

For each case, prosecutors may indict on more than one trafficking charge. For the twenty-six cases prosecuted by the AGO, prosecutors indicted a total of eighty-four trafficking charges with an average of 3.2 sex trafficking charges per case (against a single defendant). For the thirty-seven cases prosecuted by DAOs, prosecutors indicted defendants on a total of sixty-six trafficking charges with an average of 1.8 charges per case. The first part of this analysis will be based on individual charges, while the latter part will be based on cases.

¹⁷⁷ N/A means that I did not obtain data for this county. It does not necessarily mean that no cases have been prosecuted.

B. *Findings and Interpretations*

The efforts to analyze the Massachusetts sex trafficking statute resulted in several lines of inquiry. First, the study evaluates the impact of the new broad trafficking charge on securing convictions both statewide and by county. Second, the study investigates whether the rate of conviction changed over time, particularly before and after the SJC decision in *Commonwealth v. McGhee*. Third, the study explores potential reasons for dismissal in cases that do not result in conviction. Fourth, the study analyzes conviction trends based on race and gender. Fifth, the study analyzes convictions based on conduct of the defendant because in order to determine whether the statute is effectively meeting the legislature's goals, it is important to consider specifically which type of sex trafficking activities are most often prosecuted. These activities may include activities such as illicit massage businesses, brothels, and escort services.¹⁷⁸

i. Convictions

In order to determine the impact of the statute, it is important to note the total number of charges per county and the resulting adjudication of each charge. The following table shows the disposition¹⁷⁹ of every sex trafficking charge in the sample for cases prosecuted by the AGO and by the DAOs.

178 See generally POLARIS, *supra* note 16.

179 A nolle prosequi ("NP") is a formal abandonment of an action for a specific charge by a prosecutor. *Nolle Prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019). A dismissal is when a judge disposes of an action by granting a motion to dismiss. *See Judgment of Dismissal*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty plea is when a defendant admits to committing a crime, thus accepting the charges. *Plea*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty verdict is when a jury finds the defendant guilty of the charged offense. *Guilty Verdict*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty finding is when a judge finds the defendant guilty of the charge beyond a reasonable doubt. *Finding of Guilt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Table 3: Disposition of Sex Trafficking Charges in the Survey Cases

COUNTY	DISPOSITION	PROSECUTING OFFICE			
		AGO		DAO	
		Total	Percentage	Total	Percentage
SUFFOLK	NP/Dismissed	22	40.0	8	30.8
	Guilty Plea	17	30.9	10	38.5
	Guilty Verdict/Finding	12	21.8	7	26.9
	Not Guilty Verdict	4	7.3	1	3.8
	Total	55	–	26	–
MIDDLESEX	NP/Dismissed	8	47.1	20	74.1
	Guilty Plea	0	0	2	7.4
	Guilty Verdict/Finding	6	35.3	5	18.5
	Not Guilty Verdict	3	17.6	0	0
	Total	17	–	27	–
ESSEX	NP	0	0	9	69.2
	Guilty Plea	1	50.0	1	7.7
	Guilty Verdict/Finding	1	50.0	3	23.1
	Not Guilty Verdict	0	0	0	0
	Total	2	–	13	–
BRISTOL	NP/Dismissed	3	100	–	–
	Guilty Plea	0	0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	3	–	0	–
NORFOLK	NP/Dismissed	5	100	–	–
	Guilty Plea	0	0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	5	–	–	–
HAMPSHIRE	NP/Dismissed	1	50.0	–	–
	Guilty Plea	1	50.0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	2	–	–	–

The following table uses the data above to show the conviction rate on sex trafficking charges both by county and statewide. Overall, the statewide conviction rate for both offices is largely similar. The main differences appear between the counties.

Table 4: Conviction Rate on Sex Trafficking Charges

COUNTY	CONVICTION RATE		
	AGO	DAO	Total
SUFFOLK	52.7%	65.4%	56.8%
MIDDLESEX	35.3%	25.9%	29.5%
ESSEX	100%	30.8%	40.0%
BRISTOL	0%	–	0%
NORFOLK	0%	–	0%
HAMPSHIRE	50.0%	–	50.0%
Total	45.2%	42.4%	44.0%

As depicted above, the AGO obtained a conviction on 45.2% of the sex trafficking charges it brought since the statute was passed. This rate is the result of thirty-eight successful convictions out of eighty-four total charges. The DAOs obtained an overall conviction rate of 42.4% on all the trafficking charges they brought in this same period. This rate is a result of twenty-eight successful convictions out of sixty-six total charges.

Suffolk County is the county with the most charges and the highest conviction rate. On the other hand, Middlesex, the county with the second most charges, has the lowest conviction rate of the counties surveyed. Bristol County and Norfolk County both have never had a conviction but this is likely not significant because very few cases have been tried there.

ii. Changes Over Time

The study investigates whether the conviction rate changed over time, particularly before and after the SJC decision in *Commonwealth v. McGhee* in 2015. The following table shows the number of non-convictions (including nolle prosequi, dismissals, and acquittals) and convictions for the sixty-three sample cases from 2012 to 2018.

Table 5: Change in Conviction Rate based on the Year the Charge Originated

YEAR CHARGE ORIGINATED ¹⁸⁰	TOTAL CHARGES	DISMISSALS AND ACQUITTALS	GUILTY PLEA	GUILTY VERDICT	CONVICTION RATE
2012	10	2	0	8	80%
2013	30	16	5	9	46.7%
2014	8	6	1	1	25.0%
2015	41 ¹⁸¹	21	8	12	48.8%
2016	31	26	3	2	16.1%
2017	19	5	14	0	73.7%
2018	11	8	1	2	27.3%

In the above table, the dispositions are ordered by year. This was done in order to understand whether prosecutors grew in confidence regarding their cases as the years went by and were no longer affected by uncertainty-avoidance. Uncertainty-avoidance is the concept that prosecutors are less likely to try a case when they are unsure whether their convictions will get overturned on appeal.¹⁸² After the 2015 *McGhee* decision, which established that the sex trafficking statute was constitutional, this uncertainty should have decreased. With the added confidence they would not be challenged on the constitutionality of the statute and were more likely to win at trial, it follows that prosecutors would bring more numerous and stronger cases. Following this assumption, it is likely that the *McGhee* decision contributed to the spike in cases since 2015.

The table above shows the range of conviction rates since the statute was passed. Of the cases originating in 2012, Superior Courts disposed of ten complaints for sex trafficking. Of the sex trafficking charges from 2012, 20% were dismissed or acquitted and 80% had findings of guilty. Of the cases originating in 2013, the courts disposed of thirty complaints for sex trafficking – a significant increase from the previous year. Of these

¹⁸⁰ The year the charge originated is not necessarily the same year a final disposition was entered. This Note considered presenting the data by the year the charge was disposed of, but eventually decided to order it by year the charge originated in order to observe potential patterns of how prosecutors decide to file charges.

¹⁸¹ Of the cases brought during 2015, ten were brought before August 13 (the day *McGhee* was decided), and five were brought after August 13. Therefore, it is likely that 2016 would have been the first year where a significant change would be observed.

¹⁸² Amy Farrell et. al, *The Prosecution of State-Level Human Trafficking Cases in the United States*, ANTI-TRAFFICKING REV., at 48–49 (May 2016).

charges, 53.3% were dismissed or acquitted, and 46.7% resulted in a guilty plea or finding. Of the cases originating in 2014, courts disposed of eight complaints: 75.0% of charges were dismissed outright and 25.0% resulted in a conviction. Of the 2015 charges, the courts disposed of forty-one complaints: 51.2% were dismissed or resulted in a not guilty finding, and 48.8% resulted in a conviction. While on its face this may seem like an increase, it is important to note that ten out of the twelve guilty verdicts (83.3%) are on charges originating from the same case.¹⁸³ Therefore, the data is slightly skewed. Of the 2016 charges, the courts disposed of thirty-one complaints: 83.9% were dismissed or resulted in a not guilty finding, and 16.1% resulted in a conviction. Surprisingly, the year after the *McGhee* decision was the year with the most dismissals and acquittals, and the year with the lowest conviction rate. Of the cases originating in 2017, the courts disposed of nineteen charges: 26.3% were dismissed, and 73.7% resulted in a conviction. Like in 2015, the results are slightly skewed because twelve out of the fourteen guilty pleas (85.7%) resulted from the same case.¹⁸⁴ Finally, of the 2018 cases, courts disposed of eleven complaints: 72.7% were dismissed and 27.3% resulted in a conviction.

This pattern of case dispositions shows that the *McGhee* decision did not significantly change the likelihood of obtaining a conviction. At least half of the charges ended up either being dismissed by a judge or dismissed by a prosecutor through a nolle prosequi entry. This could imply that despite knowing that their cases are not going to be overturned on appeal on a constitutional challenge, prosecutors still have a lot of uncertainty as to whether they can meet their burden at trial. Is it because there are not enough resources in place for law enforcement and prosecutors to properly detect sex trafficking? Is this because the statute encompasses so much behavior that it is harder for prosecutors to determine which cases should be pursued? Further research is necessary in order to fully answer these questions.¹⁸⁵ However, it remains clear that the new statute has not been a perfect solution to fixing the problems identified by the legislature, as prosecutors still remain more likely to dismiss their charges rather than proceed to trial or attempt a plea deal.

183 The case is *Commonwealth v. Pompilus*, No. 1584CR11238 (Mass. Super. Ct. filed Nov. 30, 2015).

184 The case is *Commonwealth v. Berdet*, No. 1784CR00202 (Mass. Super. Ct. filed May 23, 2017).

185 See *infra* Part V.

iii. Reasons for Nolle Prosequi

A nolle prosequi is a notice of abandonment by a prosecutor for a specific charge.¹⁸⁶ It is an “affirmative exercise of a prosecutorial tool to discontinue prosecution.”¹⁸⁷ There are several reasons why a prosecutor may choose to proceed with this. First, prosecutors may fear that there is insufficient evidence and thus they cannot meet the tough burden of proof on all elements at trial.¹⁸⁸ They may also uncover more information regarding the defendant’s innocence and thus decide not to proceed with the prosecution.¹⁸⁹ Second, prosecutors often use nolle prosequi to get plea deals on other, lesser charges.¹⁹⁰ This means that a more serious charge is used as a “hammer,” and then dropped, in order to get the defendant to plead guilty to other, less serious charges.¹⁹¹ Third, prosecutors may use nolle prosequi to obtain more evidence through proffers, or as a way to ensure that conspirators will testify against the main defendant.¹⁹² This means that prosecutors may opt to drop some or all charges if the conspirator agrees to testify at trial as a witness for the government.¹⁹³

The prosecutorial system thrives largely on discretion, which is exemplified in the prosecutorial use of nolle prosequi. Under Massachusetts law, prosecutors are supposed to file a signed written statement explaining the reason for their abandonment of charges.¹⁹⁴ However, court case filings are sometimes incomplete; many cases lack written or oral records as to why prosecutors decided to withdraw certain charges and proceed with others. Because of the limited records available for review, this study is limited to a quantitative analysis of the charges listed on the dockets. The table below shows the results of nolle prosequi entries in this data set. Out of the sixty-three cases surveyed, thirty cases involved sex trafficking charges that were dismissed through a nolle prosequi (not including defendants that were acquitted at trial).

186 Commonwealth v. Denehy, 2 N.E.3d 161, 172 (Mass. 2014).

187 *Id.*

188 *Reasons Why Criminal Charges Are Dropped or Dismissed*, NEAL DAVIS LAW FIRM, <https://www.nealdavislaw.com/criminal-defense-guides/criminal-charges-dropped-dismissed.html> (last visited Mar. 31, 2020).

189 *Id.*

190 See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

191 NEAL DAVIS LAW FIRM, *supra* note 188.

192 See Spencer Martinez, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 CLEV. ST. L. REV. 141, 144 (1999); NEAL DAVIS LAW FIRM, *supra* note 188.

193 See Martinez, *supra* note 192.

194 MASS. R. CRIM. P. 16.

Table 6: Result of Filing Nolle Prosequi

RESULT	NUMBER (RATE)
Full Case Dropped	9 (30.0%)
Partially Dropped Charges	1 (3.3%)
Plea Deal on Non-Trafficking Charges	20 (66.7%)

As seen from the table above, twenty defendants accepted a plea deal on lesser charges once the sex trafficking charges were dropped. This represents 31.7% of the total sample. This means that in almost one-third of cases, it can be argued that the trafficking statute was likely being used as a hammer to get a conviction on lesser charges. The lesser charges include but are not limited to: deriving support from prostitution,¹⁹⁵ soliciting prostitution,¹⁹⁶ maintaining a house of prostitution,¹⁹⁷ and keeping a house of prostitution.¹⁹⁸ It is apparent that these charges primarily involve prostitution, and thus their use contributes further to the conflation of prostitution and sex trafficking. While the law purports to be focused on trafficking, rather than prostitution, the data shows that a large portion of the defendants are not being convicted of trafficking but instead of crimes involving prostitution.

The fact that a large number of cases end in a conviction of prostitution charges, rather than trafficking charges, may be the result of the statute's vague references to "recruit[ing], entic[ing], harbor[ing], transport[ing], [and] provid[ing]."¹⁹⁹ These vague references allow the statute to be used to target a variety of activities other than actual trafficking. For example, the statutory definition of sex trafficking "could include sex workers who encourage friends to join the sex trade or recommend a friend to a client (enticing and recruiting) or who help run a brothel (harboring)."²⁰⁰ This is a major cause for concern as some women may choose sex work out of preference or necessity.²⁰¹ By prosecuting these crimes, the Commonwealth is moving further away from actually prosecuting sex trafficking. The focus should not be on women who may choose sex work voluntarily, but rather

195 MASS. GEN. LAWS ANN. ch. 272, § 7 (Westlaw 2020) (criminalizing support from, or sharing, earnings from prostitution).

196 *Id.* § 8 (criminalizing solicitation of prostitute).

197 *Id.* § 6 (criminalizing ownership of a place inducing or suffering a person to resort in such place for sexual intercourse).

198 *Id.* § 24 (criminalizing "[k]eeping house ill of fame").

199 MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020).

200 Berger, *supra* note 21, at 562.

201 *Id.*; *see supra* Part I.

on those cases in which “women have been forced into prostitution against their will or have been subjected to abusive and exploitive conditions even if they initially consented”²⁰²

iv. Race/Ethnicity and Gender Trends

Police and prosecutors have limited resources so it is important to understand what types of decisions they make. Which trafficking cases rise to the level of using these resources? In order to begin answering this question, the data was broken up by race/ethnicity and gender. It is important to note these determinations were made based on what was written in prosecutorial findings; they may not accurately reflect how a defendant wishes to identify themselves.²⁰³

The dominant image of sex trafficking is that of violent men trafficking innocent young female victims.²⁰⁴ However, this does not accurately represent the diversity of the experience of sex trafficking. Research suggests that women are also perpetrators of sex trafficking.²⁰⁵ This survey sample includes sixty-three defendants. Of these defendants, ten are white, twenty-nine are Black, eight are Asian, and sixteen are Latinx. Additionally, forty-eight are men and fifteen are women.²⁰⁶

Table 7: Demographics of Sex Trafficking Defendants in the Sample

	MEN	WOMEN	Total
WHITE	9	1	10
BLACK	24	5	29
ASIAN	4	4	8
LATINX	11	5	16
Total	48	15	63

As seen from the data, Black people, especially Black men, are the individuals most prosecuted in Massachusetts for sex trafficking. This is

²⁰² Berger, *supra* note 21, at 564.

²⁰³ While not measurable, there is a possibility that non-binary and multiracial identities might not be represented accurately in court filings.

²⁰⁴ Lauren A. McCarthy, *A Gendered Perspective on Human Trafficking Perpetrators: Evidence from Russia*, 6 J. HUM. TRAFFICKING 79, 79 (2020); *see supra* Part II(C).

²⁰⁵ McCarthy, *supra* note 204.

²⁰⁶ Tables 7–9 use data collected and compiled by the author from court case files for each respective case.

consistent with nationwide research.²⁰⁷ White women are the least prosecuted individuals. While it is important to understand which individuals are more likely to be prosecuted, it is also important to see which individuals are more likely to be convicted. The following table shows convictions by race/ethnicity and gender.

Table 8: Disposition of Sex Trafficking Charges based on Defendant Demographics

	DISMISSALS/ ACQUITTALS	TRAFFICKING PLEAS/CONVICTIONS	PLEAS/ CONVICTIONS ON OTHER CHARGES
WHITE MEN	3	1	5
WHITE WOMEN	0	1	0
BLACK MEN	6	15	3
BLACK WOMEN	3	0	2
ASIAN MEN	2	1	1
ASIAN WOMEN	1	2	1
LATINO MEN	3	4	4
LATINA WOMEN	0	1	4

Black men are the individuals that are most likely to be convicted on sex trafficking charges. Black men are also more likely to be convicted of sex trafficking rather than for other, lesser charges. All other individuals are more likely to have their trafficking charges dismissed, accept plea deals, or be convicted on lesser charges than be convicted on sex trafficking charges. The data suggests that there are significant disparities in how the law is applied between individuals of different races and ethnicities.

v. Conduct Trends

Along with race/ethnicity and gender trends, the data can be used to understand which method of sex trafficking is prosecuted most often. Methods included in this data are pimps, brothels, illicit massage businesses, and domestic violence. A pimp is an individual “who solicits customers for a prostitute, usu[ally] in return for a share of the prostitute’s earnings.”²⁰⁸

²⁰⁷ See North, *supra* note 23 (“People of color are significantly more likely to be arrested for sex work-related offenses than white people.”).

²⁰⁸ *Pimp*, BLACK’S LAW DICTIONARY (11th ed. 2019).

A brothel is a place where individuals engage in sexual activities, operating as organized crime networks.²⁰⁹ Brothels “tend to cater to commercial sex buyers from similar ethnic and/or language backgrounds advertising through word of mouth” or Backpage.com.²¹⁰ Illicit massage businesses are hidden behind a façade of legitimate spa services concealing that their main business is the sex trafficking of female employees.²¹¹ Domestic violence trafficking is trafficking that occurs in a domestic setting where individuals force their intimate partners to perform sex work.²¹² The number of cases prosecuted under each method is depicted in the table below.

Table 9: Methods of Sex Trafficking Prosecuted by Law Enforcement

	MASS. ATTORNEY GENERAL	DISTRICT ATTORNEY	<i>Total</i>
PIMP	11	30	41
BROTHEL	3	4	7
MESSAGE BUSINESS	12	1	13
DOMESTIC VIOLENCE	0	2	2

There is a clear difference in the methods of sex trafficking that are prosecuted by the AGO and the various DAOs. The data shows that while the AGO is more likely to tackle the larger scale cases that tend to be more complex and involve more victims and defendants (similar to organized crime networks),²¹³ the DAOs are more likely to tackle pimp cases which usually involve one victim and one defendant.²¹⁴

These results are not surprising. The AGO has an entire division dedicated solely to prosecuting human trafficking.²¹⁵ The various DAOs generally do not have a dedicated unit.²¹⁶ This shows the large difference

209 POLARIS, *supra* note 16, at 17.

210 *Id.*

211 *Id.* at 12.

212 *See What is Human Trafficking?*, CTR. FOR SEXUAL ASSAULT SURVIVORS: BLOG (Jan. 7, 2020), <https://visitthecenter.org/the-blog/f/what-is-human-trafficking>; *see generally* Commonwealth v. Dabney, 90 N.E.3d 750 (Mass. 2018).

213 *See* POLARIS, *supra* note 16, at 12, 17–18.

214 *See Pimp*, *supra* note 208.

215 *Fighting Human Trafficking*, MASS.GOV, <https://www.mass.gov/fighting-human-trafficking> (last updated 2020).

216 Suffolk County is the only District Attorney Office that has a dedicated sex trafficking unit. *See Bureaus of the Suffolk DA's Office*, SUFFOLK DISTRICT ATT'Y MASS., <https://www.suffolkdistrictattorney.com/about-the-office/bureaus-of-the-suffolk-das-office> (last updated 2019).

in resources that are available to both offices. The prosecutors in the Human Trafficking Division at the AGO have at their disposal a “team of prosecutors, advocates, . . . troopers, and a paralegal who work alongside . . . local law enforcement to investigate and prosecute cases of human trafficking.”²¹⁷ These resources make it easier to identify and investigate sex trafficking crimes especially those more complex ones with a larger scope. Additionally, the AGO, unlike the DAO, has statewide jurisdiction.²¹⁸ This means that they can prosecute cases which occur across multiple counties. Based on the review of AGO cases in this survey sample, this happens often in cases involving organized brothels and illicit massage businesses.

217 *Fighting Human Trafficking*, *supra* note 215.

218 *See Directory of District Attorney Offices*, MASS.GOV, <https://www.mass.gov/directory-of-district-attorney-offices> (last updated 2020); *Fighting Human Trafficking*, *supra* note 215.

V. SUMMARY AND IMPLICATIONS

A. *Summary of Findings*

This part will frame the principal conclusions drawn from this study analyzing trial court cases and highlight potential implications. Overall, the statute, as presently written, has not accomplished the goals of the legislature. Instead, by allowing prosecutors to use the sex trafficking statute as a hammer to obtain a conviction on charges involving prostitution, it conflates different activities, potentially hurting the true victims.

As previously mentioned, the sponsors of the sex trafficking bill intended for it to be a weapon in the fight against the increasing rates of sex trafficking in Massachusetts.²¹⁹ AG Coakley hoped to expand the definition of sex trafficking in order to make more behaviors prosecutable, to make it easier for prosecutors to secure convictions, and to protect more victims.²²⁰ However, the current day-to-day operation of the statute instead achieves some problematic results.²²¹ Prosecutors still have a hard time obtaining convictions on sex trafficking charges, evidenced by the fact that less than 50% of the total survey charges resulted in a conviction.²²² The data suggests that rather than seeking convictions on these charges, prosecutors end up using the sex trafficking charge as a hammer to induce defendants into accepting a plea deal on lesser charges. This inducement happens in almost one-third of cases.²²³

This behavior of dismissing the more serious charges in order to get plea deals on lesser charges is not unique to sex trafficking. In fact, plea deals represent a majority of convictions in the American legal system.²²⁴ However, this pattern begs the question of whether the statute really is as effective as the legislature deems it to be. If the purpose of the statute was to expand the behavior that could be prosecuted and make it easier for prosecutors to obtain convictions, why is that not the result? The language of the statute likely needs to be revisited and amended in order to actually help combat sex trafficking because, in its current form, the statute still punishes individuals for merely being involved in sex work or aiding sex work. By putting sex work and violent human trafficking on the same level, the statute ignores the

219 *See supra* Part III(B).

220 *Supra* Part III(B).

221 *See generally supra* Part IV.

222 *See supra* Table 3.

223 *See supra* Table 5 and accompanying text.

224 *Plea Bargains*, JUSTIA, <https://www.justia.com/criminal/plea-bargains/> (last updated May 2019).

striking moral differences between the two and potentially harms both true victims and sex workers.²²⁵

Furthermore, this statute seems to be used primarily to prosecute individual pimps rather than arguably more serious systematic activities such as illicit massage businesses and brothels.²²⁶ This contributes to the mistaken conflation of activities where the sex worker is consenting and activities where the victim does not. Additionally, the law is disproportionately applied against Black men,²²⁷ which could imply possible racial undertones in the statute's administration by law enforcement and prosecutors.

B. *Broader Implications*

This study has been limited to carrying out an empirical analysis using concrete information about a particular human trafficking statute in one particular jurisdiction. Reviewing the broader debates on prosecutorial discretion and on victim protections is beyond the scope of this article. Nonetheless, the findings from this study could potentially have significance for each of these larger topics, and thus it is appropriate to highlight these potential implications.

First, prosecutorial discretion contributes to the unequal bargaining power between prosecutors and defendants and causes defendants to accept plea offers prematurely to avoid more serious charges, which was supported by the data in the survey cases.²²⁸ Prosecutorial discretion means that a prosecutor has the ability to choose whether or not to charge a potential defendant with a crime.²²⁹ Some argue that a prosecutor has more control over a person's life and liberty than any other individual does in this country.²³⁰ This discretion is largely unreviewable except in a few specific instances.²³¹ For this reason, plea deals generally involve unequal bargaining power and thus may not lead to accurate or just dispositions.²³² Furthermore, as plea deals typically happen "behind closed doors" with no oversight, there are several concerns regarding the process and its

225 See generally *supra* Part I.

226 See *supra* Table 8.

227 See *supra* Table 7.

228 Rakoff, *supra* note 190.

229 *Id.*

230 See, e.g., Robert H. Jackson, Attorney Gen. of the U.S., The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys, 1 (Apr. 1, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

231 See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974).

232 Rakoff, *supra* note 190.

legitimacy.²³³ The plea-bargaining process allows prosecutors to use add-on charges as weapons to effectively coerce defendants into pleading guilty.²³⁴ Prosecutors have most of the information regarding the case, such as police reports, witness interviews, and forensic reports.²³⁵ Defense counsels do not have access to the same information, leaving them at a significant informational disadvantage, especially if the client is detained and they have limited opportunities to meet.²³⁶ This unequal bargaining power often causes defendants to prematurely accept plea offers because they fear that the prosecution could potentially win on much more serious charges.²³⁷ In theory, the criminal justice system is based on the notion that one needs to have their “day in court” in front of a jury of their peers before being deprived of their liberty, and yet the plea-bargaining system, ever present in the realm of sex trafficking, represents the exact opposite of this notion.²³⁸ The data gathered in this study is merely further evidence that prosecutorial discretion needs to be challenged and that the legislature needs to demand more accountability from law enforcement offices.

Second, the broad language in the statute and the low conviction rates can create problems for victim protection. Part of the reason that the legislature adopted the broader statute was to be able to prosecute more activities in the hopes of protecting and rescuing more victims.²³⁹ However, as shown by the survey results, more often than not the sex trafficking charges are being dropped in favor of other, lesser crimes which do not offer the same statutory protections for victims. In cases where sex trafficking charges are dropped, victims do not have access to the civil remedies, safe-harbor provisions, affirmative defenses, and the human trafficking victim trust fund.²⁴⁰ Civil remedies allow sex trafficking victims to bring a tort action against the traffickers.²⁴¹ The safe harbor provision establishes a presumption that any child charged with common night walking or prostitution is a victim of trafficking and not a criminal.²⁴² Additionally, under the Massachusetts statute, being a victim of human trafficking can serve as an affirmative defense to certain crimes, but the burden is on the victim to show that they

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 *Supra* Part III.

240 *See* MASS. GEN. LAWS ANN. ch. 265, §§ 50, 55, 57, 59 (Westlaw 2020).

241 *Id.* § 50(d).

242 *Id.* § 59(a)(2).

were trafficked.²⁴³ Furthermore, the trafficking statute established a Victims of Human Trafficking Trust Fund to assure assets forfeited and assessments collected from trafficking related offenses are deposited and then distributed to victims.²⁴⁴ None of these protections are available if one is a victim of a lesser crime involving prostitution rather than trafficking. Thus, dropping the trafficking charge to entice a defendant to take a plea deal is not always the most beneficial option for the victim.

C. *Limits of this Study*

The research carried out in this study has some practical and theoretical weaknesses. First, the data used throughout this Note can only indirectly help measure the effectiveness of the Massachusetts sex trafficking statute. This Note focused primarily on the information presented in court dockets and filings which is an imperfect way of understanding all the complexities behind sex trafficking prosecution. Dockets are not always an accurate reflection of all the instances of sex trafficking because they only account for the instances that were investigated and eventually led to an indictment.²⁴⁵ Additionally, this study did not rely on direct observation or actual interviews with judges or attorneys.

Second, the available data is not as detailed and complete as necessary in order to fully arrive at a conclusion on the efficacy of the statute. Court records only include information regarding charges, dispositions, and pleas. They do not include a judge's or prosecutor's reasoning behind dismissing certain charges and proceeding on others. Additionally, there are not many written or oral records of decisions on motions in the trial courts which contributes to the lack of transparency. Court dockets also lack information about jury deliberations. It is nearly impossible to analyze how juries are persuaded by the statutory construction since proceedings happen completely behind closed doors. The only way to get even the slightest insight behind the process is to interview prosecutors and defense attorneys and ask them to make an inference based on their experience trying sex trafficking cases.

Third, the limited time since the statute was passed presents another potential issue with the findings of this study. As the study was limited to cases disposed by October 31, 2019, the sample only contains sixty-three cases filed within a period of merely seven years. While this is sufficient to

243 *Id.* §§ 59(a)(1), 59(b).

244 *Id.* § 55; MASS. GEN. LAWS ANN. ch. 10, § 66A (Westlaw 2020).

245 Sex trafficking is underreported. It is likely that the true numbers are much higher. *See Myths, Facts, and Statistics, supra* note 62.

arrive at preliminary determinations, more time is required to determine whether these patterns have enduring significance. Furthermore, the sample only includes data from a limited number of counties. It does not represent a comprehensive overview of all sex trafficking cases that have been prosecuted statewide, meaning the conclusions only apply to the sample cases. This research does not guarantee that the highlighted practices are the same in counties not included in the study.

D. *Potential Future Research*

Given the scope of this research project, there are still many research avenues that could be pursued. The goal of this Note is to provide preliminary research and analysis on the effect of the new statute, but it is not intended to be an end point in ensuring that the Massachusetts legislature best serves and protects sex trafficking victims. In particular, further qualitative research; a more encompassing statewide comparison of all counties in Massachusetts; and a study of other states that omit the force, fraud, or coercion element in their sex trafficking statutes would help to inform this analysis.

As previously stated, court dockets can provide insightful information, but they lack the reliability necessary for a complete analysis. In the future, supplemental data sources can be used to check and fill in the gaps left by statistics. These sources could include: (1) law enforcement reports, (2) prosecuting attorney interviews, (3) defense attorney interviews, and (4) trial court observations. Law enforcement reports can provide insight into what police officers identify as sex trafficking behavior. Additionally, they can show how enforcement officers go about conducting their investigations. These reports may also include information that is not available in the prosecutorial court filings. Prosecuting attorney interviews can help provide insight into prosecutorial practice by explaining what decisions prosecutors have to make and why certain cases are dropped. Defense attorney interviews can help outline which issues defendants most commonly run into when arguing under this statute. Lastly, trial court observations can help with understanding what decisions judges make and why.

Another potential avenue of research is conducting a more in-depth statewide comparative analysis. This would help further highlight and explain the differences between various counties and between urban and non-urban areas within a specific county. Future research could include data from all fourteen counties in the state. Additionally, the research could differentiate between the towns of origin of the specific case. As counties include several different cities and towns, they are not necessarily representative of exactly where sex trafficking is happening. Furthermore, different law enforcement

entities across the state may have different priorities and different ways of detecting this behavior. A study documenting these differences and exploring the reasons for, and consequences of, these differences could make a significant contribution to understanding sex trafficking in Massachusetts.

Lastly, in order to understand the efficacy of the statute, it would be useful to compare these results to those of other states that also do not have the force, fraud, or coercion element in their statute. A comparative analysis can be used to evaluate the strength of different statutes and thus determine the most effective way to successfully fight sex trafficking on a national scale.

VI. RECOMMENDATIONS

First and foremost, the Massachusetts legislature should decriminalize sex work.²⁴⁶ While this Note acknowledges that decriminalization is not a magic solution, it will likely better protect sex workers and true sex trafficking victims.²⁴⁷ “Decriminalization would allow law enforcement [and prosecutors] to focus [entirely] on stopping exploitation and abuse, rather than [policing] consensual adult sex.”²⁴⁸ This would also enable sex workers to enforce their labor rights, thus gaining access to crucial services to protect their health.²⁴⁹ Recognition of sex work as a form of labor often translates into regulation of the industry through health and safety codes.²⁵⁰ Furthermore, decriminalization would allow for victims that generally would not report their abuse to feel more comfortable coming forward,²⁵¹ increasing the accuracy of reporting statistics. When sex work is criminalized, “[f]ear of arrest and other consequences means that those engaged in sex work are less likely to report instances of violence or exploitation, resulting in a ‘climate of impunity [that] emboldens police, health sector, and non-state groups to abuse sex workers’ rights.”²⁵² Decriminalizing sex work will allow analysis from a labor perspective, restoring agency to women.²⁵³ Women struggling for survival should not have to be punished by the criminal justice system for the hard economic choices they make: “[t]heir choice of sex work as the best option . . . should not then be used to further deny those women the bargaining power” to have agency in their life choices.²⁵⁴

Second, the legislature should shift the criminal justice system’s focus to perpetrators, rather than victims of trafficking, by amending the sex trafficking statute. To assume adding a required mental state to the statute is

246 Decriminalization is the removal of all criminal prohibitions and penalties on sex work, including laws targeting clients and brothel owners. OPEN SOC’Y FOUNDS., 10 REASONS TO DECRIMINALIZE SEX WORK (Mar. 2015), https://www.opensocietyfoundations.org/uploads/cc072baf-14b2-48f8-8c5f-30d7e9a6ec14/10-reasons-decriminalize-sex-work-20150410_0.pdf.

247 Kohn, *supra* note 144.

248 *Id.*

249 *See id.*

250 *See* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 398 (2006); Tastrom, *supra* note 42.

251 *See* Tastrom, *supra* note 42.

252 Erin Albright & Kate D’Adamo, *Decreasing Human Trafficking Through Sex Work Decriminalization*, 19 AMA J. ETHICS 122, 123 (2017) (second alteration in original).

253 Berta E. Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 438–40 (2006); Barnhart, *supra* note 12, at 113.

254 Barnhart, *supra* note 12, at 113.

sufficient to focus entirely on the perpetrators is a simplistic and inaccurate view. In order to adopt a perpetrator-centered approach, the legislature needs to amend the statute to focus on the means of trafficking, not the methods. This way, “the statute shifts the focus from how a victim was placed in a trafficking situation to the means that the trafficker used to keep them in a position of servitude.”²⁵⁵ In order to shift the focus, the legislature should be more specific about the means used to exploit victims. Currently, the statute reads “by any means.”²⁵⁶ However, as previously discussed, this conflates consensual sex work and coerced trafficking.²⁵⁷

A more specific recommendation is to consider using the language “a person who [substantially] deprives or violates . . . personal liberty,”²⁵⁸ instead of the current language (“by any means”). This phrase remains broad but emphasizes the fact that sex work must be done involuntarily in order for it to be considered trafficking. “Deprivation or violation of personal liberty [can be further] defined [by] . . . listing . . . the most common means of exploiting trafficking victims.”²⁵⁹ This should include traditional methods of coercion, but also the other various ways that victim vulnerabilities are exploited that may not rise to the level of coercion described by the federal statute, such as through deceit, duress, and undue influence.²⁶⁰ “The means by which traffickers overcome the will of their victims,” rather than “the methods for gaining control over the victim,” is the most important part of the sex trafficking definition.²⁶¹ A broader definition of coercion, which includes physiological coercion and abuse of vulnerabilities, would remove some of the obstacles that prosecutors face when trying trafficking cases. The

255 *Id.* at 116.

256 MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020).

257 *Supra* Part I, Part III(B).

258 Language taken from examples in Barnhart, *supra* note 12, at 115–16.

259 Barnhart, *supra* note 12, at 116.

260 Some definitions of “depriving or violating personal liberty” could be: “(1) unlawfully providing [drugs] to a person who is patronized, with intent to impair said person’s judgment[;] . . . (2) making . . . false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in [commercial sexual] activity; (3) withholding, destroying or [concealing] any actual or purported . . . government identification document . . . of another person with intent to impair said person’s freedom of movement; . . . (4) requiring that prostitution be performed to retire, repay, or service a real or purported debt; (5) using . . . any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution”; or (6) abusing positions of power (not limited to political, legal, and educational power) in order to compel or induce the person to engage in prostitution. *See* Barnhart, *supra* note 12, at 121–22 n.235 (definitions taken from N.Y. PENAL LAW § 230.34); *supra* Parts III–V.

261 Barnhart, *supra* note 12, at 116.

specificity also makes the statute easier for law enforcement to implement.²⁶² Specificity will also allow the legislature to state explicitly the behavior they want to be covered by the statute without them having to overcompensate and revert to drafting a very broad statute to cover more behavior than what is needed. An amended statute would also need to recognize the explicit difference between voluntary sex work and coerced trafficking.²⁶³ Lastly, it should include a section explicitly granting prosecutorial immunity for victims of trafficking, even if the perpetrator does not end up being successfully charged and convicted of trafficking.²⁶⁴

262 *See id.* at 129–30.

263 Halley et al., *supra* note 250, at 393.

264 *See* LEGISLATION ONLINE, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING 6 (2005), <https://www.legislationline.org/download/id/1264/file/5b6fb5af473eb70407d29b957330.pdf> (providing examples of potential language).

CONCLUSION

Seeking to reduce the number of sex workers who are in exploitative, dangerous conditions is laudable, but Massachusetts should avoid going too far in conflating sex work and sex trafficking. Overall, the research in this Note suggests a move away from the current and ineffective statutory scheme towards a statute that seeks to redirect anti-trafficking energies into more effective methods for change that do not affect the integrity of women's agency. While some may argue that the force, fraud, or coercion limitation makes it impossible to prosecute any sex trafficking, it is evident that the omission of this limitation is still not the solution to the issue, as evidenced by the prosecutorial outcomes documented in this Note.

Efforts to combat human trafficking in Massachusetts, and the rest of the country, are fraught with ideological divides that halt meaningful identification of real victims. End Demand strategies do not end sex work and protect victims; they push true victims further into the shadows, putting them more at risk of experiencing violence and trauma.²⁶⁵ Prosecutors should divert their resources to combating sex trafficking primarily against those individuals that take advantage of non-consenting victims. Viewing sex work as a spectrum—from the most involuntary and forceful (such as enslavement) to the more voluntary (influenced by poverty, lack of other options, or preference for sex work)—is necessary to avoid conflating sex work and trafficking which causes detriment to both true victims and voluntary sex workers.

Traffickers do need to be punished for preying on particular social vulnerabilities, but the legislature needs to be intersectional in its approach. Demand reduction strategies do not address the inherent societal issues that are at the root of the trafficking pandemic. The Massachusetts statute creates a harmful notion that because of their gender, women in sex work are all enslaved and exploited. This view needs to be adapted by amending the language of the statute to reflect the fact that there are various intersecting vulnerabilities, beyond gender, that traffickers exploit. Redrafting the statute to differentiate explicitly between choice and coercion, and to include a list of vulnerabilities the legislature wishes to protect, will allow true victims to be identified more quickly and voluntary sex workers to own their agency. Finding the line between choice and coercion is no simple task, but Massachusetts should work to push past patriarchal horror stories. Ending prostitution is not the answer: recognizing that women get a say is.

²⁶⁵ Kohn, *supra* note 144.