An Examination of Prostitution and Sex Trafficking Laws within the United States

Allison J. Capaul
Hamline University

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An Examination of Prostitution and Sex Trafficking Laws within the United States

Allison Jean Capaul

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ABSTRACT:

As one of the oldest professions, prostitution has had a continual presence in the United States. This once tolerated activity became a public affront at the turn of the twentieth century. Failed attempts at regulation and changes in societal views then advanced the criminalization of prostitution throughout the United States: it was made completely illegal in all states with the exclusion of thirteen counties in Nevada.

At the same time, awareness of sex trafficking increased and laws attempted to protect individuals who were being transported by force, deceit, and threat of force for purposes of sex slavery. While states have recognized the existence of this involuntary servitude through sex trafficking, victims often remain unnoticed. Indeed, the simple category of sex trafficking is unable to subsume all prostitution victims. Persons who enter prostitution do so for various reasons. Some were former victims of trafficking. While they no longer are under threat, these individuals continue to sell themselves. Many are involved in a relationship with a controlling pimp. Others enter due to socioeconomic circumstances and have no better option. Do prostitution and sex trafficking laws protect these victims or do new laws need to be created?

Alternative sentencing models provide prostitutes with help and resources needed to break away from a life of prostitution. Despite the emergence of this alternative approach in select states, other states fail to show signs of adopting these methods. Although a given procedure may help a victim elude prison and is a better option, victims of pressurized prostitution may still go unnoticed.

Amidst changing laws, the overlap of prostitution and sex trafficking requires consideration. This research consists of a nation-wide examination and evaluation of the laws surrounding prostitution and sex trafficking in the United States. It will show how each state is handling these victims of prostitution.
Pressurized Prostitution and Its Victims: An Examination of Prostitution and Sex Trafficking Laws within the United States

Allison Jean Capaul

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It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases, which obviously should not be comprised within its terms.

— President Roosevelt
INTRODUCTION

As one of the oldest professions, prostitution is the act of performing sexual services in exchange for payment.\(^1\) When determining a legal approach to prostitution, there are four different courses of action that can be taken.\(^2\) The first approach is the complete criminalization of prostitution. This method makes any involvement in prostitution illegal.\(^3\) The second approach is toleration or criminalization in part. It allows the prostitute to escape legal consequences, while other actors in prostitution are punished.\(^4\) Third, decriminalization of prostitution does not specifically have laws against the relationships or specific acts of prostitution and there are no laws regulating prostitution either. Rather, prostitution is held to standards like other forms of employment (i.e. employment and health laws). Engagement in prostitution is only punished if criminal laws are broken (i.e. rape, physical assault, etc.) and engagement in prostitution is punished for a criminal law that is broken.\(^5\) Finally, the fourth approach is legalization in which prostitution is legal and not against the law. However, the government heavily regulates prostitution and those involved must follow specific state laws and regulations concerning the conduct and operation of the business.\(^6\)

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\(^1\) Minn. Stat. § 609.321 (2011).
\(^3\) Chuang, supra note 2, at 1668-1669.
\(^4\) Chuang, supra note 2, at 1668-1669.
\(^6\) Chuang, supra note 2, at 1669.
The United States started as a country allowing prostitution to exist without rules or laws regulating it. During the 19th century in the United States, common law allowed officials to punish those involved in prostitution “under other offenses such as lewdness, fornication, adultery, or disorderly conduct.” After an unsuccessful attempt at controlling the business of prostitution, the United States moved towards the criminalization of prostitution (with the passage of the law). Later, in the United States Supreme Court decision of Hoke v. United States, it was determined individual states had the sole right to self-regulate prostitution within their jurisdiction. This led to more strictly enforced state laws. With the exception of thirteen counties in Nevada, the once legal profession of prostitution was made completely illegal in the United States by 1971. It has remained so to this day.

The research done for this paper has resulted in an examination of the intersection of prostitution and sex trafficking. What classifies an individual as either an individual selling himself or herself in prostitution or a sex trafficking victim? Since laws between the fifty states vary, this determination is dependent upon the state a person is caught in and the methods taken to identify individuals. Attempts at solving the overlap between prostitution and sex trafficking have been taken at the state level.

Use of alternative sentencing methods has been expanding throughout the states in the United States of America. There are programs available to individuals

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8 Ross, *supra* note 7, at 1476.
9 Ross, *supra* note 2, at 1476.
12 Drexler, *supra* note 11, at 205.
selling themselves for purposes of prostitution and/or patrons that serve as an educational rehabilitation to help these individuals from committing the crime again. However, without an established method of requiring such use of the programs and services, the impact of the program does not reach all individuals convicted of prostitution or related offenses.

Throughout the remainder of this thesis, the reader will be taken through the history of prostitution within the United States and then introduced to the state laws through an analysis of their definition of the crime. The paper will then move on to the legal history of sex trafficking within the United States and an analysis of what is defined as sex trafficking (or the state equivalent of such). The next section will discuss the defenses afforded to individuals who are found to be either victims of prostitution or trafficked individuals. From there a discussion surrounding the intersection of the two crimes takes place. It is from this discussion that a solution to the overlap of prostitution and sex trafficking is presented.

HISTORY

Prostitution

Prostitution has proven to be a controversial issue throughout the course of United States history and continues to be so today. Though it was not illegal during the early years of our nation’s history, prostitution was slowly controlled until the regulations developed into the criminalization of prostitution, Nevada excluded. The determination of how to regulate prostitution was left up to the discretion of the individual states. The transportation of persons across state borders for sexual purposes fell under the purview of federal law.\textsuperscript{13} In order to gain an understanding of

\textsuperscript{13} Hoke v. United States, 227 U.S. 308 (1913).
the current laws pertaining to prostitution, it is important to examine the past and the
evolution of these laws to what they are today. The transformation of these laws can
provide an understanding of how prostitution has been viewed and whether the laws
have been effective. Through the investigation into the history and development of the
laws, a pattern or trend presents itself on how the laws have changed. It helps with the
evaluation of where problems exist with the current laws, and is informative on how
the laws of prostitution can be changed to better address the multi-faceted problems of
prostitution.

Since the Thirteen Colonies fought for independence from Britain in the 18th
Century, prostitution has been a part of American society. At this time the profession
of prostitution was for the most part legal; however, it was disapproved of.14 During
the American Revolutionary War, there emerged instances of attempts by military
leaders to control prostitution. First witnessed inside of the American army camps,
prostitution had mostly negative effects to the army. It gave a bad image to the army,
distracted the soldiers, gave way to thefts, and most importantly, spread venereal
disease; yet, the allowance of prostitutes within the army camps kept morale high.15
The disease of soldiers and disorder in the camps where prostitution was allowed
became too much for General Artemas Ward, as well as other commanders, to
give up.16

On June 30, 1775, General Ward prohibited prostitutes from entering the
military camps, and stated that appropriate punishment would be given in order to

14 Ross, supra note 7, at 523.
the camp of the “lewd women.” After the banning, an accusation of prostitution against a woman meant she would be put under guard. Through military court hearing it would be determined what punishment would be appropriate. The punishment would then be carried out against the women. Although punishment did not happen often, the forms bestowed upon the condemned prostitutes were having their head shaven, being “well watred under a pump” or getting drummed out of the camp they were occupying. The latter of these three punishments was the most common type of punishment.

The transition from the 18th Century into the 19th Century involved a growth in prostitution among society. Though, in most cities it was out of the public eye, the development started to bring worry to society. An upsurge in the number of bawdy houses, brothels, and saloons brought about attempts at deterring participation in prostitution. Through ordinances, city officials around America tried to prevent and punish those in the industry. Most of the ordinances made sexual intercourse between two non-married consenting adults illegal. Walking along the street looking for a patron was also illegal. It was also illegal to participate in adultery, and other acts thought to be associated with prostitution or other crimes.

In the District of Columbia, laws of vagrancy determined vagrants to be “any person wandering abroad and lodging…in the open air,” or “any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself [or herself].” While the vagrancy

17 Mayer, supra note 16, at 111; Ward, supra note 15, at 123.
19 Mayer, supra note 17, at 111; Ward, supra note 16, at 124.
21 William O. Douglas, Vagrancy and Arrest on Suspicion, 70.1 YALE L.J. 1, 4 (1960).
laws were aimed at punishing individuals who fit the guidelines, they were sometimes used to punish those who were participating in sexual transgressions. The punishments took the favor of fines. These laws were in part successful at punishing those found to be involved in prostitution; yet, overall they were ineffective in the attempt to purge towns of prostitution. Due to a lack of “resources and conviction,” there was not an extreme abundance of persons arrested for vagrancy or prostitution. Thus prostitution continued to expand.

Like the American Revolutionary War, the Civil War (1861-1865) brought about an enormous growth of prostitution in the United States. Again, prostitution was thought to keep morale high during this time and was accordingly tolerated. A soldier camping near Alexandria, Virginia depicted the increasing number of prostitutes in a letter to his wife when he stated “one house of every ten is a bawdy house.”

After the war many proposals were brought about for laws to regulate this sex business. Some cities (such as New York, Cincinnati, Chicago, Baltimore, and Pennsylvania) made the attempt at legalizing and controlling prostitution, but failed. In 1870, the St. Louis (Missouri) city council created the “Social Evil Ordinance” in order to regulate prostitution. This ordinance gave the power to their Board of Health to issue licenses to the houses of prostitution and the women. The board also appointed physicians to check the health of the women, so that they would prevent the spread of disease. Like the other cities that tried to regulate prostitution, the St. Louis

22 Deady, supra note 5, at 523.
23 Whitebread, supra note 20, at 241.
25 Drexler, supra note 11, at 204.
26 Whitebread, supra note 20, at 241.
law failed. 27 Cities continued to use statutes – like “open and gross lewdness” statutes to punish those involved in prostitution. 28 At this point, most of the prostitutes and establishments of prostitution were tolerated if they were located within certain geographic areas which became known as “Red-light Districts.” 29

The Red-light Districts were illegal under many laws, but they were tolerated due to the view that they were a “necessary evil.” 30 Within the cities, prostitution was not as prominent, because it mostly “operated on the fringes of urban society.” 31

The shift from the 19th to the 20th century brought about a different view on prostitutes. Prior to the 20th century, many people viewed the prostitutes as “fallen women,” or women who had resorted to this trade because they had a lack of morals or because they were of a lower class and it was the only way to make money. People of society often felt sympathy for these women, while at the same time blaming them. 32 At the turn of the century, the prostitutes were viewed as “white slaves,” or women who were forced into the trade. They were seen as “young and innocent.” Victims. 33 These views were brought on by the discovery of “white slaves” or women who were enslaved into prostitution. 34

This breakthrough brought about the Mann Act. Passed by Congress in 1910, the act (also known as the White Slave Traffic Act) made it a federal crime for anyone to transport “any woman or girl for purposes of prostitution or debauchery or for any

28 Deady, supra note 5, at 523.
30 Hennigan, supra note 27, at 155.
31 Hennigan, supra note 27, at 156.
32 Hennigan, supra note 27, 157.
33 Hennigan, supra note 27, 159.
34 Hennigan, supra note 27, 158-159
other immoral purpose" from one state to another. The intention of this act was to strike against forced prostitution; however, it became used to punish adults who had sexual relations outside of marriage. In 1986, the Mann Act was amended and “or any immoral purpose” was eradicated and helped prevent the previous broad interpretations of the act.

Meanwhile, on the state level, the Red Light Abatement laws were being put into effect. First introduced in Iowa in 1909, the Red Light Abatement Act expanded standing and allowed individuals within a broad jurisdictional area to bring a public nuisance action to prohibit prostitution from a property. Citizens were given the right to close a dwelling of prostitution. As a result of these laws, many of the red light districts ceased to exist. By 1919, the Red Light Abatement Act expanded throughout the United States and was in effect in 41 states. At the beginning of the 1920s most of the red light districts within the United States were gone, and by 1952, the only red light district in existence was in Galveston, Texas.

In 1913, the United States Supreme Court made a decision in Hoke v. United States, upheld the Mann Act, but granted the right to the individual states to control prostitution, since the Mann Act only provided congressional regulation of prostitution involving interstate travel. By 1925, every state had passed a form of law concerning the regulation of prostitution. The following decades brought about many cases challenging the prostitution statutes, but the courts maintained the validity

36 Donovan, supra note 36, at 601-602.
37 Deady, supra note 5, at 525.
38 Hennigan, supra note 27, at 126.
39 Hennigan, supra note 27, at 127.
40 Hoke v. United States, 227 U.S. 308 (1913).
41 Drexler, supra note 11, at 203-204.
of the laws. In 1971, with the exception of the thirteen counties in Nevada, prostitution was made completely illegal in the United States and has remained to be.42

The transition of laws from the end of the 18th century until the present establish the fact that “as prostitution increased, so too did disapproval for the ‘profession.’”43 History also shows the importance of enforcement and preciseness with respect to the effectiveness of these laws. For example, as previously discussed, the vagrancy laws did not explicitly illegalize prostitution. This failure fostered the continuance and growth of prostitution in the United States. In addition, the allowance of prostitution in segregated areas during the 19th and early 20th centuries contributed to the growth. Once the laws were more heavily enforced, the existence of these districts ceased to exist. The above historical discussion of laws surrounding prostitution provides context for the importance avoiding vagueness in laws. The desire to avoid vagueness should be used when considering new prostitution laws.

Sex Trafficking

As the United States made prostitution illegal, an awareness of a new crime involving sex increased: human sex trafficking. This crime entails the act of a person transporting or recruiting an individual by force, deceit, or threat of force for purposes of sex slavery.44

42 Drexler, supra note 11, at 205.
43 Rebecca L. Wharton, A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act, 16.3 WM. & MARY J. WOMEN & L. 753, 759 (2010).
44 22 U.S.C. § 7101(b)(2). This definition is merely the federal definition of sex trafficking. The laws of the states within the United States vary on their definitions. See the state analysis of sex trafficking laws for more details.
Two significant steps to combat sex trafficking – the Mann Act of 1910 and the Victims of Trafficking and Violence Protection Act of 2000 – were used. As discussed above, the Mann Act of 1910 forbade any person to cross state lines with a female for purposes of prostitution or for another similar reason.\(^{45}\)

Efforts towards combating human trafficking on both the national and international level were brought about during the mid-1990s.\(^{46}\) Not only was trafficking increasing, but also the United States became an ideal location to traffic individuals to. During Bill Clinton’s presidency, he enacted a policy framework (commonly known as the “three Ps”) targeted at trafficking. In this structure, the “prosecution of trafficking, prevention of trafficking, and protection of trafficked persons”\(^{47}\) was focused on to guide the United States in efforts against trafficking. This brought about the creation of laws to combat the crime.

At the height of human trafficking awareness and advocacy in 2000, the United States participated in the creation of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women (international law) and Children and the Trafficking Victims Protection Act of 2000 (United States law).\(^{48}\) The Victims of Trafficking and Violence Protection Act of 2000, a federal law, expanded on the Mann Act of 1910. In addition to defining sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,”\(^{49}\) it also provided a definition for a victim of

\(^{45}\) Donovan, supra note 36, at 601.
\(^{46}\) Chuang, supra note 2, at 1660.
\(^{47}\) Chuang, supra note 2, at 1661.
\(^{48}\) Chuang, supra note 2, at 1657.
\(^{49}\) Victims of Trafficking and Violence Protection Act of 2000, PL 106-386, October 28, 2000, 114 Stat 1464. (22 U.S.C.A § 7102, Sec 103 (9).)
trafficking as “a person subject to an act or practice”\textsuperscript{50} that constitutes a severe form of trafficking in persons or sex trafficking. This act brought about the establishment of the Office to Monitor and Combat Trafficking in Persons. This agency was created to solely tackle the issues of human trafficking on all legal levels and to bring forth legal actions.\textsuperscript{51}

Reauthorized three more times (2003, 2005, and 2008), the Trafficking Victims Protection Act remains the national authority on human trafficking. Other efforts to lower the United States’ affiliation with human trafficking include (1) incorporating a clause in the contract of United States government contractors prohibiting these contractors from partaking in trafficking activities and (2) any military personnel who participates in prostitution – whether it is legal or not in the location the act took place – to be dishonorably discharged.\textsuperscript{52}

In the United States, it is estimated that between 100,000 to 300,000 children are sexually exploited. This number is hard to determine, since traffickers carefully cover up many incidences of sex trafficking and many victims caught for prostitution do not speak out about it.\textsuperscript{53} Sex trafficking is illegal throughout the United States.

\textbf{ENTRANCE}

Pertinent to this discussion on the intersection, involves the risk factors as to why individuals enter prostitution or continue the lifestyle of a prostitute. Seldom, if

\textsuperscript{50} Victims of Trafficking and Violence Protection Act of 2000, PL 106-386, October 28, 2000, 114 Stat 1464. (22 USCA § 7102, Sec. 103 (14).


\textsuperscript{52} Chuang, \textit{supra} note 2, at 1688.

at all, do individuals enter prostitution or perform acts of prostitution for the mere thrill of breaking the law. “Entering the sex trade may not be a voluntary, premeditated career choice…it may be a last resort option.”\(^{54}\) Among the reasons, a theme transpires: an underlying pressure or compulsion for these individuals to enter prostitution. In some of the motivations the theme is obvious (i.e. victims of recruitment methods), while in others it requires deep inspection and consideration (i.e. social influences). While reasons or pressures exist for why someone would enter prostitution, these precursors are not simply a cause that produces the effect. It is imperative to look at both the reason and the circumstances surrounding the entirety of the individual’s situation.

**Education/Small Job Opportunities**

“Without an education I can’t really do nothing. If I could have a job in the office, but make the same money, I’d take the job,”\(^{55}\) stated a male prostitute in his thirties. While jobs without an education requirement exist, the ability to obtain a job with enough pay to support an individual is hard to come by. Although they have ambitions and goals, many individuals involved in prostitution face situations in which there is an obstacle – a history of prostitution or criminal conduct, lack of opportunity, or educational requirements – which stops these people from supporting themselves through a legal job.\(^{56}\) When applying for jobs, a criminal background prevents many from obtaining it over others without a tainted record. Especially with


\(^{56}\) Rosen, *supra* note 55, at 426.
the state of the current economy, finding a job already proves difficult. In addition, if an individual lives in a poor area, few job opportunities are close by.

**Family and Social Background**

Everyone has different views of what is right and wrong. Being raised in different environments, surroundings, and communities impact different personal and cultural values of individuals. Growing up and then living in an area “where they, their parents, and their peers have been rejected many times” can destroy the hope of finding a job that is legal and so may turn to prostitution. During their childhood, some lived in an area where prostitution was normal activity for family and friends. These individuals “look at role models and peers to see what their options are,” and prostitution became normalized. Some see it as an inevitable pathway during their life. There are other young girls or women who see friends engaged in prostitution as having a life of glamour – flexible lifestyle, nice clothes, freedom, and wealth. Peer influence has a great deal to do with many individuals entrance into prostitution – whether the influence is forced or socially constructed.

**Sexual Abuse**

Engagement in prostitution can relate to previous sexual abuse experiences of prostitute. Attempting to run away from abuse at home, individuals may end up running into a life of prostitution as a means to get by. One prostitute believed that

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60 Kennedy, *supra* note 24, at 13.
since she was “getting molested at home...why not get paid for it and get rent covered.” Individuals previously abused as either children, young adults, or adults participate in acts of sex in exchange for money, because they are desensitized to the psychological consequences; they “learned to separate their emotion from their sexual activity.” As well as the separation of emotion and sexual acts, sexual abuse degrades a child sexually and reinforces the abuse victim to believe he or she is a sexual object. These reactions and results of sexual abuse create an individual who is psychologically suited for prostitution, as a prostitute utilizes “emotional distancing during sex...while servicing her trick.” While prior sexual abuse does not guarantee an individual will turn to a life of prostitution, the National Criminal Justice Reference Service found a person abused as a child is “27.7 times more likely than others to be arrested for prostitution. Sexual abuse does not represent a cause and effect or prostitution, but being a victim of this crime is related to engagement in prostitution.

Economic Necessity (unrelated to substance addiction)

For many prostitutes, resorting to this “profession” is due to financial difficulties. These individuals for various reasons are in need of an income, which can support either themselves or their children. In other instances, an underage prostitute

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62 Kennedy, supra note 24, at 14.
63 Rosen, supra note 55, at 421.
65 Simons, supra not 64, at 376.
66 Rosen, supra note 55, at 421.
may be a runaway and “turned to prostitution as they felt that they had no other potential source of income.” 68 “In some cases, entry into street prostitution began with women accepting financial assistance from men in exchange for sexual services. For example, one woman interviewed at the safe house…reported being stranded in a strange city after a fight with her boyfriend and stated: “I just was at a restaurant having coffee and, um, a rich man made me a very generous offer. Asked me if I was all right, if there was anything I needed help with. I explained that I had no means of getting home, and he bought me a ticket home and gave me money as well in return for sex which took about four minutes.” Being turned out by a stranger was different than the pimping techniques described because the man did not stay involved or benefit from her earnings.” 69 In these instances, the individuals are suffering from economic difficulties or have no alternative legal methods for an income. There is a need for money. This need pressures them into the last resort option of prostitution.

**Drugs**

Drug use and addiction are other causes for engaging in and continuing to engage in prostitution. 70 While some don’t form an addiction until after turning tricks, others form a habit prior to their involvement. The habit formed is the motivation for entering the sex trade. These individuals find prostitution as the way to support their habit and fulfill their need for drugs. Individuals either prostitute themselves for the money to obtain drugs, or “trade sexual favors directly for narcotics.” 71 Varying from

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68 Kennedy, *supra* note 24, at 12.
70 Lyn Stankiewicz Murphy, *Understanding the Social and Economic Contexts Surrounding Women Engaged in Street-Level Prostitution*, 31:12 ISSUES IN MENTAL HEALTH NURSING 775, 779. (In some cases, female prostitutes engaged in prostitution in order to support their partner’s or both of couple’s drug habit.)
a cost of ten dollars a day to thousands creates a need for a higher income. In addition, using drugs gives the individuals a belief they are “unworthy” of doing other jobs or are deterred from a job due to the possibility of drug testing. While prostitution is not an appealing way of making money, it is a means to make enough money to support a drug addiction. This also applies to a prostitute who continues to turn tricks to support their drug addiction. Some prostitutes interviewed believe “once the drugs stop, the tricking will stop,” and others have stated they need drug treatment to help them. Although some entered prostitution due to other reasons, they continued to engage in sexual acts out of the necessity for drug money. These pressures, “both the physical and the emotional need for drugs overpower the aversion to the behavior of prostitution.”

STATE LAW ANALYSIS

Prostitution

The crime of prostitution is committed when an individual engages in a sexual activity with another person in exchange for a fee. Drawing upon the different states’ legal definitions of prostitution, one is able to draw a simplified definition of the offense based on three characteristics. For this crime to occur there must be the following: level of engagement, sexual activity, and a fee. The fifty states all vary on the details surrounding these three characteristics.76

72 Id.
73 Murphy, supra note 70, at 779.
74 Murphy, supra note 70, at 779.
75 Murphy, supra note 70, at 778.
76 Mississippi, South Carolina, and West Virginia are excluded from the second two characteristics, since their laws do not provide terms for those characteristics. Michigan is excluded from the analysis of the three characteristics, since the Michigan Penal Code does not explicitly define prostitution. It is determined that an individual “16 years of age or older who accost, solicits, or invites another person…to commit prostitution or to do any other lewd
Level of Engagement

With respect to the first element – level of engagement – the states vary on what level is necessary to constitute prostitution. There are states that require a simple offer to engage in prostitution, while some require the act to take place for it to be considered a crime. California, Louisiana, Maryland, Mississippi, Nevada, Ohio, South Carolina, and West Virginia are the states that require the highest level of engagement before an individual can be arrested for being a prostitute. An individual must “engage in,” “practice,” or “perform” the sexual activity in return for a fee. A conviction requires the actual performance of sexual activity in exchange for a fee to take place before allowing the arrest of an individual. In a sense, the “true” crime must actually be committed before an individual can be arrested and convicted for prostitution.

Although prostitution is the act of sexual activity in exchange for a fee, other states have interpreted this crime to allow leniency in the arrest and conviction of an individual for this crime. Lowering the level of engagement necessary, New Mexico, North Carolina, South Dakota, Tennessee, Vermont, and Virginia extend beyond

\[\text{or immoral act} \text{ is guilty of soliciting. Mich. Comp. Laws § 750.448 (2013). In regards to sexual activity under Michigan’s Penal Code, it was found in People v. Warren that in addition to sexual intercourse, the “sexual stimulation of customer’s penis by direct manual contact in exchange for money constitutes prostitution.” People v. Warren, 449 Mich. 341, 346, 535 N.W.2d 173, 175 (1995).}\]


\[\text{80 Md. Code Ann., Crim. Law § 11-301 (West 2013).}\]
engaging in to also acts of “offering to engage in” prostitution. This lowers the involvement and actions necessary to be arrested for prostitution. An individual could merely make an offer to engage in prostitution and would be considered in violation of prostitution laws. There is no requirement for sexual activity or exchange of compensation to take place.

Similar to the previously mentioned states, Iowa also broadens the criminal definition of prostitution to involve “offering” sexual activity for sale. Yet, with regards to the performance of such act, Iowa uses slightly different wording that could be interpreted differently from the other states traditional “engaging in” or “performing.” In its state statutes, Iowa utilizes the word “sells” when referring to level of engagement. This word could be loosely interpreted to include the mere agreement and exchange of money before any sexual acts take place. The use of this word is hazy with whether it is strictly referring to the “engagement” in prostitution only or if it can be expanded to include “agreeing to engage” in prostitution.

Unlike Iowa’s use of the word “sell” and other states employment of “engaging in” or extension to include “offering to engage in,” the majority of states in the United States define the crime of prostitution to include “agreeing to engage in” prostitution within their laws. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Washington, Wisconsin, and Wyoming lower the level of engagement in the

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82 Supra note 81.
84 Supra note 83.
crime necessary by broadening the criminal definition to “engaging in, offering to
engage in, or agreeing to engage in” sexual activity in return for a fee. With this
extension, individuals could be asked to engage in prostitution and upon their
acceptance they could then be arrested for the crime of prostitution. Comparable to
states that necessitate “engagement in” or “offering to engage in,” these states require
an offer or acceptance for someone to be fit the states’ legal definition of prostitution.
A sexual act does not need to take place. No fee needs to be exchanged. A person
could simply say “yes” to fall under this definition.

Although merely agreeing to engage in prostitution is a low level of
engagement, there are some states that require the act of lingering in area for the
purpose of prostitution. Within Pennsylvania and Utah, an individual could be
arrested for prostitution if they are either caught “engaging” in sexual activity for hire,
or “loitering for the purpose of prostitution.” Although loitering for the purpose of
prostitution is generally illegal in many of the states, it is important to recognize these
two states as defining the crime of prostitution as such. Loitering is defined as “to be
dilatory; to be slow in movement; to stand around or move slowly about; to stand idly

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86 Supra note 85.

around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind.”

With this in mind, the standard for establishing loitering for prostitution is not very high. Two elements must occur. First, an individual must be loitering “in or within view of any public place.” Second, it must be apparent that the individual was doing so for the purpose of prostitution. The second element could be met if a police officer sees an individual repeatedly waving down cars after midnight or hours in which it is uncommon to do so. It is important to look at all the circumstances surrounding the conduct of an individual suspected of loitering for purposes of prostitution (i.e. the time of day, dress of individual, individual’s conduct and actions while loitering, etc.).

**Sexual Activity**

The second element under the prostitution definition is sexual activity. While many of the terms association under this element mean the same this, it is important to show the differences between the states. Starting with the most common term of sexual activity associated with prostitution, we will look at the following states: Louisiana, Montana, North Carolina, and Vermont. These states use the phrase “sexual intercourse,” which involves the one of the following: coitus, anal intercourse, or oral intercourse.

Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Kentucky, Massachusetts, Missouri, Nevada, New York, Rhode Island, Texas, Washington

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90 *Supra* note 89.
94 *Merriam-Webster Dictionary.*
employ the word “sexual conduct,” which is extended into forms of “sexual contact, sexual intercourse.” Sexual contact involves the direct or indirect touching of another person’s sexual organs. Alabama, Arkansas, and Indiana incorporate “deviate sexual intercourse,” “deviate sexual activity,” or “deviate sexual conduct” to describe a form of intercourse that is not the standard penetration of the penis into the vagina.

The state of Wyoming is slightly different from all, in that it utilizes the phrase “sexual intrusion,” to define acts of prostitution as the following: “sexual intercourse, cunnilingus, fellatio, analingus, anal intercourse, or an intrusion of an individual’s genital or anal opening “by any object or any part of a person’s body.”

While other states employ the standard use of defining words (Florida, Georgia, Idaho, Illinois, Iowa, Maine, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia), the following explicitly list the different sexual acts or forms of sexual contact that are deemed to be considered prostitution: Colorado, Kansas, Oklahoma, and Wisconsin.

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100 Ind. Code § 35-45-4-2 (2013).

Exchange of Fee

When thinking about the operation of prostitution, the form of payment is typically thought of as being cold, hard, cash. Yet, that is not always the case. Within the states laws, some of the states rely on money as being the only form of payment. Others extend beyond money in their criminal definitions of prostitution. Louisiana and Virginia remain the two states that define the form of payment as being money.102 The remaining states utilize words that expand beyond to include other forms of compensation to include property or some item of value.

Sex Trafficking

Sex trafficking is the compulsion of another person to engage in sexual activity for a fee. An individual is considered a victim of sex trafficking if they are compelled by another person to participate in sexual activity for a fee. From the different states’ statutes surrounding sex trafficking or its equivalent, one is either provided with or able to derive a definition of sex trafficking from the state laws.103 Within these

statutes, one is either given an explicit definition of a victim of sex trafficking or able to formulate one. With each state\textsuperscript{104}, there are three significant characteristics within each legal definition: compulsion, sexual activity, and exchange of fee. While the states remain similar in their broad definition of sex trafficking, the requirements vary within some states.

**Mechanisms of Compulsion**

Within the first element, there are many different terms associated with the mechanisms for compelling an individual to participate in commercial sexual activity. Yet, the states remain similar in that the person subjected to trafficking believed there was no alternative but to comply with their trafficker’s demands. Typically many of the states require the “use of force, fraud, or coercion”\textsuperscript{105} or equivalent terms as the standard of compulsion.\textsuperscript{106} While some states use terms to describe the force and pressure an individual endures, others list the means in which a trafficker controls his/her victim. A majority of the states list one or more of the following mechanisms:

1. Use or threaten to use physical harm to the victim or another person;
2. Physically restrain or threaten to physically restrain the victim or another person;
3. Abuse or threaten to abuse the law or legal process against the victim or another person;
4. Withhold or destroy government identification documents of another person;
5. Blackmailing an individual;


\textsuperscript{104} Wyoming is excluded from this section, since there are no current laws in place regarding human trafficking or a near equivalent of such.


\textsuperscript{106} For a full list of terms and definitions for each state please see Appendix A.
6. Bringing or threatening to bring financial harm to an individual;
7. Threaten to or financially control an individual;
8. Enticing or luring by fraud or deceit; or
9. Deprive or threaten to deprive an individual of their basic needs or rights.\(^{107}\)

These mechanisms are utilized to get an individual to comply with the trafficker and participate in commercial sexual activity. Within many of the individual states, one or more of the different mechanisms are explicitly listed within the laws.

**Sexual Activity**

In order for a victim to be considered a victim of sex trafficking, the different states require a form of sexual activity to take place. Some of the states stick with terms utilized under prostitution statutes, such as “sexual conduct,”\(^{108}\) “sexually explicit conduct,”\(^{109}\) and “sexual activity or acts.”\(^{110}\) Alabama, one of the states employing the phrase “sexual conduct” goes further to describe “genital or anal intercourse, cunnilingus, fellatio, or masturbation” as the different acts considered “sexual conduct.”\(^{111}\) Other states simply refer to the sexual activity as the offense of “prostitution”\(^{112}\) or as “commercial sexual activity,”\(^{113}\) in which

\(^{107}\) All eight of these mechanisms were derived from the fifty states statutes on their equivalent of sex trafficking laws. Table 1 identifies which mechanisms were listed under the state’s sex trafficking statute.


Oklahoma and Kentucky go further to describe the acts deemed as “commercial sexual activity.” Acts of “prostitution, participation in the production of obscene material, engaging in sexually explicit performance,” are listed under both states. Oklahoma goes further to include “performance in strip club or exotic dancing or display” as forced conduct constituting the crime of sex trafficking.

Two terms – “sexually explicit performances” and “production of pornography” extend beyond what is traditionally constituted as sex trafficking. While many of the states fail to mention the sexual acts that extend beyond the legal definition of prostitution, there are some states that include them under the laws of their equivalent to sex trafficking. These terms appear to tread into the area of labor trafficking. Yet, due to the sexual nature of the act, they are placed


under sex trafficking. Lastly a portion of the states refers to the sexual activity as services\textsuperscript{119} and do not specify beyond it. Without any specifications or remarks as to the services being of a sexual nature, the distinction between sex trafficking and labor trafficking does not exist.

**Exchange of Fee**

While this element isn’t explicitly stated under some of the states’ sex trafficking laws\textsuperscript{120}, it is a defining characteristic of sex trafficking. In the majority of states, the sexual activity must involve payment to an individual — whether it is the victim or a third party. The majority of states simply require anything of value\textsuperscript{121} is given or promised. Nearly identical to these states, Colorado and Virginia require something of pecuniary benefit\textsuperscript{122} be exchanged. While the


exchange of a fee is not the most important element of sex trafficking, it is significant. This element is what distinguishes sex trafficking from labor trafficking: a payment for the sexual services of an individual.\textsuperscript{123} Under trafficking laws, Hawaii focuses on this distinction.

In Hawaii’s labor trafficking statute, any prostitution related trafficking is explicitly denied from being considered a part of labor trafficking.\textsuperscript{124} Instead, one is instructed to refer back to prostitution-related offenses. It is under the prostitution laws that an alternative to sex trafficking is presented. Hawaii only allows for instances of sex trafficking to be charged under “Promoting Prostitution” laws.\textsuperscript{125} A victim of promoting prostitution would be someone who is compelled or induced to engage in prostitution “by force, threat, fraud, or intimidation.”\textsuperscript{126}

**Recent Updates**

As prostitution and sex trafficking are a topic of concern within many states, improvements upon the laws within various states are being made. While the amendments to prostitution and sex trafficking laws within the different states have been passed, a few will not become effective until a date later within this year. Others, due to the times in which the various state laws were researched, were unable to be added within the analysis of the paper. Below are brief summaries of the new amendments and the changes compared to the law prior to the amendment changes.

\textsuperscript{124} Haw. Rev. Stat. §707.780 (2013),
Arkansas

Approved on February 19, 2013, Arkansas law regarding trafficking has changed the term “sexual conduct” to “commercial sexual activity.” Under this term, broader terms ‘sexual act’ and ‘sexually explicit performance’ have been incorporated to broaden the acts that could be committed. It broadens to allow any touching of a person’s “sexual or other intimate parts,”127 “whether directly or through clothing.”128 Another amendment made under this act provided for “an affirmative defense to prosecution that the person engaged in an act of prostitution as a result of being a victim of trafficking of persons.”129 In addition, under the crime of sexual solicitation, the new act provides an affirmative defense for those committing the crime of sexual solicitation as a victim of human trafficking.130 These defenses are located under prostitution. By placing these defenses within the laws of prostitution, it explicitly allows for a victim of forced prostitution crimes to remain free of prosecution.

The amendments also brought about the ability for the Attorney General of Arkansas to establish a State Task Force for the Prevention of Human Trafficking131 and the ability for victims of human trafficking to bring a civil cause of action.132

Although Arkansas’s Human Trafficking Act of 2013 lowered the requirements for sex trafficking, provided a definition for victims of human trafficking and added an affirmative defense for being a prostitute, it also added a requirement for the exchange of something of value, or at least the promise of such. By doing this, the trafficking law took an extra step to ensure that commercial sexual

128 Supra note 127, at (13)(B)
activity was identical to the legal definition of prostitution. The changes made to Arkansas’s trafficking law were, for the most part, an improvement. However, these amendments allow for sex trafficking laws to be shifted under prostitution laws easily without dramatically affecting the Human Trafficking Law.

**Alaska**

Passed during the 2013 First Regular Session of the 28th Legislature and effective March 1, 2013, Alaska made a drastic change to their Prostitution and Human Trafficking laws.\(^{133}\) Acknowledging the intersection of prostitution and sex trafficking, Alaska placed sex trafficking under the section of “Prostitution and other related offenses.”\(^{134}\) This change now incorporates the crime of sex trafficking as one involved with prostitution. It defines four different degrees of sex trafficking. The amended law explicitly states the crime of sex trafficking as a person who “induces or causes a person to engage in prostitution”\(^{135}\) rather than using the term “sexual conduct.”\(^{136}\) This change gives recognition to the overlap of the two offenses.

**Kentucky**

Approved on March 19, 2013, the new statute gives an explicit definition of a victim of human trafficking\(^{137}\), allows minors to be free of prosecution for offenses constituting prostitution or loitering for prostitution,\(^{138}\) and establishes the requirement to help victims of human trafficking and provide a proper course of

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action, such as treatment or other services needed.\textsuperscript{139} This change signifies Kentucky’s awareness of the need to help victims of human trafficking. In addition, the allowance of minors to remain free of prostitution prosecution shows progress towards the realization of an individual’s pressure to become involved in the crime.

**South Carolina**

South Carolina passed in the summer of 2012 and made effective on December 15, 2012, the amendments made to the trafficking laws created and defined the different offenses of human trafficking and defined a human trafficking victim.\textsuperscript{140} Rather than the broad classification of trafficking, the newly established sex trafficking is defined as an individual “induced by force, fraud, or coercion…and anything of value is given, promised to, or received, directly or indirectly, by another person”\textsuperscript{141} to participate in a sexual performance or sexual conduct.\textsuperscript{142}

**Wyoming**

Wyoming approved a Human Trafficking Bill on February 27, 2013, which becomes effective on July 1, 2013. This long overdue act not only defines human trafficking offenses, but also provides for an affirmative defense against prosecution for victims of trafficking.\textsuperscript{143} A victim of sexual servitude is defined under this law as an individual who is compelled through the use of “coercion, deception or fraud”\textsuperscript{144} to engage in commercial sexual services.\textsuperscript{145} Commercial sexual services are defined as

\textsuperscript{139} 2013 Kentucky Laws Ch. 25 (HB\textsubscript{3}).
\textsuperscript{140} S.C. Code Ann. § 16-3-2010 (2013).
\textsuperscript{142} S.C. Code Ann. §16-3-2010(7) (2013).
\textsuperscript{143} 2013 Wyoming Laws Ch. 91 (H.B. 133), 6-2-708(a).
\textsuperscript{144} Supra note 143.
\textsuperscript{145} Supra note 143.
“any sexual act for which anything of value is given to, promised or received by a person.”

Any individual who committed criminal sexual acts “as a direct result of, or incident to, being a victim of human trafficking,” is free of prosecution for such offenses. Although Wyoming is only just establishing human trafficking laws, by providing for an affirmative defense, they are ensuring the victims of this crime are being protected.

DEFENSES

As a victim of sex trafficking, one is not freely choosing to participate in the crime of prostitution. Thus, there is a need for defenses for these victims. Within a portion of the states, a defense explicitly for victims of sex trafficking (or the state’s equivalent title) is given, while others must go to general defenses of duress, necessity, compulsion, or coercion in which offenders claim to be free of criminal liability due to the circumstances surrounding the commission of the offense. And some states failed to have a defense afforded to offenders

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146 2013 Wyoming Laws Ch. 91 (H.B. 133), 6-2-701(a)(iii).
147 2013 Wyoming Laws Ch. 91 (H.B. 133), 6-2-708(a).
148 Supra note 147.
with such extenuating circumstances surrounding the offense. While allowing a defense for these crimes, many of the states also place the burden on the ‘victim’ to prove they only committed the crimes relating to prostitution under the force, threat of force, compulsion, deception, etc. of another person. It is not the best situation to have the burden placed on the victim. Instead, having it proven by the state that an individual beyond a reasonable doubt committed the crime without being compelled by another, creates a better situation for any potential victims. The state of New Mexico places the burden on the state to prove “the defendant did not act under unreasonable fear.”

While many states provide an explicit defense to prostitution related crimes for victims of trafficking, there still lacks an efficient way to ensure a victim is not being further victimized. By taking the example of New Mexico and placing the burden on the state to prove an individual is not a victim, it allows for the victims to remain free of prosecution for crimes, which they were compelled to do.


151 Hawaii, Michigan, Mississippi, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, West Virginia, and Wyoming – through extensive research – failed to show any form of defense for individuals claiming to have committed a crime under duress, necessity, coercion, or compulsion.

152 Minn. Stat. § 609.325, Subd. 4 (2013); S.D. Codified Laws § 22-23-1.2 (2013); Vt. Stat. Ann. Tit. 13, § 2658 (West 2013). Three of the states explicitly state it within the defense itself, while others it is implied when the defense is referred to as an affirmative defense. In a criminal trial, a defendant is able to assert an affirmative defense by showing additional facts that the circumstances surrounding a defendant’s illegal conduct releases them from criminal liability.

INTERSECTION OF PROSTITUTION AND SEX TRAFFICKING

By referring to the previously discussed state law analysis’s and Table 1, one is able to see an overlap of these two crimes. Through the analysis of the Prostitution and Sex Trafficking state laws, there were three basic characteristics found under each offense. Under prostitution, the following characteristics were found: Level of Engagement, Sexual Activity, and Exchange of Fee. Under sex trafficking, the following characteristics were found: Compulsion, Sexual Activity, and Exchange of Fee. These two offenses have two of the three characteristics in common. Both crimes require a form of sexual activity to take place and an exchange of fee or promise of exchange. Under sex trafficking laws, many states refer to prostitution as the sexual activity. This goes to show the overlap and that sex trafficking is truly a crime of forced prostitution.

How many prostitutes are falsely charged due to their history as a victim of sex trafficking? Is an individual who entered prostitution as a result of sex trafficking, but is no longer under the influence of a trafficker still considered a victim? In the laws and policies of the states, there is no definitive line drawn. At the end of this research, a potential solution to the problem of the intersection of prostitution and sex trafficking is presented. This solution will not just look at how to decrease the rates of prostitution in the short-term, but will seek a long-term solution, which will both help decrease the rates and help the victims of the crimes. This research will be necessary

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to ensure the best method of deterrence for prostitution is being enforced throughout the United States.

**SEXUAL EXPLOITATION**

**Proposed Adjustment to Prostitution Laws**

There are endless possibilities to tackling the gap between prostitution and sex trafficking. Yet, one approach – discussed below – appears best. Sex trafficking involves the act of forcing another to participate in prostitution. Different instances of prostitution, such as pimping, tread into the area of sex trafficking, but are not considered as severe as sex trafficking. Pressures, such as economic necessity, history of sexual abuse, drug use, etc., can be viewed as even less severe forms of sex trafficking. These pressures cause an individual to enter and continue their involvement in prostitution. By maintaining a separation of prostitution and sex trafficking laws, we are not allowing individuals to receive the aid and resources they need. A potential solution is to merge the offenses of sex trafficking and prostitution together under one section, since these crimes intersect.\(^{155}\)

Incorporating prostitution under sex trafficking statutes is unrealistic, since sex trafficking is generally under the broader offense of human trafficking. Instead, incorporating sex trafficking into prostitution would be best. Then, human trafficking could be simplified to include a broad term of trafficking that incorporates labor trafficking and allows for instances of forced sexual acts without payment as a form of trafficking and would eliminate the need for specific classifying requirements.\(^{156}\) In

\(^{155}\) In addition, by classifying prostitution and sex trafficking laws under “Sexual Exploitation,” the states are able to incorporate other crimes of sexual exploitation (i.e. sex slavery, pornography, mail-order brides).

\(^{156}\) This paper will not go into further details on the effects this would have on Human Trafficking laws, except for the brief change that could take place. Please see the following
addition, there should be two newly established sections entitled “Pressurized
Prostitution” and “Forced Prostitution.”

Under prostitution laws, rather than typically incorporating the offense of the
prostitute and the patron into one offense, they should be separated. The following is a
proposed skeleton outline of the prostitution section I would like to see incorporated
into state laws. It is an example of the minimum requirements a state law would need
to satisfy the proposal of this paper; states could go further to incorporate more laws
within the section as is seen fit.

**Sexual Exploitation and Related Offenses**

1. **Prostitution; defined**
2. **Patron of Prostitution**
3. **Pressurized Prostitution**
4. **Forced Prostitution**
5. **Classification Method**

Under the title “Prostitution Offenses,” there are five subdivisions – prostitution,
patron of prostitution, pressurized prostitution, forced prostitution and defenses to
prostitution.

**Part 1: Prostitution; defined**

The first part, “Prostitution; defined” is an essential component to this new
proposal. Through reading many of the statutes, it was most beneficial when the crime
of prostitution was explicitly defined. A small portion of the states [refer to table 1]
failed to give defining characteristics to the crime of prostitution. This proved to be
extremely difficult, because lack of a clear definition creates confusion. So within this

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article for further information regarding the benefits and impact of creating a catch-all
Trafficking Law: Rebecca L. Wharton, *A New Paradigm for Human Trafficking: Shifting the
Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, WILLIAM
AND MARY JOURNAL OF WOMEN AND THE LAW, 16 (2010), at 753.
first part, the crime of prostitution would be explicitly defined. Based on my findings, the definition of prostitution I find most agreeable is:

Prostitution: The act of offering to, agreeing to, or engaging in sexual activity in exchange for anything of value. Sexual Activity is defined as any of the following acts: vaginal intercourse; anal intercourse; fellatio; cunnilingus; penetration by any body part or any object into any orifice of another person for purposes other than medical reasons; fondling or stimulation of the sex organs of another person for purposes of sexual gratification.

Part 2: Patron of Prostitution

The second part, “Patron of Prostitution” is the section that would provide for a definition of a patron, such as the following:

An individual buying the services in prostitution.

In addition, the punishments would be listed as each state believes to be sufficient.

Part 3: Pressurized Prostitution

The third part, “Pressurized Prostitution” is a newly formed version of prostitution. As indicated above, there are a multitude of reasons why individuals enter into prostitution. Some of the influencing factors surrounding a prostitute’s entrance or continuance into prostitution are the influence of another individual (i.e. pimp, trafficker), a history of sexual abuse, lack of an education (which creates an ability to find employment), and addiction to drugs. This section would exempt persons who enter prostitution from any punishment and instead assist them in receiving the care they require.

These individuals are entitled to the help they need. They should not be fined or charged, because they are already in a situation where money is scarce. Instead,
programs beneficial to their circumstances should be provided (i.e. prostitutes who have a history of sexual abuse prior to entrance should receive intensive psychological treatment/therapy; individuals with a low education level should receive education training/job skill help, etc.). The goal of the change to “pressurized prostitution” is not to let individuals skate by for engaging in prostitution but rather help them receive the care they require. Under this section, the purpose and process would be the following:

Recognizing the various influencing factors to an individual’s entrance into prostitution, an act as the “prostitute” in prostitution will place an individual under this section as completing the act due to ‘Pressurized Prostitution.” As a victim of pressurized prostitution, the offender will first attend a court-ordered therapy session to determine the services which will best suit their needs. These services will help an individual to provide them with the support system and skills needed to continue a life free of prostitution. It will be ordered by the courts that an individual attends the services determined to fit their needs for at least six (6) months or as may be deemed necessary. If an individual fails to comply with these requirements, then they will be found in contempt of court and given time (determined based on the circumstances surrounding their failure to comply) in jail.

In cases of “pressurized prostitution,” there may be instances in which a prostitute’s discovery involves the commission of other illegal crimes. An example would be a prostitute who is in possession or using illegal drugs. Ultimately, instances of such other illegal crimes depend on the circumstances – whether the offense was heinous or a simple speeding violation. Situations like this should be left to the prosecuting attorney and/or judge to determine the appropriate sentence. For crimes deemed inconsequential, a deal could be made to dismiss the charges upon completion of the mandated services as a part of their prostitution offense.
Part 4: Forced Prostitution

The fourth part of the “prostitution” statutes, is “Forced Prostitution.” This section is identical to the offense of sex trafficking; however, to avoid confusion with the general trafficking law, a new title is required. This section will utilize the same three element found under the sex trafficking laws. Yet, using prostitution as a term within the definition will combine the last two characteristics – sexual activity and exchange of fee –. Since prostitution had been previously defined in part one as engagement in sexual activity and exchange of anything of value, it is simpler to use the term prostitution. Under this section, a composition similar to the following could be used within the state laws:

*Forced Prostitution is when an individual by any means forces or coerces another individual to engage in prostitution [see 1 for definition].*

The definition of “forced prostitution” should also be accompanied by a description of the penalties as each state believes is adequate.

Part 5: Classification Method

The fifth and final part of the new “prostitution” statutes is “Classification Method.” This section is very important, because it helps to clarify the process for how an individual can be placed under the category of “pressurized prostitution” or “forced prostitution.” The need for this was found, based on the states different requirements surrounding establishing a defense of being a sex trafficking victim. Many times, it is the individual who has to prove they were a victim of sex trafficking, rather than the state proving beyond a reasonable doubt the individual’s engagement in prostitution was free of any force or coercion. Therefore, the classification section should go as follows:
Any individual who claims they should be classified under “Forced Prostitution” shall file a motion with the court. The burden of proof will then be placed on the prosecuting attorney to prove beyond a reasonable doubt that the individual should not be classified under “Forced Prostitution.” These individuals and other individuals who are found by the state to be classified under “Forced Prostitution” will be entitled to participate in the services that are offered to individuals of “Pressurized Prostitution.” However; victims cannot be punished for failure to comply with the program and services set up for them.

The main reason for having this section is to help establish a method for classifying individuals under either “pressurized prostitution” or “forced prostitution.” This is essential, because then victims of “forced prostitution” are not obligated to complete the alternative sentencing program offered to individuals of “pressurized prostitution.” The current idea of keeping victims of sex trafficking free from punishment for crimes of prostitution will be fulfilled. In addition, the burden for proving or disproving an individual is a victim of sex trafficking will change through this defense. By placing the burden on the prosecution to establish an individual is not a victim of “forced prostitution,” an issue with the overlap of prostitution and sex trafficking can be improved. As stated earlier, there are many victims of sex trafficking that go unidentified. While creating a “pressurized prostitution” helps to solve this form of collateral damage, creating a less stringent consequence for victims of “forced prostitution” allows an easier method of being identified as a victim within the legal system.
CONCLUSION

As we continue into the year of 2013, more changes within the laws of prostitution and sex trafficking are being brought about.\(^\text{157}\) Not only will passed legislation be taking effect, but also proposed legislature concerning prostitution and sex trafficking still is being brought before the different state legislatures.\(^\text{158}\) An example of proposed legislation is in Minnesota. Some of the legislators are seeking to provide more aid and support to victims of sex trafficking – specifically to children.\(^\text{159}\) As measures are taken to make progress forward, it is essential to complete an evaluation of the laws to ensure the possible gaps in the law are being addressed.

Both prostitution and sex trafficking have a long established history within the United States. Dating back to the 18\(^{th}\) century, prostitution was once legal and up until the 20\(^{th}\) century remained so. As views on prostitution as a crime of “fallen women” change to viewing the prostitutes as women of unfortunate circumstances, this change was brought about around the turn of the 20\(^{th}\) century. In addition, at this time the awareness of “white slavery” or sex trafficking increased and there was a push for laws combating this issue. The establishment of laws helped to fight against the crimes of prostitution and sex trafficking.

This research has presented three basic characteristics to the current laws of prostitution. 1) A certain level of engagement must be present. 2) A form of sexual

\(^{157}\) Please see Supplement to view new legislation on prostitution and sex trafficking laws that were recently passed by the State’s Legislatures and recently or will be taking effect.


activity must take place. 3) There must be some exchange of a fee or form of payment. In the crime of sex trafficking, there were three characteristics to be found as well. 1) The use of compulsion mechanisms. 2) Forms of sexual activity taking place. 3) A form of payment is given through the exchange of a fee. A comparison of the three characteristics of the two separate crimes shows an overlap of two out of the three characteristics. This identified overlap prompts a change to prostitution and sex trafficking laws. Through my research, I found a solution that I believe fits the findings of my research. While discretion is left to the prosecuting attorneys and courts to decide whether an individual should be convicted of prostitution related offenses, having laws that clearly provide for the treatment of offenders is essential so there is no room for error.
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<td></td>
<td>Level of Engagement</td>
<td>Sexual Activity</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Contact; Sexual Intercourse</td>
</tr>
<tr>
<td>Delaware</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Contact; Sexual Intercourse</td>
</tr>
<tr>
<td>Florida</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Activity</td>
</tr>
<tr>
<td>Georgia</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Act; Sexual Intercourse; Sodomy (including, but not limited to these acts)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Contact; Sexual Intercourse</td>
</tr>
<tr>
<td>Idaho</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Intercourse; Sexual Conduct</td>
</tr>
<tr>
<td>STATE</td>
<td>PROSTITUTION</td>
<td>SEX TRAFFICKING</td>
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<td></td>
<td><strong>Level of Engagement</strong></td>
<td><strong>Sexual Activity</strong></td>
</tr>
<tr>
<td>Illinois</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Penetration; Touching/Fondling of Sex Organs</td>
</tr>
<tr>
<td>Indiana</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Intercourse; Deviate Sexual Conduct; Fondling of Genitals</td>
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<tr>
<td>Iowa</td>
<td>Offer; Sells</td>
<td>Sex Act</td>
</tr>
<tr>
<td>Kansas</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Intercourse; Sodomy, Manual or Other Contact Stimulation of Genitals</td>
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<td>Kentucky</td>
<td>Agree; Offer; Engage in</td>
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<td>STATE</td>
<td>PROSTITUTION</td>
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<tr>
<td>Louisiana</td>
<td>Practice</td>
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<tr>
<td>Maine</td>
<td>Agree; Offer; Engage in</td>
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<td>Maryland</td>
<td>Perform</td>
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<td>Minnesota</td>
<td>Agree; Offer; Engage in</td>
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<tr>
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<td>SEX TRAFFICKING</td>
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<td>Level of Engagement</td>
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</tr>
<tr>
<td>Mississippi</td>
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<td>Missouri</td>
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<td>Montana</td>
<td>Agree; Offer; Engage in</td>
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<td>Nebraska</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Contact; Sexual Penetration; Any Intrusion by Any Body Part or Any Object into Genital or Anal Openings for Nonmedical/Nonhealth Purposes</td>
</tr>
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<td>Nevada</td>
<td>Engage in</td>
<td>Sexual Contact; Sexual Intercourse</td>
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<tr>
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<td>PROSTITUTION</td>
<td>SEX TRAFFICKING</td>
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<td>Level of Engagement</td>
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<td>New Hampshire</td>
<td>Agree; Offer; Engage in Sexual Contact; Sexual Penetration</td>
<td>For Consideration</td>
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<tr>
<td>New Jersey</td>
<td>Agree; Offer; Engage in Sexual Activity</td>
<td>Something of Economic Value</td>
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<tr>
<td>New Mexico</td>
<td>Offer; Engage in Sexual Act</td>
<td>For Hire</td>
</tr>
<tr>
<td>New York</td>
<td>Agree; Offer; Engage in Sexual Contact; Sexual Intercourse</td>
<td>Fee</td>
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<td>Offer; Engage in Sexual Intercourse</td>
<td>For Hire</td>
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<tr>
<td>North Dakota</td>
<td>Agree; Offer; Engage in Sexual Activity</td>
<td>Money or Other Items of Pecuniary Value</td>
</tr>
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<td>Ohio</td>
<td>Engage in Sexual Activity</td>
<td>For Hire</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Agree; Offer; Engage in Sexual Intercourse; Fellatio; Cunnilingus; Masturbation; Anal Intercourse; Lewdness</td>
<td>Money or Other Thing of Value</td>
</tr>
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<td>PROSTITUTION</td>
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<td><strong>Sexual Activity</strong></td>
</tr>
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<td>Oregon</td>
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<tr>
<td>Pennsylvania</td>
<td>Loitering; Engage in Sexual Activity</td>
<td>For Hire</td>
</tr>
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<td>Rhode Island</td>
<td>Agree; Offer; Engage in Sexual Contact; Sexual Intercourse</td>
<td>Fee</td>
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<tr>
<td>South Carolina</td>
<td>Engage in</td>
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</tr>
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<td>South Dakota</td>
<td>Offer; Engage in Sexual Activity</td>
<td>Fee</td>
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<td>Tennessee</td>
<td>Offer; Engage in Sexual Activity</td>
<td>For Hire</td>
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<td>Texas</td>
<td>Agree; Offer; Engage in Sexual Contact; Sexual Intercourse</td>
<td>Fee</td>
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<td>STATE</td>
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<td>Level of Engagement</td>
<td>Sexual Activity</td>
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<tr>
<td>Utah</td>
<td>Loitering; Engage in</td>
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<td>Vermont</td>
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<td>Virginia</td>
<td>Offer; Engage in</td>
<td>Adultery; Fornication; Sexual Acts</td>
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<tr>
<td>Washington</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Contact; Sexual Intercourse</td>
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### Table 1: Elements of Prostitution and Sex Trafficking

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<tr>
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<th>PROSTITUTION</th>
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<td>Level of Engagement</td>
<td>Sexual Activity</td>
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<tr>
<td>West Virginia</td>
<td>Engage in</td>
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<td>Wisconsin</td>
<td>Agree; Offer; Engage in</td>
<td>Nonmarital Sexual Intercourse; An Act of Sexual Gratification; Masturbation; Sexual Contact</td>
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<tr>
<td>Wyoming</td>
<td>Agree; Offer; Engage in</td>
<td>Sexual Intercourse; Cunnilingus; Fellatio; Analingus; Anal Intercourse; Intrusion of Genital or Anal Opening by Any Object or Body Part</td>
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<tr>
<td>STATE</td>
<td>DEFENSE</td>
<td>Location</td>
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<tr>
<td>Alabama</td>
<td>Prostitution – Motion to Vacate</td>
<td>Ala. Code § 712.1209.6 (2013)</td>
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<td>General Affirmative Defense</td>
<td>Alaska Stat. § 11.81.440</td>
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<td>Location</td>
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<tr>
<td>Arkansas</td>
<td>General – Affirmative Defense</td>
<td>Ark. Code. Ann. § 5-2-208</td>
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<tr>
<td>California</td>
<td>General – Exception</td>
<td>Cal. Penal Code § 26 (West 2013)</td>
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<tr>
<td>Colorado</td>
<td>General – Affirmative Defense</td>
<td>Colo. Rev. Stat. § 18-1-708 (2013)</td>
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<td>Connecticut</td>
<td>Trafficking – Affirmative Defenses</td>
<td>Conn. Gen. Stat. § 53a-192b (2013)</td>
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<td></td>
<td>Conn. Gen. Stat. § 53a-82b (2013)</td>
</tr>
<tr>
<td>Delaware</td>
<td>General – Affirmative Defense</td>
<td>Del. Code Ann. Tit. 11, § 431 (2013)</td>
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<td>STATE</td>
<td>DEFENSE</td>
<td>Location</td>
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<tr>
<td>Florida</td>
<td>Jury Instructions – Defense</td>
<td>Fla. Stat. Jury Inst. § 3.6(k) (2013)</td>
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<tr>
<td></td>
<td>Case law: Chestnut v. State, 505 So. 2d 1352 (Fla. 1st DCA 1987), Gahley v. State, 567 So. 2d 456 (Fla. 1st DCA 1990), Corujo v. State, 424 So. 2d 43 (Fla. 2d DCA 1982), and Hunt v. State, 753 So. 2d 609 (Fla. 5th DCA 2000).</td>
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</tr>
<tr>
<td>Georgia</td>
<td>Trafficking – Defense</td>
<td>Ga. Code Ann. § 16-3-6b (2013)</td>
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<tr>
<td>Hawaii</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Idaho</td>
<td>General – Defense</td>
<td>Idaho Code Ann. § 18-201 (2013)</td>
</tr>
<tr>
<td>Illinois</td>
<td>General – Defense</td>
<td>Ill. Comp. Stat. 5/7-11 (2013)</td>
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<tr>
<td>STATE</td>
<td>Location</td>
<td>Requirements</td>
</tr>
<tr>
<td>------------</td>
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</tr>
<tr>
<td>Indiana</td>
<td>Trafficking – Rights of Alleged Victims</td>
<td>Alleged victim of trafficking may not be jailed, fined, or otherwise penalized for being a victim of the offense.</td>
</tr>
</tbody>
</table>
|            | Ind. Code § 35-42-3.5-4(a) (2013)                             | (1) Person was compelled to do so by threat of imminent bodily injury or force or threat of force.  
|            |                                                               | (2) A person of reasonable firmness would be incapable of resisting the pressure.  
|            |                                                               | (3) Person did not place her/himself in a situation in which they would be subjected to duress.  |
| Iowa       | Trafficking – Affirmative Defense                             | (1) Under compulsion by another’s threat of serious injury.  
|            | Iowa Code § 710A.3 (2013)                                     | (2) Reasonably believed that such injury was imminent.  |
| Kansas     | General – Defense                                            | (1) Conduct under compulsion or threat of the imminent infliction of death or great bodily harm to self or person’s spouse, parent, child, brother or sister.  
|            |                                                               | (3) Person did not place self in situation in which they will be subject to compulsion or threat.  |
| Kentucky   | General – Defense                                            | (1) Defendant engaged in the proscribed conduct because s/he was coerced by the use of or a threat of unlawful physical force.  
<p>|            |                                                               | (3) Defendant did not place her/himself in a situation in which it was probable s/he would be subjected to coercion.  |</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>DEFENSE</th>
<th>Location</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine</td>
<td>General – Defense</td>
<td>Me. Rev. Stat. tit. 17A, § 103-A (2013)</td>
<td>(1) Compelled to engage in conduct by threat of imminent death or serious bodily injury or by force. (2) Reasonable person in the defendant’s situation would have been prevented from resisting the pressure. (3) Defendant placed her/himself in a situation in which it was reasonably probable that s/he would be subjected to duress.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Trafficking – Affirmative Defense</td>
<td>Mass. Gen. Laws ch. 265, § 57 (2013)</td>
<td>(1) Conduct committed as a human trafficking victim. (2) Victim was under duress or coerced into committing the offenses.</td>
</tr>
<tr>
<td>Michigan</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Sex Crimes – Affirmative Defense</td>
<td>Minn. Stat. § 609.325, Subd. 4 (2013)</td>
<td>Proven by a preponderance of the evidence: (1) Defendant is a sex trafficking victim. (2) Defendant compelled by explicit or implicit threats. (3) Under reasonable apprehension in the mind of the defendant that by not complying the person would inflict bodily harm upon the defendant.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>STATE</td>
<td>DEFENSE</td>
<td>Location</td>
<td>Requirements</td>
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</tbody>
</table>
(2) A person of reasonable firmness in her/his situation would have been unable to resist. |
(2) Person reasonably believes that death or serious bodily harm will be inflicted if the person does not comply. |
| Nebraska       | General – Justification              | Neb. Rev. Stat. § 28-1407                            | (1) Conduct actor believes is necessary to avoid harm or evil to her/himself or another.  
(2) Harm or evil is greater than the harm or evil of conduct committed.  
(3) Actor recklessly or negligently brought about the situation requiring a choice of harms or evils. |
(2) Person had reasonable belief their lives would be endangered or they would suffer great bodily harm if they refused. |
<table>
<thead>
<tr>
<th>STATE</th>
<th>DEFENSE</th>
<th>Location</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Mexico</td>
<td>General – Defense</td>
<td>N. M. Stat. Ann. § 14-5130 (2013)</td>
<td>(1) Defendant was forced to commit offense under threat. (2) Defendant feared immediate great bodily harm to himself or another person if he did not commit the crime. (3) A reasonable person would have acted in the same way under the circumstances. (4) Burden is on the state to prove beyond a reasonable doubt the defendant did not act under such reasonable fear.</td>
</tr>
<tr>
<td>New York</td>
<td>General – Affirmative Defense</td>
<td>N.Y. Penal Law § 40.00 (McKinney 2013)</td>
<td>(1) Defendant engaged in conduct because s/he was coerced to do so by the use or threatened force. (2) A person of reasonable firmness in his situation would have been unable to resist. (3) Defendant did not intentionally or recklessly place himself in a situation in which duress is probable.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>North Dakota</td>
<td>General – Affirmative Defense</td>
<td>N.D. Cent. Code § 12.1-05-10 (2013)</td>
<td>(1) Actor engaged in conduct because he was compelled by force or threat of force. (2) A person of reasonable firmness would be incapable of resisting the pressure. (3) Person did not voluntarily or negligently enter into a criminal enterprise or willfully place himself in a situation in which duress was foreseeable.</td>
</tr>
<tr>
<td>Ohio</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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</table>

Table 2: Defenses
<table>
<thead>
<tr>
<th>STATE</th>
<th>DEFENSE</th>
<th>Location</th>
<th>Requirements</th>
</tr>
</thead>
</table>
(2) Force or threatened force was of such nature or degree to overcome earnest resistance.  
(3) Actor did not place oneself in a situation in which duress was probable. |
| Pennsylvania | N/A                          | N/A                             | N/A                                                                                            |
| Rhode Island | Prostitution – Affirmative   | R.I. Gen. Laws § 11-34.1-2 (2013)| (1) Forced to commit commercial sexual activity by one of the following: threat or use of physical harm; physically restrained or threatened to be; subject to threats of abuse of law or legal process; subject to withholding or destruction of personal government identification documents; subject to intimidation, where accused’s physical well being was perceived as threatened. |
| South Carolina| N/A                         | N/A                             | N/A                                                                                            |
| South Dakota | Prostitution – Affirmative   | S.D. Codified Laws § 22-23-1.2  (2013)| Defendant proves by preponderance of the evidence:  
(1) Defendant was victim of human trafficking.  
OR  
(1) Defendant committed the act under compulsion, with implicit or explicit threat, by another person.  
(2) Defendant had a reasonable apprehension that if defendant did not commit the act, the person would inflict bodily harm. |
<table>
<thead>
<tr>
<th>STATE</th>
<th>DEFENSE</th>
<th>Location</th>
<th>Requirements</th>
</tr>
</thead>
</table>
| Texas     | General – Affirmative Defense                | Tex. Criminal Code Ann. § 8.05 (West 2013)                                | (1) Actor engaged in conduct because he was compelled to do so by force or threat of force.  
(2) A person of reasonable firmness would have been incapable of resisting the pressure.  
(3) Actor did not place himself in a situation in which subjection to compulsion was probable. |
| Utah      | General – Defense                            | Utah Code Ann. § 76-2-302 (West 2013)                                    | (1) Person engaged in conduct because he was coerced by the use or threatened imminent use of unlawful physical force.  
(2) A person of reasonable firmness in his situation would not have resisted.  
(3) Person did not place himself in a situation in which duress is probable. |
| Vermont   | Prostitution – Motion to Vacate by Victim of Human Trafficking | Vt. Stat. Ann. Tit. 13, § 2658 (West 2013)                                | (1) May file a motion to vacate the conviction if it was a result of the person having been a victim of human trafficking.  
(2) Court shall grant the motion if it finds in favor of the person by a preponderance of the evidence. |
| Virginia  | N/A                                          | N/A                                                                      | N/A                                                                                                                                                                                                          |
| West Virginia | N/A                                      | N/A                                                                      | N/A                                                                                                                                                                                                          |
| Wisconsin | General – Affirmative Defense                | Wis. Stat. § 939.46 (2013)                                               | Actor reasonably believes her/his act is the only means of preventing imminent death or great bodily harm to the actor or another.  
OR  
Offense committed was a direct result of being a victim of trafficking. |
| Wyoming   | N/A                                          | N/A                                                                      | N/A                                                                                                                                                                                                          |
**REFERENCES**

**Primary Sources**

All statutory research was compiled from each state’s statutes on prostitution, sex trafficking, defenses for victims, and/or their equivalents.

**Secondary Sources**


Lyn Stankiewicz Murphy, *Understanding the Social and Economic Contexts Surrounding Women Engaged in Street-Level Prostitution*, 31:12 ISSUES IN MENTAL HEALTH NURSING 775, 779. (In some cases, female prostitutes engaged in prostitution in order to support their partner’s or both of couple’s drug habit.)


