



## Analysis of Pennsylvania’s Penalties for Buying Sex

### I. Introduction

Recently legislators are beginning to recognize that commercial sexual exploitation—including sex trafficking—occurs as a result of the demand for commercial sex. Basic economic theory supports that supply follows demand. Trafficking exists because there is a demand for commercial sex, and consequently, purchasers of sex fund the sex trafficking industry. This reality calls for a shift in policing practices and statutory reform that targets the demand for commercial sex in an effort to deter potential buyers from purchasing sex. Recognizing this, states, including Pennsylvania, are beginning to alter their prostitution policing methods. This memorandum will address current Pennsylvania law with respect to penalties for buying sex, and then analyze Pennsylvania’s laws in light of national legislative trends in demand penalties. It will then discuss issues with the national trend and provide recommendations for Pennsylvania on how to best model their demand penalty amendments.

### II. Current Pennsylvania Law

The current Pennsylvania law that criminalizes the purchase of sex is “Patronizing Prostitutes.”<sup>1</sup> It is codified as a sub-provision to the crime of prostitution.<sup>2</sup> “Patronizing prostitutes” reads as follows. “A person commits the offense of patronizing prostitutes if that person hires a prostitute or any other person to engage in sexual activity with him or her or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual

<sup>1</sup> 18 PA. CON. STAT. § 5902(e) (2012).

<sup>2</sup> The crime of prostitution is broken down into several provisions including, § 5902(a) prostitution and § 5902 (e) patronizing prostitutes.

activity.”<sup>3</sup> The grading for the crime is as follows. For first and second offenses, the crime is a misdemeanor of the third degree.<sup>4</sup> For a third offense, the crime is a misdemeanor of the second degree.<sup>5</sup> Fourth or subsequent offenses are misdemeanors of the first degree.<sup>6</sup> Furthermore, “if the person who committed the offense knew that he or she was human immunodeficiency virus (HIV) positive or manifesting acquired immune deficiency syndrome (AIDS),” then the crime is a felony of the third degree.<sup>7</sup>

In Pennsylvania the maximum penalties for misdemeanors are as follows. “A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than: (1) Five years in the case of a misdemeanor of the first degree. (2) Two years in the case of a misdemeanor of the second degree. (3) One year in the case of a misdemeanor of the third degree.”<sup>8</sup> “In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.”<sup>9</sup>

Furthermore, “A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: ... (4) \$10,000, when the conviction is of a misdemeanor of the first degree, (5) \$5,000, when the conviction is of a misdemeanor of the second degree, (6) \$2,500, when the conviction is of a misdemeanor of the third degree.”<sup>10</sup> Finally, “A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: ... (3) \$15,000, when the conviction is of a felony of the third degree.”<sup>11</sup>

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<sup>3</sup> § 5902(e).

<sup>4</sup> § 5902(e.1).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> § 1104(1-3).

<sup>9</sup> § 1103(3).

<sup>10</sup> § 1101(4),(5),(6).

<sup>11</sup> § 1101(3).

### **III. National Legislative Trend and Pennsylvania's Place Among the Trend**

Nationally, imprisonment penalties for purchasing sex vary per state, but are typically anywhere from 30 days to 1 year for first time offenders. Most states' fines range between \$500 and \$1,000 for first time offenders with some states fining first-time offenders \$2,500 to \$5,000. Many states also include recidivism penalties for repeat offenders.

Overall, Pennsylvania's penalties for buying sex are comparable with the national trend, and possibly ahead of some states, in that the crime recidivizes from a misdemeanor of the third degree up to a misdemeanor of the first degree. Pennsylvania's statute recidivizes with the potential for defendants to receive a jail sentence of five years and \$10,000 fine. However, this is only in the cases of a fourth or subsequent offense.

### **IV. Problems with Current Demand Legislation Nationally**

While Pennsylvania is in line with (and potentially ahead of some states in that the crime of buying sex recidivizes to a felony) the national trend, most state penalties for purchasing sex are not nearly reflective of the harm inflicted through purchasing sex.

#### **A. Need for Disaggregation**

In many states, prostitution and patronization of prostitution are offenses codified together in one statute.<sup>12</sup> However, this is not an appropriate way to classify the crimes.<sup>13</sup> Selling and buying sex do not involve the same level of culpability.<sup>14</sup> According to Demand Abolition, "A vast majority of prostituted people are the victims of force, fraud, coercion<sup>[15]</sup>, or a total lack of options. Their buyers, however, are fully willing participants in the illegal sex trade;

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<sup>12</sup> Demand Abolition, *Arresting Demand: Disaggregating Prostitution Laws*, (June 17, 2016, 2:20 PM), <https://www.demandabolition.org/resources/arresting-demand-disaggregating-prostitution-laws/#footnotes>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 18 U.S.C. § 1591 (West 2015). "Force, fraud, and coercion" is the term federal law uses to described tactics used by traffickers to keep victims in their control.

choosing to buy sexual access to vulnerable people to satisfy their own urges. Sex buyers are the driving force of all commercial sexual exploitation—including sex trafficking—and should be held appropriately accountable. The just way to reflect the different nature of these two offenses is to [make clear distinctions between the crimes of buying and selling, including assigning] different penalties and terminology.’’<sup>16</sup>

### **B. Placement in the Crimes Code**

Another issue with most states’ anti-demand laws is the placement of the crime in the crimes code.<sup>17</sup> Typically, buying sex is classified as an offense against morals.<sup>18</sup> However, due to the harm inflicted when purchasing sex, this crime is incorrectly classified—much more harm is happening than a general moral violation of public indecency when someone buys sex.<sup>19</sup> Vulnerable women and children are exploited and oftentimes are *being sold* by a trafficker and raped by the buyer. To recognize the horrific nature and severity of this crime, it should be classified as a sexual offense or offense against the person.<sup>20</sup>

### **C. Statutory Language**

Another issue with many states’ sex buying legislation is the name of the statute itself—frequently, states, call their statute, “patronizing prostitutes” or use a similar name that understates the crime being committed. Purchasers of sex are not in the wrong for the act of payment to the seller alone, but rather *are wrong for exploiting a person in a vulnerable position trying to survive* or in worse, and most cases, *who are being sold* and who are likely never seeing any money as it is likely going to a trafficker. The crime of purchasing sex needs to be

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<sup>16</sup> Demand Abolition, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

recognized for what it truly is “*sexual exploitation*.”<sup>21</sup> Buyers are *funding the sex trafficking industry*. Purchasers of sex should not be viewed as patrons, but rather as the sexual exploiters and in many cases rapists that they are.

#### **D. Differing Penalties for Buying and Selling**

Another problem nationally that stems from codifying buying and selling together is that this typically results in assigning the same penalties for the acts of buying and selling.<sup>22</sup> The act of selling sex is a survival mechanism for many individuals and consequently, should be free from criminal penalty. In contrast, the crime of buying sex should be recognized as dangerous sexual exploitation that is harmful, and responsible for the underground market of sex trafficking.

#### **V. Recommendations and Model States**

In order to fix the problems described above, Pennsylvania should follow the following steps. (1) Disaggregate the crimes of selling and buying, (2) move buying sex in the crimes code to offenses against the person, or sexual offenses, (3) amend the statutory language so that the crime is called “sexual exploitation” and captures the real harm being inflicted—not just the act of purchasing, and (4) assign significantly harsher penalties to buying than selling—recognizing the harm differential between buying and selling.

##### **A. Disaggregation**

It is imperative Pennsylvania reform its prostitution statute through making the purchase of sex a separate offense from selling sex, and amending the statutory language to recognize who is being victimized and who is doing the victimizing. To start, the statutes need to be

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

disaggregated.<sup>23</sup> In a disaggregated statute, the crime of selling sex and buying sex are distinct, separate sections of the crimes code that receive their own penalties.<sup>24</sup> In Pennsylvania, the crime of patronizing prostitutes is located in the crimes code as a sub-provision under the crime of prostitution (§ 5902(e))—just a few places below the crime of selling sex (§ 5902(a)). Both provisions are also assigned the same penalties.<sup>25</sup> It is important, therefore, that the act of buying be codified as a stand-alone statute to recognize that more harm is happening than simply being complicit in someone else’s crime. Moreover, similar crimes, such as “promoting prostitution” should also be removed from this section. In September of 2014, the Pennsylvania legislature codified Act 105 making human trafficking a crime in Pennsylvania. The elements of Promoting Prostitution are virtually identical to those of human trafficking, with the exception that human trafficking requires a showing of some form of force, fraud, or coercion-type behavior.<sup>26</sup> It is therefore, inappropriate to consider anyone who is promoting prostitution committing a “prostitution offense” as opposed to committing human trafficking.

#### **B. Placement in the Crimes Code**

Another important consideration is the broader placement of the crime of buying sex in the crimes code. Pennsylvania lists the crime of soliciting sex as under “Offenses Against Public Order and Decency—more specifically in the chapter, Public Indecency.” Demand Abolition encourages the placement of the offenses under sexual offenses or under offenses against the person instead of classifying the crime as an offense against morals.<sup>27</sup> This placement would recognize the harm caused by the crime, as mentioned above.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> § 5902(a.1) and 5902(b.1).

<sup>26</sup> § 3011, 3012.

<sup>27</sup> Demand Abolition, *supra* note 12.

### C. Renaming and Amending Statutory Language

It is also crucial Pennsylvania rename and amend the statutory language of its patronizing provision. Pennsylvania's sex buying statute is codified within the statute "Prostitution and related offenses" contained in the fifth subsection as "Patronizing Prostitutes." This placement and language downplays on the severity of crime being committed. It makes it sound as though the act of purchasing was the problem as opposed to the domination and exploitation inherent in the transaction. We recommend using the naming structure Demand Abolition suggests—naming the crime for what it is—"Sexual Exploitation."<sup>28</sup>

Once appropriately titled, the definition of purchasing sex should read: "Sexual exploitation is knowingly entering or remaining in a place where sexual intercourse is being sold or offered for sale with intent to purchase and engage in sexual intercourse."<sup>29</sup> The criminal statute for this offence should plainly read: "A person is guilty of commercial sexual exploitation if: He pays, offers to pay, or agrees to [exchange] some form of valuable consideration to engage in sexual conduct or sexual contact with another [or] He solicits or requests another person to engage in sexual conduct with him in return for valuable consideration commits the crime of commercial sexual exploitation if the person pays, or offers or agrees to pay, a fee to engage in sexual conduct or sexual contact."<sup>30</sup> Demand Abolition cites to several states as models. Below are the models used in Kansas and Oregon.

(1) **Kansas.** Kansas named their statute, "Buying Sexual Relations."<sup>31</sup> A person commits the crime of Buying Sexual Relations when, "knowingly: (1) Entering or remaining in a place where sexual relations are being sold or offered for sale with intent to engage in manual

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> KAN. STAT. ANN. § 21-6421 (2014).

or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act with a person selling sexual relations who is 18 years of age or older; or (2) hiring a person selling sexual relations who is 18 years of age or older to engage in manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act.”<sup>32</sup> The crime of Buying Sexual Relations is a Class A person misdemeanor.<sup>33</sup> Subsequent convictions are severity level 9, person felonies.<sup>34</sup> Additionally, violators can be fined \$2,500 for a Class A person misdemeanor to go to the human trafficking victim assistance fund and a statutory minimum of \$5,000 to go to the human trafficking victim assistance fund for severity level 9, person felonies.<sup>35</sup> Courts can also “order the person convicted to enter into and complete a suitable educational or treatment program regarding commercial sexual exploitation.”<sup>36</sup>

(2) **Oregon.** Oregon named their statute “Commercial Sexual Solicitation.”<sup>37</sup> A person commits Commercial Sexual Solicitation when “the person pays, or offers or agrees to pay, a fee to engage in sexual conduct or sexual contact.”<sup>38</sup> The crime of Commercial Sexual Solicitation is a Class A misdemeanor.<sup>39</sup>

#### **D. Assigning Different Penalties**

Once the crimes are re-defined, the penalties for the purchase of sex should be duly harsher than the penalties for selling. Demand Abolition encourages the following model. “A person is guilty of patronizing a person for prostitution in the third degree when he or she

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<sup>32</sup> § 21-6421(a)(1)-(2).

<sup>33</sup> § 21-6421(b)(1)(A).

<sup>34</sup> § 21-6421(b)(2).

<sup>35</sup> § 21-6421(b)(2).

<sup>36</sup> § 21-6421(b)(3).

<sup>37</sup> OR. REV. STAT. § 167.008 (2016).

<sup>38</sup> § 167.008(1).

<sup>39</sup> § 167.008(2).

patronizes a person for prostitution. Patronizing a person for prostitution in the third degree is punishable up to a year in the county or city jail.”<sup>40</sup>

Other examples include New York and Colorado. New York assigns the following penalties. Patronizing a person for prostitution is a Class A misdemeanor.<sup>41</sup> Prostitution is a Class B misdemeanor.<sup>42</sup> Buying sex, therefore, is punishable for up to one year of jail time while selling is only up to three months for selling.<sup>43</sup> Buyers could also be fined a maximum of \$1,000, but sellers a maximum of \$500.<sup>44</sup>

In Colorado, the following penalties are assigned. Prostitution is a Class 3 misdemeanor and has a minimum of a fine of \$50, and a maximum of 6 months imprisonment, or \$750 fine, or both.<sup>45</sup> Patronizing a prostitute, however, is a class 1 misdemeanor and has a minimum of 6 months imprisonment, or \$500, or both, and a maximum of 18 months imprisonment, or \$5,000 fine, or both.<sup>46</sup> The offender may also be required to pay an additional \$5,000 payable to the Prostitution Enforcement Resources Grant Program.<sup>47</sup>

The crime of purchasing sex as opposed to selling sex should have vastly different penalties with purchasing sex being much harsher than selling given the nature of the offenses and for the reasons above.

Moreover, the crime of selling should not recidivize as many sellers of sex lacked choice in selling in the first place or are being sold by others.<sup>48</sup>

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<sup>40</sup> Demand Abolition, *supra* note 12.

<sup>41</sup> N.Y. PENAL LAW § 230.04 (McKinney 2016).

<sup>42</sup> § 230.00.

<sup>43</sup> § 70.15(1)-(2).

<sup>44</sup> § 80.05(1)-(2).

<sup>45</sup> COL. REV. STAT. § 18-7-201(3) (1977), § 18-1.3-501(1)(a) (2015).

<sup>46</sup> § 18-7-205(2) (2011), § 18-1.3-501(1)(a).

<sup>47</sup> § 18-7-205(2).

<sup>48</sup> See CSE Institute, *CSE Institute Policy Paper: Why Recidivism Provisions in the Crime of Prostitution Equate to Gender- Based Inequality and Should be Removed*, (June 20, 2016, 2:21 PM), <http://cseinstitute.org/wp->

## **VI. How HB 2090 Addresses the Problem**

House Bill 2090, introduced to the House Judiciary on May 23, 2016 by Senator Joanna McClinton, seeks to amend the statutory language for the crime of prostitution to remove the recidivism provisions for selling sex, while leaving the recidivism provisions for the crime of buying sex.<sup>49</sup> This would accomplish the goal of differentiating the penalties assigned to the crimes—recognizing the difference in criminal culpability between the actors. However, the bill could be stronger yet by following the proscribed steps above. Specifically, creating a separate provision for the crime of buying sex called “Sexual Exploitation” and list it under Sexual Offenses under Offenses Involving Danger to the Person. In addition, Patronizing Prostitution and Patronizing Prostitution of Minor should be codified within the Human Trafficking statute.

## **VII. Conclusion**

In order to effectively combat sex trafficking, Pennsylvania needs to (1) disaggregate the crimes of buying and selling sex, (2) place the crime of buying sex in the proper section of the crimes code—under “sexual offenses,” (3) name the statute properly – “sexual exploitation,” and (4) assign differing penalties to the crime of buying and selling, with buying being much harsher than selling. House Bill 2090 already seeks to address this fourth step of assigning differing penalties. When looking for models on how to amend Pennsylvania’s statute for purchasing sex, Pennsylvania should follow the model laid out by Demand Abolition. As more education spreads about the nature of prostitution, it becomes clearer that those buying sex are exerting control, power and dominance over a vulnerable population who remains powerless to the purchaser’s sexual desires. This must stop—and the most effective means to end this exploitation is through harsher penalties for those who buy sex.

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content/uploads/2015/06/Why-Recidivism-Provisions-in-the-Crime-of-Prostitution-Equate-to-Gender-Based-Inequality-and-Should-be-Removed.pdf

<sup>49</sup> H.B. 2090, 2015-2016 Leg. Sess. (Pa. 2016).