COVINGTON & BURLING LLP

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Memorandum

To: Sanctuary for Families

From: Matthew Nelson, Madeline Pruhs, and David Luttinger

Re: Patronizing a Person for Prostitution: Multi-State Research & Analysis

I. Introduction

Sanctuary for Families ("SFF") has been engaging in discussions with the New York Police Department ("NYPD") and the Federal Bureau of Investigation ("FBI") about how to decrease the demand for sex buying in New York. During those discussions, questions have arisen regarding New York's laws for (a) patronizing a person for prostitution and (b) attempting to patronize a person for prostitution.

Accordingly, SFF has engaged Covington & Burling to research and analyze these statutes and associated case law for New York as well as Maine, Massachusetts, Texas, and Washington to determine: (a) the elements of patronizing, (b) how the evidence varies by context, (c) situations, if any, in which defendants can be charged with attempted patronizing, and (d) any statistics that are available on arrests and convictions for those offenses. The below memorandum addresses each point in turn.

II. New York

A. Overview of Statutory Scheme

Name of Offense	Basic Requirements	Age Requirement – Sex Buyer	Age Requirement – Patronized Person	Actual Sexual Conduct Required?	Penalties
Patronizing a Person for Prostitution – Third Degree	A sex buyer pays, or agrees to pay, a fee to another person in exchange for engaging in sexual conduct.	N/A	N/A	No	Class A Misdemeanor Min: No Jail Max: 1 Year Fine: Up to $1,000
Patronizing a Person for Prostitution – Second Degree	Same as above.	18 years or older	15 years or younger	No	Class E Felony Min: No Jail Max: 4 Years Fine: Up to $5,000
Patronizing a Person for Prostitution – First Degree	Same as above.	Situation 1: No age requirement Situation 2: 18 years or older	Situation 1: 11 years or younger Situation 2: 13 years or younger	No	Class D Felony Min: No Jail Max: 7 Years Fine: Up to $5,000

Name of Offense	Basic Requirements	Age Requirement – Sex Buyer	Age Requirement – Patronized Person	Actual Sexual Conduct Required?	Penalties
Aggravated Patronizing of a Minor for Prostitution – Third Degree	Same as above	21 years or older	17 years or younger	Yes	Class E Felony Min: No Jail Max: 4 Years Fine: Up to $5,000
Aggravated Patronizing of a Minor for Prostitution – Second Degree	Same as above.	18 years or older	15 years or younger	Yes	Class D Felony Min: No Jail Max: 7 Years Fine: Up to $5,000
Aggravated Patronizing of a Minor for Prostitution – First Degree	Same as above.	Situation 1: No age requirement Situation 2: 18 years or older	Situation 1: 11 years or younger Situation 2: 13 years or younger	Yes	Class B Felony Min: 1-3 Years Max: 25 Years Fine: Up to $5,000

Name of Offense	Basic Requirements	Age Requirement – Sex Buyer	Age Requirement – Patronized Person	Actual Sexual Conduct Required?	Penalties
Patronizing a Person for Prostitution in a School Zone	Sex buyer patronizes a person for prostitution in an area that he or she knows, or reasonably should know, is a school zone.	21 years or older	18 years or younger	No	Class E Felony Min: No Jail Max: 4 Years Fine: Up to $5,000

B. Text of Relevant Statutes

Prostitution, N.Y. Penal Law § 230.00: "A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee. Prostitution is a Class B misdemeanor."

Sex Offenses – Definitions of Terms, N.Y. Penal Law § 130.00: "Sexual conduct means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact."

- "Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight."
- "Oral sexual conduct means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina."
- "Anal sexual conduct means conduct between persons consisting of contact between the penis and anus."
- "Aggravated sexual contact means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis, rectum or anus of a child, thereby causing physical injury to such child."
    - "Foreign object means any instrument or article which, when inserted in the vagina, urethra, penis, rectum or anus, is capable of causing physical injury."
- "Sexual contact means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."

Patronizing a Person for Prostitution – Definitions, N.Y. Penal Law § 230.02:

1. "A person patronizes a person for prostitution when:

   (a) Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or
   (b) He or she agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him or her; or
   (c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

2. As used in this article, 'person who is patronized' means the person with whom the defendant engaged in sexual conduct or was to have engaged in sexual conduct pursuant to the understanding, or the person solicited or requested by the defendant to engage in sexual conduct."

Patronizing a Person for Prostitution in the Third Degree, N.Y. Penal Law § 230.04: "A person is guilty of patronizing a person for prostitution in the third degree when he or she patronizes a person for prostitution. Patronizing a person for prostitution in the third degree is a Class A misdemeanor."

Patronizing a Person for Prostitution in the Second Degree, N.Y. Penal Law § 230.05: "A person is guilty of patronizing a person for prostitution in the second degree when, being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than fifteen years old. Patronizing a person for prostitution in the second degree is a Class E felony."

Patronizing a Person for Prostitution in the First Degree, N.Y. Penal Law § 230.06: "A person is guilty of patronizing a person for prostitution in the first degree when:

1. He or she patronizes a person for prostitution and the person patronized is less than eleven years old; or

2. Being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than thirteen years old.

Patronizing a person for prostitution in the first degree is a Class D felony."

Patronizing a Person for Prostitution in a School Zone, N.Y. Penal Law § 230.08:

1. "A person is guilty of patronizing a person for prostitution in a school zone when, being twenty-one years old or more, he or she patronizes a person for prostitution and the person patronized is less than eighteen years old at a place that he or she knows, or reasonably should know, is in a school zone."

2. "[S]chool zone means:

    a. In or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school; or

    b. Any public sidewalk, street, parking lot, park, playground or private land, located immediately adjacent to the boundary line of such school."

Patronizing a person for prostitution in a school zone is a Class E felony."

Patronizing a Person for Prostitution; Defense, N.Y. Penal Law § 230.07: "In any prosecution for patronizing a person for prostitution in the first or second degrees or patronizing a person for prostitution in a school zone, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified."

Prostitution and Patronizing a Person for Prostitution; No Defense, N.Y. Penal Law § 230.10: "In any prosecution for prostitution or patronizing a person for prostitution, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that:

1. Such persons were of the same sex; or

2. The person who received, agreed to receive or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was a female."

Aggravated Patronizing a Minor for Prostitution in the Third Degree, N.Y. Penal Law § 230.11: "A person is guilty of aggravated patronizing a minor for prostitution in the third degree when, being twenty-one years old or more, he or she patronizes a person for prostitution and the person patronized is less than seventeen years old and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the person patronized. Aggravated patronizing a minor for prostitution in the third degree is a Class E felony."

Aggravated Patronizing a Minor for Prostitution in the Second Degree, N.Y. Penal Law § 230.12: "A person is guilty of aggravated patronizing a minor for prostitution in the second degree when, being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than fifteen years old and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the person patronized. Aggravated patronizing a minor for prostitution in the second degree is a Class D felony."

Aggravated Patronizing a Minor for Prostitution in the First Degree, N.Y. Penal Law § 230.13: "A person is guilty of aggravated patronizing a minor for prostitution in the first degree when he or she patronizes a person for prostitution and the person patronized is less than eleven years old, or being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than thirteen years old, and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the

person patronized. Aggravated patronizing a minor for prostitution in the first degree is a Class B felony."

C. Proposed Changes in the Law

As of November 2023, the New York State legislature is considering Equality Model legislation that would change the legal framework governing prostitution and related offenses. Of relevance to the laws pertaining to patronizing a person for prostitution, the proposed legislation would expand the definition of the required legal consideration for patronizing from the payment of a "fee," to the exchange of a "fee, *or anything of value*." N.Y. Legis. Assemb. S-1352 § 3, Reg. Sess., 2023-2024 (emphasis added). Additionally, the legislation would eliminate the "underage ignorance" defense as codified in N.Y. Penal Law § 230.07, which applies to prosecutions for patronizing a person for prostitution in the first or second degree.[1] *Id.* at § 11. We discuss this defense in greater detail below.

D. Proving Patronizing & How the Evidence Varies by Context

1. Successful Examples of Patronizing

New York courts have explained the purpose of the current patronizing statutes in terms similar to those advanced by supporters of the Equality Model legislation: punishing sex buyers for soliciting prostitutes, because "otherwise the patron would be permitted to proceed on his way uncondemned by the law, until he finally finds a person willing to satisfy him." *People v. Bronski*, 351 N.Y.S.2d 73, 75 (N.Y. Crim. Ct. 1973). To that end, prosecutors can prove a patronizing charge in three distinct ways. The first method involves cases where a sex buyer had a "prior understanding" that he would pay a fee to another person as compensation for having engaged in sexual conduct with him. N.Y. Penal Law § 230.02(1)(a). The second applies to cases where a sex buyer "agrees to pay a fee to another person" pursuant to an understanding that the person receiving the fee would engage in sexual conduct with him. N.Y. Penal Law § 230.02(1)(b). The third pertains to cases where a sex buyer simply "solicits or requests" another person to engage in sexual conduct with him or her in return for a fee. N.Y. Penal Law § 230.02(1)(b).

Importantly, while prosecutors must offer some evidence demonstrating the existence of an agreement to transfer or the actual transfer of cash between the sex buyer and the patronized person to sustain a conviction under the first two methods, no such agreement is required for a conviction under the third method. *United States v. Bland*, 384 Fed. App'x 22, 24 (2d Cir. 2010). Rather, the third method – subsection (c) of the patronizing statute – only requires proof of mere solicitation by the sex buyer. Similarly, unlike the aggravated patronizing statute, which is explained below, the general patronizing statute does not require that any form of sexual conduct occur. *See People v. Saleh*, 975 N.Y.S.2d 711 (N.Y. Crim. Ct. 2013).

[1] The existing statute provides, "In any prosecution for patronizing a person for prostitution in the first or second degrees or patronizing a person for prostitution in a school zone, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified." N.Y. Penal Law § 230.07.

When considering *who* a sex buyer can patronize under the statute, the statute references a buyer's interactions with "another person." Courts have construed this term broadly and have concluded that it applies to all persons who have been solicited by the sex buyer, regardless of whether they were actually working as prostitutes at the time of the arrest. *See, e.g.*, *People v. Bailey*, 442 N.Y.S.2d 701 (N.Y. App. Term 1981). For example, courts have upheld patronizing convictions where defendants solicited on-duty police officers in civilian dress,[2] undercover police officers posing as prostitutes,[3] and actual prostitutes who also served as confidential informants for the police department.[4]

To that end, prosecutors have successfully proved patronizing where the initial solicitation occurred in response to an online advertisement as opposed to an in-person interaction. In *People v. Frankel*, for example, prosecutors charged a defendant with patronizing a person for prostitution in the third degree following the defendant's $100 payment to an undercover police officer posing as a prostitute. 36 N.Y.S.3d 409 (N.Y. App. Term. 2016). The arrest stemmed from a sting operation in Nassau County, "Operation Flush the Johns," where officers placed advertisements on the website "Backpage.com" that employed "coded references to rates for various sexual services." *Id.* The defendant, who was 1 of 104 individuals to respond to the advertisement, dialed the listed telephone number, expressed his interest in receiving thirty minutes of intercourse in exchange for $100, and subsequently arranged to meet the woman posing as a prostitute at a hotel. *Id.*

Likewise in *People v. Blair*, the court upheld a conviction for patronizing a person for prostitution in the second degree where the defendant engaged in similar conduct, albeit with individuals holding themselves out as minors. 184 A.D.3d 946, 951 (N.Y. App. Div. 2020). In *Blair*, the defendant responded to a Craigslist advertisement placed by an undercover investigator, which stated that two sisters were in the area seeking a man "for a good time." *Id.* at 946. The defendant called the number listed on the advertisement and briefly spoke with the agent, who told him that she was nineteen years old, and her sister was fourteen years old. *Id.* In subsequent text messages, the undercover officer told the defendant that the sisters were a package deal and reiterated that her sister was only fourteen years old. *Id.* at 947-48. In response, defendant stated that he was "ready" and asked if the sisters would "both dress sexy." *Id.* at 948–49. Shortly after arriving at the hotel, the defendant was arrested and ultimately convicted. On appeal, the Third Department upheld the defendant's patronizing conviction after a jury trial even though he never expressly agreed to have sexual contact or discussed any specific sexual acts. *Id.* at 949-50 (finding that a reasonable jury could have inferred a solicitation from the many communications).

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[2] *See, e.g.*, *People v. Bronski,* 351 N.Y.S.2d 73 (N.Y. Crim. Ct. 1973).

[3] *See, e.g.*, *Jones v. Yazzo*, 481 F. Supp.3d 109, 113 (E.D.N.Y. 2020).

[4] *See, e.g.*, *People v. Doe*, 515 N.Y.S.2d 982, 983 (N.Y. Crim. Ct. 1987).

2. Patronizing v. Attempted Patronizing

As mentioned above, a defendant violates the patronizing statute when he or she solicits "another person" to engage in sexual conduct in exchange for a fee. N.Y. Penal Law § 230.02(1)(c). Accordingly, mere solicitation of a person who holds himself out as a prostitute constitutes the *completed* crime, not merely an *attempt* to commit it. *Bronski*, 351 N.Y.S.2d at 75. Although rare, New York courts have nonetheless upheld convictions for the crime of attempted patronizing of a person for prostitution where there is evidence that the defendant intended to make a solicitation but failed to actually communicate the offer due to unforeseen circumstances. In *People v. Menner*, for instance, the court suggested that prosecutors could successfully charge attempted patronizing in situations where a sex buyer phoned a prostitute but did not leave a voicemail, or sent an electronic message that never delivered due to technological issues. 39 N.Y.S.3d 578, 582 (N.Y. App. Term 2016).

Additionally, as discussed in greater detail below, prosecutors can bypass the "underage ignorance" defense under N.Y. Penal Law § 230.07 and charge attempted patronizing if there is *any* evidence that the sex buyer believed that the person with whom he was attempting to have sexual conduct was underage.

3. Patronizing v. Aggravated Patronizing

Aggravated patronizing of a minor for prostitution differs from the general patronizing statute in that the aggravated statute requires proof that one of the specified types of sexual activity actually occurred.[5] Provided that such activity occurs, the criminal penalties are more serious. For example, if a defendant who is at least eighteen years solicits someone who is under the age of fifteen, he or she is guilty of patronizing a person for prostitution in the second degree, which is a Class E felony punishable by up to four years in prison. But if that defendant also had sexual intercourse with the person, that person is guilty of aggravated patronizing of a minor for prostitution in the second degree, which is a Class D felony punishable by up to seven years in prison.

4. Defenses to Patronizing

In addition to the usual defenses available to all defendants in criminal prosecutions, it is a defense to a charge of patronizing a person for prostitution in the first and second degree "that the defendant did not have reasonable grounds to believe that the person [patronized] was less than the age specified" in the particular statute. N.Y. Penal Law § 230.07. While there is little case law that provides guidance on what circumstances constitute "reasonable grounds" for this "underage ignorance" defense, a defendant could conceivably invoke this defense when there is evidence that the prostitute told the defendant she is over eighteen or produced fake identification. Nonetheless, courts have held that conversations during the solicitation where a prostitute informs the sex buyer that she is a minor can rebut the buyer's claim of ignorance. *See, e.g.*, *Blair*, 184 A.3d at 949-50 (rejecting a defendant's claim of ignorance and finding that

[5] "Sexual conduct means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact." N.Y. Penal Law § 130.00.

the defendant believed that the person he was soliciting for prostitution was underage because she told him several times during phone and text conversations).

As explained above, the Equality Model legislation seeks to eliminate the "underage ignorance" defense in its entirety. *See* N.Y. Legis. Assemb. S-1352 § 11, Reg. Sess., 2023-2024. In the interim, however, there are still opportunities under the current regime to overcome the ignorance defense and charge attempted patronizing in situations where there is *any* evidence that the sex buyer believed that the person with whom he was attempting to engage in sexual conduct was underage. For example, if the sex buyer patronizes a person he believes to be under a certain age, but that person is actually older than the accused believes, he can still be charged and found guilty of attempting to patronize a person of the age he believed the person to be. *See, e.g.*, *People v. Sharif*, 532 N.Y.S.2d 709, 709-10 (N.Y. Crim. Ct. 1988). In *Sharif*, prosecutors charged a sex buyer with attempting to patronize a person for prostitution in the second degree after he solicited an undercover police officer who told the sex buyer that she was only sixteen years old. *Id.* Although the officer herself was much older than sixteen, the court upheld the attempt conviction because the relevant inquiry was whether the sex buyer *believed* she was sixteen. *Id.*

In addition to the "underage ignorance" defense, defendants can argue entrapment as an affirmative defense to patronizing charges. A successful entrapment defense has two elements: (1) government inducement of the crime and (2) that such inducement or encouragement created a substantial risk that the offense would be committed by a defendant who was not otherwise disposed to commit it. *People v. Figueroa*, 167 A.D.3d 1073, 1074 (N.Y. 2018). By contrast, conduct that merely affords a person "an opportunity to commit an offense" does not constitute entrapment. N.Y. Penal Law § 40.05; see also *People v. Brown*, 82 N.Y.2d 869, 871–872 (N.Y. 1993).

To that end, in *People v. Blair*, the Third Department held that the defendant was not entitled to an entrapment defense because law enforcement merely afforded him an opportunity to commit the crime. 184 A.D.3d at 950-51. The court explained that the defendant voluntarily responded to a Craigslist advertisement, continued engaging with the women via text messages despite being told several times that one of them was only fourteen years old, followed up to ask where to meet and for both females to dress "sexy," arrived with the agreed-upon amount of money for both females, and – most significantly – declined to offer payment until the fourteen year old emerged from the bathroom. *Id.* All of this demonstrated that the defendant was predisposed to commit the offense and thus was not entrapped by law enforcement. *Id.*

E. Statistics

1. Statewide

Below is an analysis of arrests and dispositions for patronizing charges from 2009-2019 as reported by the New York State Division of Criminal Justice Services.[6] There are several reasons why there is a significant difference in the number of arrests and dispositions. These might include: prosecutorial discretion, pleas, and diversion programs; officewide declination policies for certain offenses; failure to prove an essential element of the crime; judicial suppression of evidence or testimony; investigative issues; and data processing errors.

Charge	Arrest Year										
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Patronizing a Prostitute - 3rd Degree	1248	1295	1475	1503	1524	957	983	1073	1250	1085	560
Patronizing a Prostitute - 2nd Degree	3	2	1	2	4	0	0	0	2	0	0
Patronizing a Prostitute - 1st Degree	1	0	3	0	0	0	0	0	2	0	0
Patronizing a Prostitute - School Zone	0	0	0	1	1	1	0	2	8	6	11

Charge	Sentence Type	Disposition Year										
		2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Patronizing a Prostitute - 3rd Degree	Total Convictions	97	71	89	84	91	82	63	52	62	43	20
	Jail Sentence	16	9	27	24	13	9	5	9	11	4	2
	Time Served	24	19	23	32	29	19	12	8	18	5	5
	Jail + Probation	1	0	1	1	0	0	1	0	0	0	0
	Probation	3	0	1	1	5	2	1	0	0	0	1
	Fine	22	14	13	9	9	31	22	18	17	20	6
	Conditional Discharge	31	29	24	17	35	21	21	15	14	14	6
	Other/Unknown	0	0	0	0	0	0	1	2	2	0	0
Patronizing a Prostitute - 2nd Degree	Total Convictions	0	0	0	0	0	0	0	1	0	0	2
	Prison	0	0	0	0	0	0	0	1	0	0	1
	Jail + Probation	0	0	0	0	0	0	0	0	0	0	1
Patronizing a Prostitute - 1st Degree	Total Convictions	0	0	0	0	0	0	0	0	0	1	0
	Prison	0	0	0	0	0	0	0	0	0	1	0
Patronizing a Prostitute - School Zone	Total Convictions	2	2	1	1	1	0	1	0	0	0	0
	Jail	0	0	0	1	0	0	0	0	0	0	0
	Time Served	1	0	1	0	0	0	0	0	0	0	0
	Fine	0	1	0	0	0	0	1	0	0	0	0
	Conditional Discharge	1	1	0	0	1	0	0	0	0	0	0

[6] This data was obtained from the following report published by the organization, Decriminalize Sex Work ("DSW"). *See "By the Numbers": New York's Treatment of Sex Workers and Trafficking Survivors*, DECRIMINALIZE SEX WORK (February 2022), https://decriminalizesex-work.webpkgcache.com/doc/-/s/decriminalizesex.work/dsw-releases-groundbreaking-report-on-sex-work-and-human-trafficking-in-new-york-state/ DSW obtained these statistics after filing a data request with the New York State Division of Criminal Justice Services. Although New York State publishes general crime statistics on its webpage, the statistics are not broken down as specifically as they are here. Accordingly, we have been unable to independently verify these statistics and obtain the most recent data.

2. Manhattan

Of all the counties in New York, the New York County District Attorney's Office has published the most robust database of arrest and disposition statistics for prostitution-related offenses. Nonetheless, the database (a) combines prostitution and patronizing when detailing the annual number of arrests and (b) does not distinguish between the varying degrees of patronizing. Where this coupling occurred, we noted "ALL" in parentheses.

Manattan Arrest & Prostecution Statistics: Prostitution & Patronizing											
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Total Arrests (ALL):	484	522	442	332	305	249	136	35	19	16	4
Misdemeanor Arrests	472	507	429	331	296	236	130	33	19	15	3
Desk Appearance Ticket	38	15	44	25	107	143	79	33	18	14	3
Live Arrest	434	492	385	306	189	93	51	0	1	1	0
Felony Arrests	12	15	13	1	9	13	6	2	0	1	1
Total Declined to Prosecute (ALL)	2	5	4	3	7	17	2	1	5	13	2
Misdemeanor Arrests	2	4	4	3	7	15	2	1	5	13	1
Felony Arrests	0	1	0	0	0	2	0	0	0	0	1
Reason for Decline (ALL)											
Cannot Prove Element of Crime	1		3	2	2	1	1				
DAT Processing Issue					5	4		1			
Further Investigation Needed		2				2	1				1
Lacks Prosecutorial Merit	1	2				2				4	
Office Declination Policy										2	1
Other		1	1	1		8			5	7	
Live Arrest Cases Continuing Past Arraignment (Patronizing)	122	22	38	19	79	58	39	2	0	1	0
Misdemeanor	122	22	38	19	79	57	39	2	0	1	0
Felony	0	0	0	0	0	1	0	0	0	0	0
Convictions (Patronizing)	25	7	7	3	6	4	4	0	0	0	0
Misdemeanor	25	7	7	3	6	4	4	0	0	0	0
Felony	0	0	0	0	0	0	0	0	0	0	0
Adjournments in Contemplation of Dismissal (Patronizing)	19	12	5	4	16	12	14	5	0	0	1

III. Maine

A. Overview of Statutory Scheme

In 2023, Maine became the first state in the country to adopt a version of the Equality Model by repealing its statute criminalizing prostitution while retaining laws criminalizing patronizing. Legislators enacted this change in response to broad advocacy efforts. However, they also may have been influenced by trends in law enforcement, namely decreasing arrests for prostitution and a departmental emphasis on relatively high profile "sting operations" for patronizing arrests. That being said, Maine has published only limited data on these offenses, leaving it unclear if these sting operations actually resulted in criminal charges or convictions. The next few years will likely be instructive to determine whether state officials allocate resources and/or implement changes brought on by the Equality Model inspired legislation.

B. Text of Relevant Statutes

Sex Offenses – Definitions of Terms, 17-A M.R.S.A. § 251: "Sexual act" means:

1. Any act between two persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other;

2. Any act between a person and an animal being used by another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; or

3. Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.

"Sexual contact" means any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.

Patronizing a Person for Prostitution, 17 M.R.S.A. § 851, § 853-B: "'Engages a person for prostitution' means providing, offering to provide, or agreeing to provide, either to the person who is sought for an act of prostitution or to a third person, pecuniary benefit in return for a sexual act or sexual contact" (17-A M.R.S.A. § 851, sub-1-A)

"A person is guilty of engaging a person for prostitution if:

A. The person engages a person for prostitution within the meaning of section 851, subsection 1-A. Violation of this paragraph is a Class E crime; or

B. The person violates paragraph A, and, at the time of the offense, the person has one or more prior convictions under this section or for engaging in substantially similar conduct to that contained in this section in another jurisdiction. Section 9-A governs the use of

prior convictions when determining a sentence, except that, for the purposes of this paragraph, the date of the prior conviction may not precede the commission of the offense by more than 2 years. Violation of this paragraph is a Class D crime."

(17-A M.R.S.A. §853-B)

Commercial Sexual Exploitation of a Minor or Person with Mental Disability, 17-A M.R.S.A. § 855:

- *Minor*: "The person, in return for an act of prostitution, gives, offers to give, or agrees to give a pecuniary benefit either to the person being prostituted or to a third person and the person being prostituted has not in fact attained eighteen years of age or the person knows or believes that the person being prostituted has not attained eighteen years of age. Violation of this paragraph is a Class C crime."

- *Mental Disability*: "The person, in return for an act of prostitution, gives, offers to give or agrees to give a pecuniary benefit either to the person being prostituted or to a third person and the person being prostituted suffers from a mental disability that is reasonably apparent or known to the actor and that in fact renders the person with a mental disability substantially incapable of appraising the nature of the conduct or conduct involved. Violation of this paragraph is a Class C crime."

Victims' Compensation Fund, 5 M.R.S.A. §3360-1: Among other sources, this is funded by:

- "[A]n assessment of $1,000 on any person for the first conviction and $2,000 for each subsequent conviction of engaging a person for prostitution as described in Title 17-A, section 853-B; and

- an assessment of $1,000 on any person for the first conviction and $2,000 for each subsequent conviction of commercial sexual exploitation of a minor or commercial sexual exploitation of a person with a mental disability as described in Title 17-A, section 855."

The assessment is part of the fine for purposes of collection.

1. Penalties

As the statutes indicate, penalties for patronizing range from a $1,000 fine and up to six months incarceration[7] for the first patronizing offense to a $2,000 fine and up to 364 days incarceration[8] for the second patronizing offense. The second offense must be committed within two years of the first conviction for patronizing in order for this sentence enhancement to apply.

[7] Class E: Crimes punishable by up to six months incarceration and a $1,000 fine. *Criminal Justice System*, OFFICE OF THE MAINE ATTORNEY GENERAL, https://www.maine.gov/ag/crime/criminal_justice_system.shtml , (last visited Nov. 10, 2023).

[8] *Id.*

17 M.R.S.A. § 853-B; 17 M.R.S.A. § 9-A. The penalties for patronizing a minor or someone with a mental disability are a $5,000 fine and up to 5 years incarceration. 17 M.R.S.A. § 855.

2. Attempted Patronizing

There are no attempted patronizing crimes in Maine, as attempting to patronize constitutes the completed crime.

C. Overview of Recent Changes

1. Adoption of the Equality Model

On June 26, 2023, the Governor of Maine signed into law a bill that partially decriminalized prostitution.[9] This made Maine the first state in the country to officially adopt a version of the Equality Model. The bill's main features are that it (1) eliminated the crime of engaging in prostitution,[10] (2) amended the definition of "engaging a prostitute" to include "offering to provide" a pecuniary benefit, instead of only "providing or agreeing to provide" a pecuniary benefit for sexual contact,[11] (3) added defenses to charges of conspiracy and sex trafficking if the actor's participation was limited to engaging in prostitution,[12] and (4) raised the penalties for patronizing a minor or a person with a mental disability from a Class D to a Class C crime.

Simultaneously, Maine officials implemented additional legislative initiatives to further entrench the Equality Model. Later in 2023, the legislature passed a bill that sealed the criminal records of persons previously convicted of selling sex.[13] It also increased the financial assessment that a person convicted of patronizing must pay to the Victim's Compensation Fund. Prior to 2023, the assessment was $500 for the first conviction and $1,000 for the second conviction.[14] In 2023, the law was amended to require an assessment of $1,000 for the first conviction and $2,000 for the second conviction, which defendants pay to the Victim's Compensation Fund.[15] Assessments paid to the Victim's Compensation Fund are considered part of the fine for § 853-B convictions and may not be waived by the court. As the maximum fine for a first patronizing conviction—a Class E crime—is $1,000 and the maximum fine for a second

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[9] L.D. 1435; *see also* Adam Bartow, *New Law Partially Decriminalizes Prostitution in Maine*, WMTW (June 26, 2023), https://www.wmtw.com/article/new-law-partially-decriminalizes-prostitution-maine/44347895

[10] P.L. 2023, c. 316, sec. 8.

[11] P.L. 2023, c. 316, sec. 5.

[12] P.L. 2023, c. 316, sec. 2, 7.

[13] L.D. 1436. Full text is available on the Maine Legislature's website: *An Act to Provide Remedies for Survivors of Sexual Exploitation*, 131st Maine Legislature, http://www.mainelegislature.org/legis/bills/display_ps.asp?PID=1456&snum=131&paper=&paperld=l&ld=1436 (last visited Nov. 10, 2023).

[14] § 853-B; § 855

[15] P.L. 2023, c. 412, sec. GG-1.

conviction is $2,000—a Class D crime—this ensures that fines for patronizing will go directly towards Maine's Victims' Compensation Fund. However, the fund offers financial assistance to a variety of crime victims, so there is no guarantee this increased funding will lead to more financial assistance for those people being prostituted.

Ultimately, this makes the penalties for a patronizing conviction under Maine law similar to those of New York for patronizing in the third degree: a fine of $1,000 and potential incarceration for six months (Maine) to a year (New York).

2. Changing Attitudes Towards Targeting Sex Buyers

The decision to adopt the Equality Model is in line with Maine law enforcement's desire in recent years to reduce demand for commercialized sex through a greater focus on sex buyers. Over the past decade, high-profile law enforcement officials have attempted to bring their districts at least implicitly in line with the Equality Model. Then-Lieutenant—who later became South Portland Police Chief from 2019 to 2021[16]—Frank Clark ran a successful sting operation in which police arrested and charged eight men with engaging a prostitute as part of "routine practice used to deter the demand for prostitution."[17] He noted that "prostitutes are now treated as victims," and credited statewide education and advocacy efforts for the paradigm-shift.[18] However, South Portland law enforcement did not stop prosecuting the crime of engaging in prostitution. Rather, law enforcement continued to arrest women for engaging in prostitution in an effort to identify trafficking victims and to encourage them to cooperate in sex trafficking investigations by identifying their traffickers.[19]

The previous District Attorney for Androscoggin, Franklin, and Oxford counties, Andrew Robinson, also spoke out in favor of increasing penalties for sex buying and decriminalizing selling sex in 2021.[20] Robinson noted that most arrests for prostitution in his district were done in part "to gain access" to services to help those selling sex. The ones who "should be subjected to the criminal justice system," Robinson asserted, were those buying sex.

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[16] *Portland Police Chief Leaving for Private Sector Job,* PRESS HERALD (Sept. 24, 2021), https://www.pressherald.com/2021/09/24/portland-police-chief-leaving-for-private-sector-job/

[17] Juliette Lakaa, *South Portland Prostitution Sting Nets 8 Johns*, PRESS HERALD (Jan. 4, 2018), https://www.pressherald.com/2018/01/04/south-portland-prostitution-sting-nets-8-johns/

[18] *Id.*

[19] Juliette Lakaa, *South Portland Motel Dispute Opens Window on Sex Trafficking*, PRESS HERALD (July 5, 2018), https://www.pressherald.com/2018/07/05/south-portland-motel-dispute-opens-window-on-sex-trafficking/

[20] Steve Collins, *District Attorney in Lewiston Pushes to Decriminalize Prostitution*, SUN JOURNAL (May 16, 2021), https://www.sunjournal.com/2021/05/16/district-attorney-in-lewiston-pushes-to-decriminalize-prostitution/ . He was speaking about the bill to decriminalize prostitution that passed Maine's legislature in 2021 but then was vetoed by the governor. Full text at: *An Act to Remove Punishments for Sex Selling and Decrease Demand by Increasing Penalties for Sex Buying*, 130th Maine Legislature, http://www.mainelegislature.org/legis/bills/display_ps.asp?paper=HP1181&snum=130# (last visited Nov. 10, 2023).

D. Proving Patronizing & How the Evidence Varies by Context

The new patronizing statute is substantially similar to the prior version (17-A M.R.S.A. § 853-B)—the primary difference being the new statute adds "offering" to pay for prostitution as a criminalized action in addition to "providing" or "agreeing to provide" payment—so previous case law involving § 853-B should still be applicable. However, there is little case law interpreting Maine's patronizing statutes – under both the prior and current regime.[21] Rather, the publicly-available cases focus on how these statutes interact with other laws and clarify that the statute indeed imposes criminal penalties. *See, e.g.*, *State v. Strong*, 60 A.3d 1286, 1291 (Me. 2013) (holding that persons who solicit the services of a prostitute do not have a reasonable expectation to be safe from surveillance, and thus cannot allege a violation of privacy under Maine law if they knowingly frequent a place to purchase sex); *State v. Roper*, Unified Criminal Docket No. CR-11-6480 (Jan. 19, 2012) (holding that although the penalty for patronizing could be a fine only without jail time, § 853-B is nonetheless a criminal statute).

E. Statistics

Like New York, publicly available statistics from Maine on prostitution-related offenses are limited. Like the Manhattan statistics reported above, Maine historically reported only aggregated arrests for prostitution-related crimes. In 2021, the Maine State Police began disaggregating these arrests and instead reporting prostitution, purchasing prostitution, and assisting or promoting prostitution separately.[22] To that end, in 2021, Maine officials arrested nine people for prostitution, one person for purchasing prostitution, and six for assisting or promoting prostitution.

The reported statistics do, however, suggest that law enforcement is achieving their stated goals of decreasing prostitution arrests overall and focusing on those buying rather than those selling sex. Notably, statewide arrests for all combined prostitution-related offenses spiked in 2017 but have been consistently declining since then. The most updated statistics Maine released are those from 2021. The 2022 statistics should be released before the end of 2023.[23]

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[21] The University of Maine's law library maintains a database of decisions from the Maine Superior Court (Maine's trial court of general jurisdiction.) However, this database only goes back to 2000 and only contains one case involving 17-A M.R.S.A. § 853-B: *State v. Roper*, Unified Criminal Docket No. CR-11-6480, accessible at https://files.mainelaw.maine.edu/library/SuperiorCourt/decisions/CUMcr-11-6480.pdf

[22] Arrest data pulled from Maine's Crime Reports, which in turn report data Maine law enforcement sends to the F.B.I. through the Unified Crime Reports program. *Crime in Maine*, MAINE STATE POLICE, https://www.maine.gov/dps/msp/about/maine-crime (last visited Nov. 10, 2023).

[23] The 2021 report "Crime in Maine" was released on December 22, 2022; the 2020 report on September 29, 2021; the 2019 report on November 4, 2020. As of November 21, 2023, the 2022 report has not been released.

Arrests for All Prostitution & Commercialized Vice Offenses	
2002	40
2003	12
2004	29
2005	25
2006	29
2007	45
2008	28
2009	29
2010	14
2011	26
2012	56
2013	51
2014	52
2015	81
2016	105
2017	119
2018	54
2019	51
2020	37
2021	16

1. Portland & South Portland Statistics

Portland and Lewiston, Maine's two largest cities, report the following statistics related to prostitution and/or purchasing prostitution:

Arrests for All Prostitution & Commercialized Vice Offenses in Portland & South Portland	
2017	19
2018	3
2019	10
2020	4
2021	1

Arrests for All Prostitution & Commercialized Vice Offenses in Lewiston	
2017	7
2018	23
2019	8
2020	8
2021	0

Ultimately, these statistics demonstrate that law enforcement officials in Maine have made only limited arrests for either prostitution or purchasing prostitution.

2. Reported Sting Operations

Despite the statistics, there does appear to be anecdotal evidence demonstrating a significant desire among law enforcement, at least in more populated areas of Maine, to find and arrest sex buyers. For example, the South Portland Police Department undertook three sting operations in 2022 resulting in the arrest of thirty-three men for solicitation of prostitution.[24] After one of these operations, police officials acknowledged that sex buyers are the driving force behind prostitution and human trafficking, so they are attempting to target this demand.[25] Police officials in Lewiston conducted a similarly successful sting operation in 2020 with the help of a "Human Trafficking Task Force made up members of the Lewiston Police Department,

[24] Phil Hirschkorn, *Maine to Become First State to Decriminalize Prostitution Only for Selling Sex Not Paying for It*, WMTW (July 19, 2023), https://www.wmtw.com/article/maine-to-become-first-state-to-decriminalize-prostitution-only-for-selling-sex-not-paying-for-it/44581287

[25] *See* Ariana St Pierre, *14 Charged Following South Portland Prostitution Sting*, WGME (Mar. 23, 2023), https://wgme.com/news/local/14-charged-following-south-portland-prostitution-sting-hotel-human-trafficking-johns-maine-violence-coercion-to-exploit-women

the Federal Bureau of Investigations, Homeland Security Investigations, the Maine Department of Corrections, the Lisbon Police Department, the South Portland Police Department and the Androscoggin County District Attorney's Office."[26]

These sting operations, which appear to have led to the majority of arrests of sex buyers in all of Maine, are resource intensive. Even with the documented desire to decrease demand for sex buying, some reports suggest that Maine law enforcement lacks sufficient resources to successfully prosecute these violations, which calls into question whether the intent of the current legislation will effectively deter sex buyers and decrease demand for sex workers. For example, in a 2022 sting operation, Portland police uncovered evidence that 178 people attempted to buy sex. However, the department only charged fourteen of these individuals due to a lack of "time and resources."[27]

IV. Massachusetts

A. Overview of Statutory Scheme

As of November 2023, Massachusetts appears to be considering Equality Model legislation, with a bill pending in the Judiciary Committee of the state legislature. In 2011, the state increased its penalties for sex buying and made efforts to combat and recognize patronizing crimes that occur predominantly over the internet. However, there was no clear increase or change in the number of arrests for purchasing prostitution after the introduction of harsher penalties, nor any indicators of reduced demand. Accordingly, this trend may be the motivation behind legislators' renewed interest in considering different statutory measures to combat sex buying.

B. Text of Relevant Statutes

Engaging in Prostitution, G.L. c. 272 § 53A(a): "Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee shall be punished by imprisonment in the house of correction for not more than one year or by a fine of not more than $500, or by both such imprisonment and fine, whether such sexual conduct occurs or not."

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[26] *See, e.g., Press Release: Lewiston Maine Police Department*, released on Facebook (Feb. 5, 2020), https://www.facebook.com/LewistonPolice/posts/press-release-for-immediate-release-contact-lt-david-stpierre207-513-3001-ext-33/10156458164486511/ (cleaned up); *8 Charged with Engaging a Prostitute After Sting Operation in Lewiston*, WGME (Feb. 5, 2020), https://wgme.com/news/local/8-charged-with-engaging-a-prostitute-after-sting-operation-in-lewiston

[27] Norah Hogan, *South Portland Police Department Charges 14 People in a Prostitution Sting*, WMTW (Mar. 23, 2023), https://www.wmtw.com/article/south-portland-police-department-charges-14-people-in-a-prostitution-sting/43403807# In this case, officers engaged with over 100 people who responded to an online advertisement in an attempt to solicit sex. Then, they arrested those who showed up to a designated location and handed over money. Although they arrested fourteen individuals, officers pointed to a lack of resources that prevented them from staying in contact with hundreds of other individuals who responded for long enough that they would come to an exchange point. While time and resources was certainly a significant factor, there are likely other factors including a suspect's own willingness to complete the transaction that were also in play.

Sex Offenses – Definitions of Terms: The term "sexual conduct" includes sexual intercourse, anal intercourse, fellatio (or oral sex involving contact between the mouth of one person and the penis of another person), cunnilingus (or oral sex involving contact between the mouth of one person and the female sex organs —the vagina, vulva or labia — of another person), masturbation of another person or any other intrusion of a part of one person's body or some other object into the genital or anal opening of another person's body.[28]

Patronizing a Person for Prostitution, G.L. c. 272 § 53A(b): "Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than two and one-half years or by a fine of not less than $1,000 and not more than $5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not."

Soliciting for Prostitute, G.L. c. 272 § 8: "Whoever solicits or receives compensation for soliciting for a prostitute shall be punished by imprisonment in a house of correction for not more than two and one-half years, or by a fine of not less than $1,000 and not more than $5,000 or by both such imprisonment and fine."[29]

Patronizing a Minor for Prostitution, G.L. c. 272 § 53A(c): "Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of eighteen, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of eighteen, shall be punished by imprisonment in the state prison for not more than ten years, or in the house of correction for not more than two and one-half years and by a fine of not less than $3,000 and not more than $10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not."

1. Penalties

As the statutes indicate, penalties for patronizing include a fine between $1,000 and $5,000 and potential imprisonment of up to 2.5 years. G.L. c. 272 §53A(b). The law provides for enhanced penalties if the defendant paid someone "with the intent to engage in sexual conduct" with a minor, which carries a maximum sentence of ten years in state prison and/or a fine of between $3,000 and $10,000. G.L. c. 272 § 53A(c). Notably, Massachusetts increased the penalties for sex buying in 2011 as part of a legislative push to decrease human trafficking.[30]

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[28] *Jury Instruction 7.480: Sexual Conduct for a Fee* (2009 ed.), available at: https://www.mass.gov/doc/7480-sexual-conduct-for-a-fee-gl-c-272-s-53a/download

[29] While on its face this criminalizes the act of "pimping," it is included in this section because agencies sometimes prosecute individuals for patronizing under this statue. *See, e.g.*, *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671 (2011). Presumably, they read "soliciting [business] for prostitute" as "soliciting for prostitute [to patronize]."

[30] *See* Legal Update: An Act Relative to the Commercial Exploitation of People, *Massachusetts District Attorneys Association* (Jan. 3, 2012).

Among other things, the law made sex buying punishable by up to 2.5 years of incarceration and/or a fine of between $1,000 and $5,000.[31]

C. Proposed Changes in the Law

As of November 2023, the Massachusetts legislature is considering two proposals to change the legal framework around prostitution, which have been referred to the Joint Committee on the Judiciary.[32] One bill, H. 1597/S. 983, which is sponsored by Representative Mary Keefe in the House and Senator Cindy Freeman in the Senate, effectively proposes the Equality Model: decriminalizing the act of selling sex while maintaining penalties for sex buying. Key provisions include:[33]

- Eliminating G.L. c. 272 § 53A(a) (eliminating the state statute that criminalizes prostitution)
- Keeping G.L. c. 272 § 53A(b) (keeping the criminalization of sex buying)
- Keeping G.L. c. 272 53A(b) (keeping the heightened penalties for buying sex from someone under 18 years of age)
- Changing G.L. c 272 § 8, the section which criminalizes soliciting for a prostitute, to exempt prostituted people (maintaining the criminalization of pimps but ensuring prostituted people will not be criminalized for soliciting)
- Changing statutory language from "prostitute" to "prostituted person"
- Puts money that was seized because it was used or intended to be used to patronize towards a Victims of Human Trafficking Trust Fund
- Creates a special commission to research, identify, and respond to prostitution in Massachusetts

The other bill, H. 1758, intends to fully decriminalize prostitution. Key provisions include:[34]

- Eliminating G.L. c. 272 §§ 53A(a) and 53A(b) (thus eliminating criminalization of prostitution and of sex buying)
- Eliminating G.L. c. 272 § 8 (thus eliminating criminalization of soliciting for a prostituted person, or pimping)
- Keeping G.L. c. 272 53A(b) (thus keeping the criminalization of buying sex from someone under 18 years of age)

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[31] An Act Relative to the Commercial Exploitation of People, 2011 Mass. Acts 178, https://malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter178

[32] Sam Drysdale, *Massachusetts Lawmakers Weigh Bills to Decriminalize Prostitution*, NBC (May 19. 2023), https://www.nbcboston.com/news/politics/mass-lawmakers-weigh-bills-to-decriminalize-prostitution/3047780/

[33] An Act to Strengthen Justice and Support for Sex Trade Survivors, H.1597, 193rd Cong. (2023), https://malegislature.gov/Bills/193/H1597

[34] An Act to Promote the Health and Safety of People in the Sex Trade, H.1757, 193rd Cong. (2023), https://malegislature.gov/Bills/193/H1757

- Expunging records for prostitution-related (and marijuana-related) arrests, detentions, convictions, and incarcerations

Different advocacy organizations have spoken out and testified at hearings in favor of both bills. Based on our research, the Equality Model legislation (H. 1597/S. 983) that would result in partial decriminalization appears to have more support from the advocacy community.[35]

D. How Evidence Varies by Context

Most prosecutions for sex buying in Massachusetts resulted from undercover police operations. In *Commonwealth v. Wright*, for example, the defendant was arrested during a sting operation and ultimately convicted. 91 Mass. App. Ct. 1113 (2017). The undercover officer posed as a prostitute, entered into a verbal agreement with the defendant to trade oral sex for money, and then arrested the defendant. *Id.* Notably, police arrested six other men attempting to buy sex through the sting operation, which was part of a broader Essex County effort to address sex buying. *Id.*

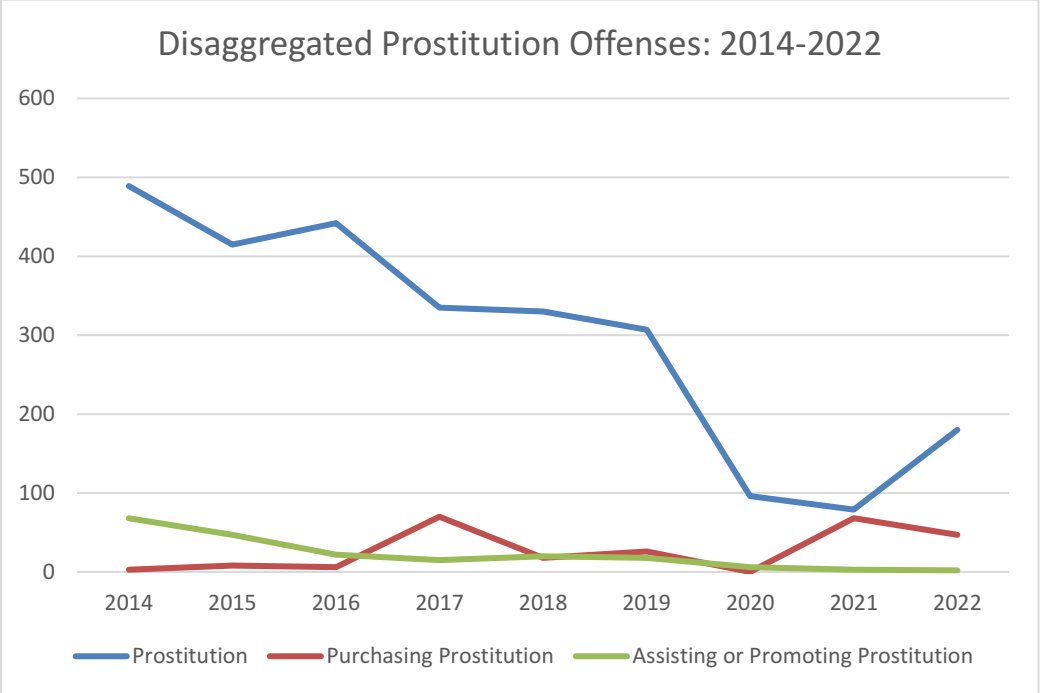
When arguing these cases, which often involve communications between the defendant and the solicited person, prosecutors must establish that the defendant was the one who made the offer or agreement. This evidence tends to involve a showing that the defendant had an in-person conversation with a prostitute or undercover officer. In cases involving online communications, however, prosecutors may prove the identity of the person who sent these communications through other methods. In *Commonwealth v. Amaral*, for instance, the court relied on a verification from Yahoo that an email account was registered to the defendant, photos that the defendant took of himself and sent to the undercover officer, records of calls made by officers to the phone number provided by the defendant, and photos that confirmed the defendant actually answered those officers' calls. 78 Mass. App. Ct. 671, 676 (2011). Nonetheless, the court noted that the critical piece of evidence was when "the defendant appeared as planned" at the agreed-upon location to have sex with a fifteen-year-old prostitute. *Id.* Only then was his guilt "established," according to the court. *Id.*

E. Statistics

Over the past decade, Massachusetts law enforcement agencies annually have arrested more individuals for prostitution than for purchasing prostitution. As depicted below, arrests for prostitution generally have declined while arrests for purchasing prostitution follow no particular pattern. Note that 2014 is the year when Massachusetts began reporting arrests for purchasing prostitution; prior to this these statistics were aggregated with prostitution-related arrests. We have noted this distinction by highlighting the post-2014 data in blue.

[35] *See* Drysdale, *supra* note 32.

Prostitution-Related Arrests in Massachusetts				
	Aggregated Prostitution Offenses	Prostitution	Purchasing Prostitution	Assisting or Promoting Prostitution
2002	468	397	0	71
2003	493	416	0	77
2004	814	769	0	45
2005	789	778	0	11
2006	674	665	0	9
2007	905	833	0	72
2008	971	869	0	102
2009	626	609	0	17
2010	724	696	0	28
2011	667	651	0	16
2012	692	600	0	92
2013	778	666	0	112
2014	560	489	3	68
2015	470	415	8	47
2016	470	442	6	22
2017	420	335	70	15
2018	368	330	18	20
2019	351	307	26	18
2020	102	96	0	6
2021	150	79	68	3
2022	229	180	47	2



After Massachusetts increased penalties for sex buying in 2011, some counties began to arrest and charge more individuals for purchasing prostitution rather than for prostitution. Media reports suggest, however, that the law had little immediate impact on dispositions. For example, a 2013 *Boston Globe* report noted that none of the state's district attorneys could cite a case in which defendants had faced even a $1,000 fine since the law's passage, and the majority of patronizing cases in Boston's Suffolk County were "dismissed, reduced, or continued without guilty findings."[36] Indeed, the current efforts to amend Massachusetts law suggest that multiple actors agree that increasing the penalties for sex buying without eliminating those penalties for prostitution would not be an effective strategy to reduce demand.

That being said, Massachusetts officials do charge at least a few dozen patronizing cases each year. 2022, the latest date for which statistics are available, was the first year in which more individuals were arrested for patronizing than for prostitution. No county consistently brings the most charges. The chart below depicts the number of charges brought between 2018–2022:[37]

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[36] Jennifer B. McKim, *Sex trade clients seldom punished: An intent unmet in state's 2011 trafficking law*, BOSTON GLOBE (Dec. 9, 2013), https://www.bostonglobe.com/metro/2013/12/09/despite-law-sex-trade-clients-are-seldom-punished/NGqgdBWxpaKWAzgFJjZVXJ/story.html.

[37] Data taken from the Massachusetts Trial Court Charges Dashboard, run by the Massachusetts Trial Court Department of Research and Planning. Available at: https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtChargesDashboard/AllCharges (last visited Nov. 10, 2023).

Prostitution-Related Arrests in Massachusetts				
	Prostitution (c. 272 § 53A)	Patronizing (c. 272 § 53A(b))	Soliciting for Prostitution (c. 272 § 8)	Patronizing a Minor (c. 272 § 53A(c))
2018	344	179	16	10
2019	345	154	18	5
2020	172	75	2	5
2021	62	34	2	3
2022	105	115	1	5

V. Texas

A. Overview of Statutory Scheme

In September 2021, Texas became the first state to make solicitation of prostitution a felony offense. Prior to then, solicitation was classified as a Class B misdemeanor with a maximum sentence of 180 days in jail and a $2,000 fine. Repeat offenders faced the harsher punishments of a Class A misdemeanor, carrying a maximum sentence of one year of incarceration and a fine of up to $4,000.

Under the new law, however, persons charged with solicitation face a "state jail felony" for a first-time conviction, with a *minimum* sentence of 180 days and a fine of up to $10,000. The maximum penalty for first-time offenders is two years in state prison. Additionally, the legislature enhanced the penalty for repeat offenders, making the offense a felony of the third degree with a minimum sentence of two years in state prison, a maximum sentence of ten years, and a fine of up to $10,000. In making this change, Texas legislators have construed those who buy sex as active supporters of human trafficking. State Representative Senfronia Thompson, one of the law's primary sponsors, said that "demand is the driving force behind trafficking," noting that if the state could "curb or stamp out the demand end of it, then we can save the lives of numerous persons."[38]

B. Text of Relevant Statutes

Solicitation of Prostitution, Tex. Penal Code Ann § 43.021(a): A person commits the crime of solicitation of prostitution "if the person knowingly offers or agrees to pay a fee for the purpose of engaging in sexual conduct with that person or another."

- "Fee" means the payment or offer of payment in the form of money, goods, services, or other benefit. Tex. Penal Code Ann § 43.01(1-b).
- "Sexual conduct" is defined as any act involving "deviate sexual intercourse, sexual contact, [or] sexual intercourse." Tex. Penal Code Ann § 43.01(4).

[38] Robert Arnold, *Texas to be First State to Make Buying Sex a Felony*, NBC HOUSTON (Aug. 5, 2021), https://www.click2houston.com/news/investigates/2021/08/05/texas-to-be-first-state-to-make-buying-sex-a-felony/

- "Deviate sexual intercourse" includes any contact between the genitals of one person and the mouth or anus of another person. Tex. Penal Code Ann § 43.01(1-a).
- "Sexual contact" includes any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. Tex. Penal Code Ann § 43.01(3).
- "Sexual intercourse" means any penetration of the female sex organ by the male sex organ. Tex. Penal Code Ann § 43.01(5).

1. Penalties & Defenses

Similar to New York law, the solicitation offense in Texas is enhanced from a "state jail felony" to a felony of the second degree if the person to whom the defendant offers or agrees to pay the fee for the purpose of engaging in sexual conduct is (A) younger than eighteen years of age, (B) represented to the defendant as being younger than eighteen years of age, even if they are actually older than eighteen, or (C) believed by the defendant to be younger than eighteen years of age. Tex. Penal Code Ann § 43.021(b)(2).

Unlike New York's current regime, however, Texas adopted a version of the Equality Model with respect to the underage ignorance defense. To that end, under Texas law, it is no defense that the defendant did not have reasonable grounds to believe that the patronized person was less than eighteen years old. Tex. Penal Code Ann § 43.021(b)(2). Instead, a defendant can be found guilty of the enhanced offense regardless of whether the defendant knew or had some good-faith belief as to the age of the person at the time of the offense. *Id.*

Finally, similar to New York's patronizing statutes, Texas enhances the penalty to "the next highest category" if the defendant solicited a person in a location that was on the premises of, or within 1,000 feet of, the premises of a school or any location where a school-sponsored function was taking place. Tex. Penal Code Ann § 43.021(b-1).

C. How the Evidence Varies by Context

Since the revised law took effect in September 2021, there have been few cases decided by Texas courts. However, given that the new law only altered the penalties, and not the substantive terms of the offense, prior case law should be instructive. Like New York's statute, it is immaterial under Texas law that the patronized person is not an actual prostitute. For example, a defendant's solicitation of an undercover police officers is sufficient to uphold a conviction. *See, e.g.*, *Willis v. State*, No. 14-09-00041-CR, 2010 WL 1957031, at *2 (Tex. App. Ct. May 18, 2010). Accordingly, a defendant can be found guilty even if an undercover officer made the initial solicitation so long as the defendant had some further discussion with that officer prior to being arrested. *See, e.g.*, *Ozack v. State*, 646 S.W.2d 941, 943 (Tex. Crim. App. 1983) (upholding conviction for patronizing when the defendant responded to an undercover officer's initial offer to engage in sexual intercourse for a fee because the defendant made an implied offer by asking about, and subsequently negotiating over, the price and exact services to be performed).

D. Statistics:

1. Harris County

In the year after the amended solicitation laws took effect, media reports indicated that the Harris County District Attorney's Office filed 518 felony cases for solicitation of prostitution.[39] Of the 232 cases that have been decided or disposed of since then, only eleven (or 5%) ended in felony convictions. Meanwhile, 178 cases (or 77%) were dismissed through the Office's pretrial diversion program. In those cases, defendants were required to take a decision-making class tailored to "Johns" and either pay a fine or make a donation to the Houston Area Women's Center. Upon compliance, those defendants were given an opportunity to have their criminal charge expunged. In response to backlash, the DA's Office noted that pretrial diversion is typically only offered to first-time offenders, and the recidivism rate is among the lowest of any crimes.

2. Montgomery County

Although there is limited data, media reports indicate that the Montgomery County District Attorney's Office disposed of thirty-nine cases since the revised law went into effect, with thirty-three (85%) resulting in criminal convictions.[40]

VI. Washington

In an effort to reduce the demand for sex buying, Washington officials have employed several creative strategies. They implement fines, impound vehicles used in the commission of patronizing crimes, designate certain locations as high-prostitution areas, and deploy more officers to such areas. As a result, arrests for prostitution have dropped precipitously in recent years. Although law enforcement officials have claimed to be using those resources previously focused on prostitution to more aggressively tackle patronizing, it is unclear if there has been a corresponding rise in arrests and convictions for patronizing.

A. Text of Relevant Statutes

Engaging in Prostitution, RCW 9A.88.030: "A person is guilty of prostitution if such person agrees or offers to engage in sexual conduct with another person in return for a fee."

Sex Offenses – Definitions of Terms, RCW 9A.44.010: "Sexual conduct" means "sexual intercourse or sexual contact."

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[39] Jeremy Rogalski, *Texas Made Sex Buying A Felony; Harris County DA's Office Rarely Gets Felony Convictions*, KHOU 11 (Oct. 19, 2022), https://www.khou.com/article/news/investigations/sex-solicitation-prostitution-crime-felony-texas/285-acb989d8-e5f9-4e15-89a6-4900824cf51f

[40] *Id.*

1. "Sexual intercourse"

    a. Has its ordinary meaning and occurs upon any penetration, however slight, and
    b. Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
    c. Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

2. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

Patronizing a Person for Prostitution, RCW 9A.88.110: "A person is guilty of patronizing a prostitute if:

A. Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or
B. He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person will engage in sexual conduct with him or her; or
C. He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

The crime of patronizing a prostitute may be committed in more than one location. The crime is deemed to have been committed in any location in which the defendant commits any act under subsection (1)(a), (b), or (c) of this section that constitutes part of the crime. A person who sends a communication to patronize a prostitute is considered to have committed the crime both at the place from which the contact was made pursuant to subsection (1)(a), (b), or (c) of this section and where the communication is received, provided that this section must be construed to prohibit anyone from being prosecuted twice for substantially the same crime."

Commercial Sexual Abuse of a Minor, RCW 9.68A.100: "A person is guilty of commercial sexual abuse of a minor if:

A. He or she provides anything of value to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;
B. He or she provides or agrees to provide anything of value to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
C. He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for anything of value.

Consent of the minor is not a defense, and this is a Class B felony.

1. Penalties

Under Washington law, patronizing a prostitute is a misdemeanor. Prostitution is also classified as a misdemeanor. Misdemeanors in Washington are punishable by a maximum of 90 days incarceration and/or a maximum fine of $1,000. The law also assesses additional fees on those convicted of patronizing. For the first offense, offenders must pay $1,500; for the second, $2,500; and for the third or greater, $5,000. RCW 9A.88.120(c). Commercial sexual abuse of a minor is a Class B felony. Class B felonies are punishable by a maximum of 10 years of incarceration and/or a fine of $20,000. RCW 9A.20.021.

Convictions for patronizing an adult—under 9A.88.110—or a minor—under 9A.68A.100—also mandate that the defendant (1) not be subsequently arrested for patronizing, (2) remain outside the geographical area in which they were arrested unless it interferes with employment, residence, or is otherwise unfeasible, and (3) if a first-time offender, attend a program designed to educate about the negative costs of prostitution.[41] RCW 9A.88.130.

In addition to the patronizing statutes, Washington has a relatively elaborate anti-human trafficking statutory scheme. In 2003, Washington became the first state to criminalize human trafficking at the state level. Every other state in the country has since followed suit.[42]

B. Overview of Recent Changes

As of 2009, Washington imposes sanctions on sex buyers' vehicles. The legislature has recognized that sex buyers often use cars when transacting to purchase sex. Thus, the law allows arresting officers to impound the motor vehicle of someone arrested for patronizing if (i) the vehicle was used in commission of the alleged crime, (ii) the person is the owner of the vehicle or it is a rental car, and (iii) the person arrested had previously been convicted of patronizing or a similar offense or the offense took place in a designated high prostitution area. RCW 9A.88.140. Arrestees must pay a fine to recover their vehicles—those not convicted can recover the fine—which funds a state treasury account dedicated to prostitution prevention and intervention services.

The legislature imposed these sanctions in an effort to reduce demand for sex buying, and also to reduce traffic congestion in high prostitution areas. RCW 9A.88.130. Spokane and Tacoma among other cities, have designated certain areas as high-prostitution areas, posted

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[41] H.B. 2692 in 2012 added this requirement that first-time offenders attend a program about the negative costs of prostitution. It also increased the fees assessed on those convicted of patronizing, and established that "[a]t least fifty percent of the revenue" from these fees be spent on prevention including these education programs. *See* Commercial Sale of Sex- Reduction, H.B. 2692, 62d Legislature, Reg. Session (2012), https://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bills/Session%20Laws/House/2692-S.SL.pdf#page=1; *Timeline of WA State Accomplishments to Prevent Human Trafficking and Sexual Exploitation of Minors*, UNIVERSITY OF WASHINGTON, https://www.washington.edu/womenscenter/anti-human-trafficking/landmark-legislation/ (last visited Nov. 10, 2023).

[42] *Human Trafficking State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/human-trafficking-state-laws#:~:text=In%202003%2C%20Washington%20became%20the,forced%20labor%20or%20sexual%20servitude (last visited Nov. 10, 2023).

signs, and impounded vehicles under this law.[43] To be sure, citizens voiced concerns that this program could lead to increased police harassment in these neighborhoods. For example, shortly after Spokane established one of these zones in 2015, these were reports of police going door-to-door and encouraging residents to report suspected sex trafficking.[44]

Finally, as of January 1, 2024, Washington will no longer criminalize prostitution for individuals under eighteen. The statute will read, "A person *age eighteen or older* is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." 9A.88.030.[45]

C. How Evidence Varies by Context

To secure a patronizing conviction under Washington law, a prosecutor must prove the defendant paid or agreed to pay a fee in exchange for sex, or requested that an individual have sex with him or her in return for a fee. The prosecutor must also prove that the action of patronizing occurred within the jurisdiction in which the defendant was charged—whether that be the agreement, the payment itself, or the request depending on how far along the transaction went. The law specifically recognizes that the request or agreement may take place online, as the statute defines the crime as having been committed in "any location in which the defendant commits any [section 1] act." § 9A.88.110. Thus, defendants who send an email, text, or phone call are considered to have committed patronizing both at the place where they requested sex for payment or offered to pay for sex, and where that request or offer was received. *See City of Kent v. Feaster*, 2018 WL 827161, *2 (Wash. App. Div. 1, Feb. 12, 2018). For example, a phone call between a defendant in Tacoma and an undercover police officer in Spokane, during which the defendant agrees to pay the officer for sex, could be charged in either Tacoma or in Spokane. However, as in Massachusetts, prosecutors must show that the defendant was the one who agreed to pay for sex; they can do so by arresting defendants when they appear at the motel, or other location, where the defendant previously agreed they would pay for sex. *Id.*

The communication of the patronizing request requires an agreement between two or more persons. *Id.* Thus, prosecutors must demonstrate that a defendant actually interacted with the person or undercover officer offering sex. *Id.* The act of calling and setting a meeting point, followed by actually showing up at that meeting point, is sufficient evidence to confirm the identities of those who interacted.

Intent is not a necessary element of a patronizing conviction in Washington. *Id.* Agreeing to pay for sex is sufficient, whether or not defendants intended to actually have sexual contact with the individual they agreed to pay. *City of Yakima v. Esqueda*, 612 P.2d 821 (1980). Like New York, mere solicitation is the completed crime rather than an attempted crime:

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[43] Jeff Humphrey, *Spokane Police Ready to Crackdown on Sprague Avenue Sex Trade,* KXLY (Feb. 17, 2015), https://www.kxly.com/news/local-news/spokane-police-ready-to-crackdown-on-sprague-avenue-sex-trade/article_083e31b3-1065-5f2d-bd13-05047b98fac6.html

[44] Elizabeth Nolan Brown, *Parking in 'Designated Area of High Prostitution Activity' Could Get Your Car Impounded in Spokane, Washington*, REASON (May 5, 2015) https://reason.com/2015/03/05/parking-in-designated-area-of-high-prost/

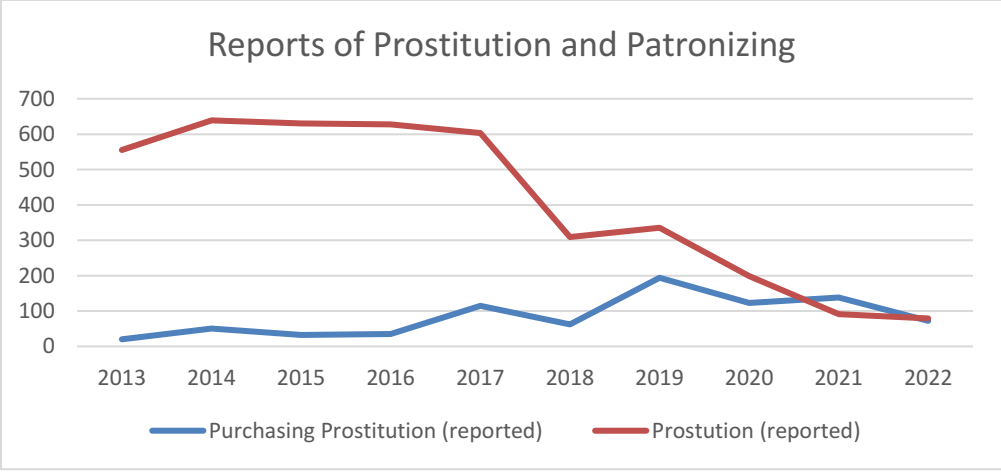
[45] 2020 c 331 §§ 4, 5, and 6 (emphasis added).

"request[ing] another person to engage in sexual conduct with him or her in return for a fee" is enough. 9A.88.110(C).

D. Statistics

Washington offers statistics on aggregated arrests for prostitution and only disaggregated "reports" of prostitution and purchasing prostitution.[46] While data on disaggregated arrests and convictions would be ideal, in the meantime reports are treated as roughly analogous to arrests. This data is summarized below:

Prostitution-Related Arrests in Washington				
	Prostitution Arrests (All Related Crimes)	Prostitution Reports (All Related Crimes)	Purchasing Prostitution (Reported)	Prostitution (Reported)
2013	398	627	20	555
2014	467	807	50	639
2015	400	762	32	630
2016	537	773	35	628
2017	651	920	115	603
2018	254	445	62	309
2019	332	638	194	335
2020	228	425	123	199
2021	138	322	138	91
2022	103	222	72	79



[46] *Data*, WASHINGTON STATE STATISTICAL ANALYSIS CENTER, https://sac.ofm.wa.gov/data (last visited Nov. 10, 2023); *CJIS Statistics and Reports*, WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS, https://www.waspc.org/cjis-statistics---reports (last visited Nov. 10, 2023).