

The Lawless Worker: Classifying Sex Workers as Vulnerable Victims in State and Federal Proceedings

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I. INTRODUCTION	140
II. BACKGROUND: SEX WORK AND SENTENCING ENHANCEMENTS ...	146
A. <i>Introducing the Involuntary Sex Worker and the Traditional Sex Worker</i>	146
1. The Involuntary Sex Worker: Sex Trafficking and Pimp-Controlled Prostitution	148
2. The Traditional Sex Worker: Prostitution	154
B. <i>Federal and State Level Sentencing Enhancements</i>	158
III. ACHIEVING VULNERABLE VICTIM STATUS FOR SEX WORKERS DURING THE SENTENCING PROCESS.....	160
A. <i>Employing Federal Sentencing Guideline 3A1.1 and State Aggravating Factors in Criminal Proceedings</i>	161
B. <i>Logistics in Application</i>	171
1. Victim Compliance and Testimony	171
2. Addressing Pervasive Bias.....	174
C. <i>Declining Prosecution to Increase Reporting</i>	176
IV. CONCLUSION.....	179

“No, I’ve not heard about it being a hate crime but I can identify with that, you know, stigma. You get all that . . . people need to recognise that we are human beings. (Bev)”¹

“It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.”²

I. INTRODUCTION

Violent crime looms large in the commercial sex industry.³ Take C.M., a sex worker, for example.⁴ C.M. saw and approached another sex worker standing on the covered porch of an abandoned house with two men.⁵ The two men gave the other sex worker money to purchase crack cocaine and heroin.⁶ Like the other sex worker, C.M. maintained

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1. Teela Sanders, Jane Scoular & Rosie Campbell, *Sex Work, Hate Crime and the Criminal Law*, 86 J. CRIM. L. 109, 117 (2022) (emphasis added).

2. *Slaughter-House Cases: Butchers’ Benevolent Ass’n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. 36, 70 (1872).

3. See Andrea N. Cimino, *Sex Work and Adult Prostitution: From Entry to Exit*, in HANDBOOK OF BEHAVIORAL CRIMINOLOGY 239, 249 (Vincent B. Van Hasselt & Michael L. Bourke eds., 2017) (“[O]ccupational hazards of street-based sex work are unique: exploitation, violence, rape, and murder.”) [hereinafter *Sex Work and Adult Prostitution*]; see also *id.* at 239 (defining the “commercial sex industry” as “organizations, managers, and workers involved in selling sexual exchanges or services”).

4. *State v. Cruz-Pena*, 234 A.3d 1241, 1245 (N.J. 2020).

5. *Id.*

6. *Id.* at 1245–46.

her drug addiction by exchanging sexual favors for drugs.⁷ When the other sex worker returned, the men gave her more money to purchase cocaine before she left again.⁸ After some time, C.M. attempted to leave, but one of the men struck her in the face, sending her ninety-pound body into the wall.⁹ He took forty dollars from her.¹⁰ For four to five hours, C.M.'s captor held her at knifepoint and orally, vaginally, and anally raped her.¹¹ When C.M. bled on him, he struck her in the face again.¹² C.M.'s story represents only one instance of violence related to sex work.¹³

Sex work includes, but is not limited to, prostitution, sex trafficking, OnlyFans content creation, escorting, and exotic dancing.¹⁴ Although other types of sex work may be subject to heightened violence, this Note focuses on sex trafficking victims, pimp-controlled prostitution, and prostitution due to their prominence and visibility,¹⁵ as well as their mental, physical, and social afflictions.¹⁶ Accordingly, “sex work” as used in this Note largely refers to the above specified contexts.¹⁷

7. *Id.* at 1246.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* *People v. Kline*, 248 N.E.3d 1172, 1179–80 (Ill. App. Ct. 2024) (showing sexual assault of a sex worker).

14. *See infra* notes 37–42 and accompanying text (detailing the types of sex work).

15. *See Sex Work and Adult Prostitution, supra* note 3, at 243 (stating that prostitution is “more publicly visible”); MICHAEL S. SCOTT & KELLY DEDEL, OFF. OF CMTY. ORIENTED POLICING SERVICES, U.S. DEP’T OF JUST., STREET PROSTITUTION 2 (2d ed. 2006), https://popcenter.asu.edu/sites/default/files/street_prostitution_2nd_ed.pdf (identifying street prostitution as having “the most visible negative impact on the community”).

16. *See infra* notes 29–33 and accompanying text (showing vulnerability).

17. The reader should consider how other types of sex workers, like OnlyFans content creators, escorts, and exotic dancers, qualify as vulnerable victims. For example, the OnlyFans platform is in its infancy, but future circumstances may make OnlyFans content creators more vulnerable. The United Kingdom is attempting to foster communication with online sex workers in anticipation of the growing legal hurdles. *See Sanders, Scoular & Campbell, supra* note 1, at 118 (“Red Umbrella developed

Public perception associating sex work with poverty, sexually transmitted diseases, and drug use cultivates violence against sex workers.¹⁸ Violence against sex workers also stems from the belief that a career in sex work is “immoral.”¹⁹ These violent actions and negative perceptions signal to sex workers that they are “not a protected class.”²⁰ Effects of this reputational infamy include sex workers’ underreporting about crimes committed against them; lack of legislation affording them protection;²¹ victimology scholarship emphasizing why they are

their digital engagement with sex workers showing Merseyside Police how to communicate appropriately in online spaces. This work . . . created online promotional material to raise awareness of the hate crime approach and to build trust amongst online sex workers.”).

18. See *Sex Work and Adult Prostitution*, *supra* note 3, at 243 (stating that sex work “represents the best ‘choice’ given their impoverished circumstances”); Andrea N. Cimino et al., *Childhood Maltreatment and Child Protective Services Involvement Among the Commercially Sexually Exploited: A Comparison of Women Who Enter as Juveniles or as Adults*, 26 J. CHILD SEXUAL ABUSE 352, 355 (2017) (showing a lack of support) [hereinafter *Child Protective Services Involvement Among the Commercially Sexually Exploited*]; Ted Gup, *What’s New with the World’s Oldest Profession?*, COSMOPOLITAN, October 1995, at 236, 236–39, <https://www.proquest.com/magazines/whats-new-with-worlds-oldest-profession/docview/2029552056/se-2> (stating sex workers are haunted by the “specter of AIDS” and “enslaved” by the world of substances).

19. See Cynthia Navarrete Gil et al., *Best Practices and Challenges to Sex Worker Community Empowerment and Mobilisation Strategies to Promote Health and Human Rights*, in *SEX WORK, HEALTH, AND HUMAN RIGHTS: GLOBAL INEQUITIES, CHALLENGES, AND OPPORTUNITIES FOR ACTION* 189, 201 (Shira M. Goldenberg et al. eds., 2021) (“[M]ultiple structural barriers fac[e] sex workers and their ability to organise and mobilise within their communities. These include labour rights violations, financial insecurity, institutional and interpersonal violence, criminalisation and punitive laws, and stigma and discrimination.”).

20. Laura LeMoon, *Sophia Leone’s Death Should Wake Us Up to Violence Against Sex Workers*, DAILY BEAST (Mar. 14, 2024, at 03:52 CT), <https://www.yahoo.com/entertainment/sophia-leone-death-wake-us-085230827.html>. “This is planning for your death multiple times a day, every day, when you go into that person’s house/apartment/car/hotel room and genuinely do not know if you will ever come out again.” *Id.*

21. See Yvette Butler, *Silencing the Sex Worker*, 71 UCLA L. REV. 726, 728–36 (2024) (discussing epistemology issues with the lack of input from sex workers). Enactment of Nordic model laws expose sex workers to more violence. See Sarah Kingston & Terry Thomas, *No Model in Practice: A ‘Nordic Model’ to Respond to Prostitution?*, 71 CRIME, L. & SOC. CHANGE 423, 423 (2018),

not “worthy” or “perfect” victims;²² and increased violence from those who believe there will not be criminal ramifications.²³ This stigmatization leads to higher rates of violence against sex workers.²⁴ Though their occupation does not justify this violence, society normalizes it

<https://link.springer.com/article/10.1007/s10611-018-9795-6> (defining Nordic Model laws as “the purchase of sex [is] a criminal offense”); *A Guide on the Human Rights of Sex Workers*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Mar. 14, 2024), <https://www.ohchr.org/en/documents/tools-and-resources/guide-human-rights-sex-workers> (“Ending the demand has negative impact on sex workers’ health and safety, which has been recognised by UNAIDS who found that ‘the criminalization of the clients of sex workers . . . negatively affects sex workers’ safety and health, including reducing condom access and use, and increasing the rates of violence.”); see also *Maine’s New Law Partially Decriminalizing Sex Work is Not What it Seems*, NBC NEWS (Oct. 25, 2023), <https://www.nbcnews.com/video/maine-s-new-law-partially-decriminalizing-sex-work-is-not-what-it-seems-196383813869> (enactment of Nordic Laws in Maine).

22. See WILLIAM G. DOERNER & STEVEN P. LAB, *VICTIMOLOGY* 7 (8th ed. 2017) (“An early pioneer in victimology was a German scholar, Hans von Hentig. . . . [He] claimed that the victim was often a contributing cause to the criminal act.”); *id.* at 8–9 (discussing Benjamin Mendelsohn’s—the “father” of victimology—categorizations which “range[d] from the *completely innocent victim*, who exhibited no provocative or facilitating behavior prior to the offender’s attack, to the victim who is *more guilty than the offender*, because the victim instigates or provokes the criminal act”).

23. Lauren E. Fernandez, *Defending the Less Dead: Using the Decriminalization of Sex Work to Combat the High Incidence of Serial Homicide of Street-Based Sex Workers*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 205, 205 (2022) (highlighting that serial homicide occurs amongst sex workers at a high rate because the perpetrators often rely on “half-hearted investigation techniques” and the “biases of society”).

24. See JODY RAPHAEL & DEBORAH L. SHAPIRO, *SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO* 18 tbl. 1 (2002), <https://search.issuelab.org/resource/sisters-speak-out-the-lives-and-needs-of-prostituted-women-in-chicago-a-research-study.html> (highlighting percentage of women experiencing different crimes); see also *Commonwealth v. McGowan*, 20-P-557, 2020 Mass. App. Unpub. LEXIS 470, *2–3 (Mass. App. Ct. Jun. 1, 2020) (discussing how the victim, a sex worker, was raped and punched in the abdomen after refusing to tell the defendant where her car and money were); *State v. Simpson*, 443 P.3d 789, 791–93 (Utah Ct. App. 2019) (detailing the murder of a sex worker).

through podcasts, journals, and other media.²⁵ The law, namely sentencing enhancements, can cure this social epidemic.²⁶

This Note argues for the classification of sex workers as vulnerable victims under sentencing enhancements due to their heightened risk of violence, societal marginalization, and barriers to legal redress. Some argue that decriminalization is the solution.²⁷ However, decriminalization arguments overlook the political landscape in America,²⁸ and the inability to eliminate the stigmatization of sex work through broad paint strokes of legislation.²⁹ The proper solution is to employ

25. Compare SOLVED MURDERS: TRUE CRIME MYSTERIES: *The Video Strangler Pt. 1* (Spotify, Aug. 2, 2023), and SOLVED MURDERS: TRUE CRIME MYSTERIES: *The Video Strangler Pt. 2*, (Spotify, Aug. 9, 2023) (discussing the serial killer, Maury Travis, who murdered between twelve to twenty women, many of whom were sex workers with addiction problems), with T-PAIN, I'm N Luv (Wit a Stripper) (CD, Zomba Recording LLC Dec. 6, 2005) (idolizing the work of strippers), and CHAPPELL ROAN, Pink Pony Club (CD, Atlantic Recs. Sep. 22, 2023) (encapsulating the empowerment of performing sex work). “Less dead” is used to identify the social status of sex workers who go missing because of serial killers. Fernandez, *supra* note 23 (“Several serial murderers in the past thirty years have evaded detection for years, taking the lives of dozens of victims, by targeting sex workers, playing off the biases of society and law enforcement, and counting on the halfhearted investigation techniques that often followed missing person reports for less valued members of society, or the “less dead.”).

26. “[H]uman rights are women’s rights And women’s rights are human rights.” Hillary Clinton, First Lady, Women’s Rights are Human Rights (Sep. 5, 1995), <https://wams.nyhistory.org/end-of-the-twentieth-century/the-information-age/womens-rights-are-human-rights/>.

27. See Linda S. Anderson, *Ending the War Against Sex Work: Why It’s Time to Decriminalize Prostitution*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 72, 119–22 (2021); Fernandez, *supra* note 23; Annie Jordan, *Sex, Drugs, and Ballot Measures: An Argument for Massachusetts to Fully Decriminalize Prostitution*, 56 SUFFOLK U. L. REV. 145, 154–57 (2023).

28. Only Nevada has not completely outlawed sex work. *Prostitution Laws by State*, DECRIMINALIZE SEX WORK (Sep. 3, 2023), <https://decriminalizesex.work/advocacy/prostitution-laws-by-state>. But see NBC NEWS, *supra* note 21 (discussing Maine’s Nordic model approach). Consider that like prostitution, “[n]o legislature would repeal prohibitions of automobile theft simply because it is a less serious offense than homicide.” Julie Pearl, *The Highest Paying Customers: America’s Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769, 788 (1987).

29. Many workers are unwilling to acknowledge their involvement in the industry due to stigma. See Carol Leigh, *Further Violations of Our Rights*, 43 AIDS:

federal and state vulnerable victim sentencing enhancements to offenses where the defendant acted violently towards the sex worker while they were working. Sex workers are vulnerable victims because of their diminished capacity from drug use,³⁰ lack of education due to their upbringing,³¹ isolation from familial or community support,³² presence of diseases,³³ and cynicism toward trusted officials.³⁴

This Note discusses sex trafficking, pimp-controlled prostitution, and prostitution; explores existing sentencing enhancements; and asserts that applying the vulnerable victim sentencing enhancement to curtail the heightened violence against sex workers is a more workable solution than decriminalization. This Note discusses sex trafficking and pimp-controlled prostitution in Section II.A.1, and prostitution generally in Section II.A.2. The history and framework of sentencing enhancements are set out in Section II.B. Section III.A asserts that prosecutors should employ Federal Sentencing Guideline § 3A1.1 and existing state-level aggravating factors to penalize defendants. Section III.B.1 addresses victim compliance and services whereas III.B.2 addresses pervasive biases about sex workers and sex crime. Section III.C

CULTURAL ANALYSIS/CULTURAL ACTIVISM 177, 177 (1987) (“Ex-prostitutes . . . are often quick to disavow their histories.”).

30. See Jenny Iversen et al., *Patterns and Epidemiology of Illicit Drug Use Among Sex Workers Globally: A Systematic Review*, in SEX WORK, HEALTH, AND HUMAN RIGHTS: GLOBAL INEQUITIES, CHALLENGES, AND OPPORTUNITIES FOR ACTION 95, 101 tbl. 6.1 (Shira M. Goldenberg et al. eds., 2021) (showing drug use among sex workers).

31. *Contra* Scott Cunningham & Todd D. Kendall, *Prostitution, Hours, Job Amenities and Education*, 15 REV. ECON. HOUSEHOLD 1055, 1056 (2017) (showing prostitutes with a college degree face less violence because they combine their sexual services with companionship).

32. *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18 (describing how lack of community support leads to heightened risk of sex trafficking).

33. See Steffanie A. Strathdee et al., *Substance Use and HIV Among Female Sex Workers and Female Prisoners: Risk Environments and Implications for Prevention, Treatment, and Policies*, 69 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME (Supp. 2 2015) S100, S110 (2015) (“HIV prevalence [is] 12 times higher among [female sex workers] than among other women of reproductive age.”).

34. See *infra* notes 252–61 and accompanying text (explaining sex workers’ distrust in police officers).

demonstrates that prosecutors have the discretion not to prosecute sex workers in exchange for their cooperation with criminal proceedings.

II. BACKGROUND: SEX WORK AND SENTENCING ENHANCEMENTS

The following sections discuss sex trafficking and pimp-controlled prostitution; prostitution; and the framework of sentencing enhancements. While there is significant overlap between the three types of sex work,³⁵ the distinction—autonomy and consent—should be noted.³⁶ First, this section defines sex trafficking and pimp-controlled prostitution as well as discusses the sex worker’s inability to consent to a transaction when they are under the control of another. It then defines prostitution, the associated dangers and characteristics of prostitutes, and their ability to consent considering these characteristics. Finally, this section explores sentencing enhancements.

A. *Introducing the Involuntary Sex Worker and the Traditional Sex Worker*

Sex work is categorically broad; it is “any exchange of money or goods in return for a sexual service.”³⁷ In criminology, this definition delineates into “direct” and “indirect” contacts.³⁸ Direct sex work includes: street solicitation, brothels, escort services, strip clubs, and services extending from advertisements online.³⁹ Society recognizes these services as “‘prostitution’ because it is clear that the primary purpose

35. Consider *United States v. Bell*, where the prostitutes transitioned between prostitution and pimp-controlled work. 761 F.3d 900, 903–05 (8th Cir. 2014).

36. Sanders, Scoular & Campbell, *supra* note 1, at 111 (“Recognising a disproportionate level of victimisation is important but equally to characterise all commercial sex encounters as involving victimisation is not accurate.” (quoting R. Campbell et al., *Not Collateral Damage: Trends in Violence and Hate Crimes Experienced by Sex Workers in the Republic of Ireland*, 28 IRISH J. SOCIO. 280, 284 (2020))).

37. *Sex Work and Adult Prostitution*, *supra* note 3, at 239.

38. *Id.*; see also C. Harcourt & B. Donovan, *The Many Faces of Sex Work*, 81 SEXUALLY TRANSMITTED INFECTIONS 201, 201–04 (2005), <https://pmc.ncbi.nlm.nih.gov/articles/PMC1744977/pdf/v081p00201.pdf> [<https://doi.org/10.1136/sti.2004.012468>] (showing indirect and direct sex work).

39. See Harcourt & Donovan, *supra* note 38, at 202 tbl. 1 (listing various forms of direct sex work).

of the interaction is to exchange sex for a fee.”⁴⁰ Indirect sex work includes: pornography, stripping, phone sex,⁴¹ role play, massage parlors, and “sex for drugs.”⁴² Though delineations between varying sex work exist, merchants “are likely to engage in multiple types of sex work throughout their lifetime.”⁴³ But the delineation matters when analyzing the victim’s consent levels, characteristics, and circumstances when they were working and subsequently harmed. While the usual merchant of sexual services is female, males and transgender individuals may also engage in the same types of service associated with female sex work.⁴⁴ Nevertheless, the clientele for these services is largely male.⁴⁵ This antiquated taboo generates laws cloaked in morality.⁴⁶

The perception of immorality surrounding sex work has historical roots,⁴⁷ which has contributed to the heightened violence against sex workers. Since the 1880s, America has viewed sex work “as a moral, legal, and social problem.”⁴⁸ “Anti-prostitution” laws pushed sex work further out of sight, thereby reducing the visibility of victimization and worsening the overall working conditions for those offering sexual services.⁴⁹ These laws also perpetuated the notion that “illicit

40. *Id.* at 201.

41. *Sex Work and Adult Prostitution*, *supra* note 3, at 239–40.

42. *See* Harcourt & Donovan, *supra* note 38, at 203 tbl. 2 (listing more categories of indirect sex work).

43. *Sex Work and Adult Prostitution*, *supra* note 3, at 241.

44. Harcourt & Donovan, *supra* note 38, at 204.

45. *Id.*

46. *See* Pearl, *supra* note 28, at 786–87 (“[T]he stated purpose of prostitution laws is to benefit society, or to protect it from the harms associated with prostitution. . . . Church groups, feminists, lawyers, and neighborhood organizations alike have argued that laws against prostitution fail to alleviate the harms associated with the activity.”).

47. *See Sex Work and Adult Prostitution*, *supra* note 3, at 239 (“Since 1910, pimps, customers, and women who sold sex could be punished under the Mann Act thus solidifying sex work as a social and moral evil in the USA.” (citations omitted)).

48. *Id.*

49. *Id.* (“[A]nti-prostitution laws drove prostitution underground, and arguably made conditions worse for persons who sell sex—particularly poor and vulnerable communities of color.” (citations omitted)). Tennessee passed an “Aggravated Prostitute” law, which “criminalizes people living with HIV who engage in sex work.” *Fact Sheet: Legal Challenge to Tennessee’s Discriminatory Aggravated Prostitution Law*, ACLU (Oct. 24, 2023), <https://www.aclu.org/documents/fact-sheet-legal-challenge>

relationship[s] are unenforceable.”⁵⁰ Because the profession is outlawed and the agreement is unenforceable, sex workers face heightened violence which they are disinclined to report.⁵¹ The decision not to report the crime can have lasting consequences for the victim if the harm goes unacknowledged; for instance, the victim foregoes victim services, endures pain and a weakened quality of life, and potentially pays for other costs associated with victimization.⁵² In fact, “most victims forge[] ahead alone. Even though many social service agencies [are] in operation, victims remain[] largely unaware of service availability.”⁵³

1. The Involuntary Sex Worker: Sex Trafficking and Pimp-Controlled Prostitution

The stark overlay between traditional and involuntary sex work compels discussion of sex trafficking and pimp-controlled prostitution.⁵⁴ “[B]etween 42% and 80% of women engaged in street prostitution [are] at some time in pimp-controlled prostitution.”⁵⁵ Additionally, the way someone becomes a sex trafficking victim varies greatly. Some workers are prostitutes when they meet a companion who coerces them

to-tennessees-discriminatory-aggravated-prostitution-law. Sex workers found guilty under this law must also register as a “violent sex offender.” *Id.* “Vagrancy, loitering, and public nuisance laws are also used to target sex workers or clients.” Strathdee et al., *supra* note 33, at S113.

50. RESTATEMENT (FIRST) OF CONTRACTS § 589 (A.L.I. 1932).

51. See discussion *infra* Section III.C (discussing barriers for sex workers to report).

52. See DOERNER & LAB, *supra* note 22, at 60–61 (listing the costs associated with crime). Once victimized, there is a greater likelihood for repeat victimization. See generally *id.* at 50–51 (“[T]he risk of being a repeat burglary victim is 12 times higher than expected, and this risk is more pronounced immediately after an initial burglary.”).

53. *Id.* at 60.

54. See *Sex Work and Adult Prostitution*, *supra* note 3, at 243 (showing overlay).

55. *Id.*; see also KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 198 (1995) (“In all the world regions, estimates from organizations addressing the exploitation of women in prostitution . . . show that 80% to 95% of all prostitution is pimp controlled. While 53% of the women interviewed by Evelina Giobbe in a study of prostitution were brought to it by a pimp, 90% of the women had pimps while in prostitution.”).

into “choosing up.”⁵⁶ Others become sex trafficking victims or pimp-controlled because the trafficker induces them, captures them, and then “enslave[s] [them] through threats and force.”⁵⁷ Some traffickers utilize flattery or “fraud to gain access to a victim and then provide[s] drugs and alcohol to incapacitate them.”⁵⁸ The common denominator for sex trafficking and pimp-controlled prostitution is that an individual maintains control over another. These individuals exploit the sex worker’s body for financial benefit.⁵⁹ For “domestic sex trafficking is a world of violence and fraud, where human frailty is callously exploited for profit.”⁶⁰

Sex trafficking occurs when someone forces or coerces another into commercial sex.⁶¹ Statutorily, sex trafficking is “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”⁶² This

56. “Choosing up” is defined as:

The process by which a different pimp takes “ownership” of a victim. Victims are instructed to keep their eyes on the ground at all times. According to traditional pimping rules, when a victim makes eye contact with another pimp (accidentally or on purpose), she is choosing him to be her pimp. If the original pimp wants the victim back, he must pay a fee to the new pimp.

Trafficking Terms, SHARED HOPE INT’L (last visited Aug. 19, 2025), <https://sharedhope.org/the-problem/trafficking-terms/>. This is an example of pimp-controlled prostitution, but other circumstances can also make the relationship pimp-controlled. See *infra* note 57 and accompanying text (discussing other forms of pimp-controlled prostitution).

57. Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1018 (2013); see also *People v. Joseph*, 278 Cal. Rptr. 3d 348, 352 (Cal. Ct. App. 2021) (“As Doe 1 approached her car, Joseph drove up next to her. Another man “forcefully” pulled Doe 1 into the car. Joseph drove to a house in Livermore, where he and his companion carried Doe 1 inside and took off her clothes. Then Joseph held Doe 1 down, and raped and sodomized her.”).

58. Parker & Skrmetti, *supra* note 57.

59. See *id.* (showing the dynamic between the trafficker and victim).

60. *Id.* at 1030.

61. See, e.g., *Sex Work and Adult Prostitution*, *supra* note 3, at 242 (defining sex trafficking). This can include “on/off-street sex work markets, stripping, or pornography.” *Id.*

62. 22 U.S.C. § 7102(12).

generally looks like an individual or senior prostitute approaching the victim and forming a relationship based on false pretenses.⁶³ After forming a relationship, the individual maintains control over the victim through force, fear, and manipulation of their insecurities.⁶⁴ The trafficker or pimp schedules “dates,” takes the victim to the commercial sex exchange, and keeps the money from the date, offering nothing to the victim.⁶⁵ For instance, in *People v. Joseph*, the defendant and his senior prostitute operated a sex trafficking enterprise by engaging with women, asking if they would be interested in a career in makeup or modeling.⁶⁶ Upon trapping the women, they forcefully kept and raped them repeatedly.⁶⁷ In another instance, *United States v. Graham*, the defendant used the victim’s drug addiction to maintain control.⁶⁸ The defendant not only “coerced her to engage in prostitution,” but he “verbally, emotionally, and physically abused” the victim as well as withheld her heroin.⁶⁹ These examples show how traffickers induce victims, use their insecurities for control, and benefit monetarily.

However, online forums can also facilitate sex trafficking.⁷⁰ The three plaintiffs of *In re Facebook* sued Facebook, alleging that the platform “creat[ed] a breeding ground for sex traffickers to stalk and entrap survivors.”⁷¹ A user above the age of majority friended the minor

63. See *People v. Joseph*, 278 Cal. Rptr. 3d 348, 351–52 (Cal. Ct. App. 2021) (stating that the defendants approached women asking if they were interested in a business opportunity; however, the opportunity was a front for later becoming one of the pimp’s workers); *United States v. Bell*, 761 F.3d 900, 903–05 (8th Cir. 2014) (discussing how one sex worker garnered other workers for one pimp).

64. See *Joseph*, 278 Cal. Rptr. 3d at 351–52 (showing forceful control over a victim).

65. See *id.* (providing an example of pimp-controlled prostitution).

66. *Id.* at 351–53.

67. *Id.*

68. 976 F.3d 59, 60 (1st Cir. 2020).

69. *Id.*

70. *In re Facebook, Inc.*, 625 S.W.3d 80, 84 (Tex. 2021); see also *Doe v. MySpace*, 528 F.3d 413, 415–16 (5th Cir. 2008) (exchanging messages over the defendant’s website resulted in meetings and subsequent sexual abuse of the plaintiff); *Sex Work and Adult Prostitution*, *supra* note 3, at 243 (“[T]he accessibility of technology has also contributed to the commercial sexual exploitation and trafficking of vulnerable women and children.” (citation omitted)).

71. *In re Facebook, Inc.*, 625 S.W.3d at 97.

plaintiffs.⁷² The sexual predator fostered a relationship through online conversations, and subsequently sexually assaulted the minors.⁷³

Another venue for sex trafficking is strip clubs, which the FBI states are often “havens” for sex trafficking.⁷⁴ Some legislatures, like Texas, find that “adult entertainment establishments [are] a ‘point of access’”⁷⁵ for traffickers to “‘locat[e] children’ to sexually exploit.”⁷⁶ In *Texas Entertainment Association, Inc. v. Paxton*, Nisi Hamilton testified that at the age of fourteen, she was a victim of sex trafficking.⁷⁷ By sixteen, Nisi was:

working in strip clubs to earn money for her trafficker. . . . [H]er trafficker had established relationships with strip clubs that allowed him to get her on stage despite her age. She testified that “while in captivity at the club,” she was given alcohol so she could relax and “play nice.”⁷⁸

In another instance, Scores Strip Club in Tampa, Florida hired a disabled seventeen-year-old girl who was developmentally thirteen years old.⁷⁹ The trafficker groomed the victim while she underwent treatment

72. *Id.* at 84–85.

73. *Id.*

74. *See* *Wacko’s Too, Inc. v. City of Jacksonville*, 522 F. Supp. 3d 1132, 1140–41 (M.D. Fla. 2021) (showing that strip clubs are access points to trafficking).

75. *Ga. Ass’n of Club Execs. v. State*, 908 S.E.2d 551, 556 (Ga. 2024).

76. *Id.* at 565 (“Atlanta Women’s Agenda (2005) found ‘a strong spatial correlation between areas of adult prostitution activities and juvenile prostitution-related activities,’ that ‘[j]uvenile truants and runaways are often found in areas with heavy adult prostitution activities,’ and most notably, ‘a spatial association between prostitution-related activities and legal adult sex venues.’”). Cara Pierce, a federal prosecutor in Texas, testified that sex traffickers “recruited victims from strip clubs and forced them to work there.” *Tex. Ent. Ass’n v. Paxton*, 732 F. Supp. 3d 684, 690 (W.D. Tex. 2024). “George P. Bush, then Texas Land Commissioner, testified in his private capacity, informing the committee of studies that show 70% of trafficking victims are females trafficked in the commercial sex industry, which includes the porn industry, strip clubs, and brothels.” *Id.*

77. 732 F. Supp. 3d at 690.

78. *Id.*

79. Gabrielle Fonrouge, *Scores Strip Club Sued for Allowing Sex Trafficking of Disabled Teen*, N.Y. POST (Jan. 29, 2020, at 10:33 ET),

for substance use.⁸⁰ The club provided the victim with Xanax, alcohol, and cocaine.⁸¹ Scores further “forced [her] to perform ‘sexually explicit acts, including sexually provocative dances while topless and with her buttocks fully exposed . . . while numerous adult men gawked at her.’”⁸² Performers subsequently took her to a “nearby hotel with customers from the club to ‘engage in prostitution,’” and the customers raped her.⁸³ While these examples involve stripping *and* sex trafficking, every experience is violent because consent is entirely absent.⁸⁴

At the heart of trafficking and pimp-controlled prostitution is control and exploitation. Once the pimp gains the victim’s trust and meets their needs, exploitation for financial gain begins.⁸⁵ The control exerted over the victim negates their ability to consent.⁸⁶ All actions taken against the worker are inherently violent because there is no consent.⁸⁷ Consent is the “affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity.”⁸⁸ An individual may

<https://nypost.com/2020/01/29/scores-strip-club-sued-for-allowing-sex-trafficking-of-disabled-teen/>.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See infra* Section II.A.2 and accompanying text (showing that when an individual exerts control over another, it negates the victim’s consent and renders any subsequent interactions acts of violence).

85. [T]here are stages to grooming: targeting the victim, looking for vulnerable girls who want attention and to be loved; gaining the victim’s trust; and meeting the victim’s needs—for food and shelter and for luxuries such as getting her hair and nails done. After meeting the need, the victim is isolated and her line of communication with friends and family is cut off. After isolation, the victim is exploited.

Milton v. State, 695 S.W.3d 689, 705 (Tex. App. 2024), *aff’d*, 721 S.W.3d 300, 307 (Tex. Crim. App. 2025).

86. *See generally infra* notes 94–97 and accompanying text (providing the nullifiers to consent).

87. *See Sex Work and Adult Prostitution, supra* note 3, at 241 fig. 1 (“All acts are considered violence.”).

88. OKLA. STAT. tit. 21, § 113 (2025); *accord* N.Y. EDUC. LAW § 6441 (Consol. 2024) (defining the affirmative consent to sexual activity); MINN. STAT. § 609.341 (2025) (defining consent).

revoke consent “at any time.”⁸⁹ However, a person “under duress, threat, coercion or force”⁹⁰ may not give consent. Thus, if the victim acts out of fear of retaliation, there is no consent.

Not only can coercion negate consent, but so can the victim’s characteristics.⁹¹ “[C]apacity to consent is a question of fact.”⁹² In some states though, an individual who is “(i) mentally disordered or incapacitated; (ii) physically helpless; (iii) overcome by deception, coercion, or surprise; [or] (iv) less than 16 years old”⁹³ may not give consent. Age is the main factor that limits sex trafficking victims’ ability to consent and increases their vulnerability.⁹⁴ But the history of age of consent laws reflects a value placed on the individual’s control and autonomy rather than succumbing to another’s will.⁹⁵ As circumstances negate one’s consent, everything they endure is categorically violent. Qualities that negate a sex trafficking victim’s ability to consent also make them a vulnerable victim. In *Milton v. State*,

Dr. Nnadozie testified that children who are “more vulnerable” are likely targeted for sex trafficking. Those

89. OKLA. STAT. tit. 21, § 113 (2025).

90. *Id.* § 113(1)(b).

91. *See* State v. Shelton, 369 P.2d 917, 919 (Ariz. 1962) (“[T]he age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent.” (citation omitted)).

92. *People v. Miranda*, 132 Cal. Rptr. 3d 315, 323 (Cal. Ct. App. 2011).

93. MONT. CODE ANN. § 45-5-501(1)(b) (West 2025); *accord* OR. REV. STAT. ANN. § 163.315(1) (West 2025) (“A person is considered incapable of consenting to a sexual act if the person is: (a) Under 18 years of age; (b) Incapable of appraising the nature of the person’s conduct; (c) Mentally incapacitated; or (d) Physically helpless.”).

94. *See* *Milton v. State*, 695 S.W.3d 689, 705 (Tex. App. 2024), *aff’d*, 721 S.W.3d 300, 307 (Tex. Crim. App. 2025) (highlighting qualities in younger victims that make them more susceptible to victimization); *see also* Parker & Skrmetti, *supra* note 57, at 1020 (“Younger people often lack the perspective, experience, and emotional maturity to see through schemes that look obviously fraudulent to older eyes. The younger the victim, the more susceptible they are to the manipulations and lies of domestic sex traffickers.”).

95. *See* Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 286–88 (2010), (discussing the history of age of consent laws and reform). Through waves of reform, society sought to eradicate the abuses of power. *Id.* at 288.

may be children with mental health issues, substance abuse issues, neglectful homes, low IQs, or a history of sexual, physical, or emotional abuse. She said traffickers are typically male, older than the victim. The trafficker is usually in control, “has all the power and leads [the] victim to be dependent upon them, dependent for basic needs such as food, water, sleeping.”⁹⁶

Sex trafficking victims are vulnerable victims for a myriad of reasons. The basis for their vulnerability permeates prostitution because of the strong intersection between the two.⁹⁷

2. The Traditional Sex Worker: Prostitution

Prostitution is the most well-known form of sex work because scholars classify many forms of sex work as prostitution; society observes prostitution more than other types of sex work; and definitionally, prostitution is broad enough to encompass many types of sex work. Scholarship considers prostitution and sex trafficking interchangeable, given their significant overlap.⁹⁸ Trafficking victims above the age of majority are also criminally liable for prostitution “unless they can demonstrate that they were exploited by a pimp or

96. *Milton*, 695 S.W.3d at 705. At the time of trial, Dr. Nnadozie was a psychologist who “conduct[ed] psychological evaluations and provide[d] individual, family, and group therapy to children who [were] victims of sexual abuse and sex trafficking.” *Id.*; see also *Our Staff – Dr. Nneka Nnadozie*, HEART2HEART COUNSELING SERVICES, <https://heart2heartsservices.org/our-staff> (last visited Oct. 19, 2025) (showing Dr. Nnadozie’s qualifications and background).

97. *Sex Work and Adult Prostitution*, *supra* note 3, at 241 (“[E]vidence suggests that sellers are likely to engage in multiple types of sex work throughout their lifetime.”).

98. See *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18, at 354 (“Given the overlap between trafficked youth and adults who are both held liable for their sexual exploitation, for the purposes of this article, the terms *CSE* and *prostitution* are used interchangeably and refer to involvement in any illegal commercial sex exchange.”); see also *Matter of Smallman*, 220 N.Y.S.3d 853, 857 (N.Y. App. Div. 2024) (showing how a survivor of sex trafficking could become a prostitute).

trafficker.”⁹⁹ Thus, prostitution may encompass trafficking, street solicitation, pornography, and stripping.¹⁰⁰ Prostitution further functions as a catch-all term because this work is “more publically visible” than other types of sex work.¹⁰¹ Moreover, a prostitute is broadly defined as “a person who engages in sex acts . . . in exchange for pay,”¹⁰² or engages in street work. Statutorily, a prostitute is a “person who for a fee engages in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person for the purpose of arousing or gratifying the sexual desire of either person.”¹⁰³

Prostitution “lies at the intersection of extreme poverty, violence, and criminality.”¹⁰⁴ Merchants in this type of sex work “begin as early as 12 to 14 years old”¹⁰⁵ because this work “represents the best ‘choice’ given their impoverished circumstances.”¹⁰⁶ Thus, individuals perform commercial sex acts for a number of reasons: substances, money for themselves or dependents, shelter, food, or previous

99. *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18, at 354.

100. *See id.* (stating that prostitution encompasses multiple forms of sex work); *supra* notes 37–40 and accompanying text (work encompassed by prostitution).

101. *Sex Work and Adult Prostitution*, *supra* note 3, at 243.

102. *Prostitute*, MERRIAM-WEBSTER (online ed. 2025).

103. *Ford v. State*, 262 P.3d 1123, 1126 n.2 (Nev. 2011) (citing NEV. REV. STAT. § 201.295(34) (2011)). *See, e.g.*, TENN. CODE ANN. § 39-13-512(6) (West 2025) (“‘Prostitution’ means engaging in, or offering to engage in, sexual activity as a business or being an inmate in a house of prostitution or loitering in a public place for the purpose of being hired to engage in sexual activity.”); N.C. GEN. STAT. ANN. § 14-203(5) (West 2025) (defining “prostitution” as “[t]he performance of, offer of, or agreement to perform vaginal intercourse, any sexual act . . . or any sexual contact . . . for the purpose of sexual arousal or gratification for any money or other consideration.”); MINN. STAT. ANN. § 609.321(9) (West 2025) (“‘Prostitution’ means hiring, offering to hire, or agreeing to hire another individual to engage in sexual penetration or sexual contact, or being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact.”); NEB. REV. STAT. ANN. § 28-801(1) (West 2025) (“[A]ny person who performs, offers, or agrees to perform any act of sexual contact or sexual penetration . . . with any person not his or her spouse, in exchange for money or other thing of value, commits prostitution.”).

104. *Sex Work and Adult Prostitution*, *supra* note 3, at 243.

105. *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18, at 354.

106. *Sex Work and Adult Prostitution*, *supra* note 3, at 243 (citation omitted).

exposure to the industry.¹⁰⁷ Their reason for performing also stems from, *inter alia*, the lack of stable housing as well as “their physical and emotional distance from friends and family.”¹⁰⁸

While the sex worker consents to the initial commercial sex exchange to acquire one of the above needs, their consent voids part way through the exchange when the purchaser commits non-consensual, violent acts against them.¹⁰⁹ *People v. Brown* provides a jarring illustration.¹¹⁰ In this case, the eighteen-year-old worker (“Doe”) and Michael Brown discussed their exchange over text and call after Brown responded to her ad online.¹¹¹ After they met and Doe got into Brown’s car, the two discussed the price, and Brown then struck Doe “five or six times in the face, head, and arms.”¹¹² He referred to her in pejorative terms, calling Doe a “punk” and “bitch.”¹¹³ He then “forced Doe to orally copulate his partially erect penis” for three hours.¹¹⁴ He also subjected her to unwanted groping.¹¹⁵ Similarly, in *People v. Kline*, the worker (“J.S.”) met her assailant at his residence to engage in work.¹¹⁶ When J.S. attempted to leave, the defendant “punched her in the neck and choked her in a headlock from behind.”¹¹⁷ The defendant placed her on his bed and again, choked her until she was unconscious.¹¹⁸ When J.S. woke up, she removed her clothes and told the defendant he

107. See *id.* (“[S]treet-based prostitutes enter sex work because they face homelessness, extreme poverty, and lack alternative employment opportunities.”); *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18 (discussing survival sex).

108. *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18.

109. See *State v. Cruz-Pena*, 234 A.3d 1241, 1245–46 (N.J. 2020) and *People v. Brown*, A156267, 2021 Cal. App. Unpub. LEXIS 5127, at *1–3 (Cal. Ct. App. Aug. 9, 2021), for examples where the defendant subjected the sex worker to non-consensual acts during a commercial sex act.

110. 2021 Cal. App. Unpub. LEXIS 5127, at *1–8.

111. *Id.* at *1–2.

112. *Id.* at *2–3.

113. *Id.* at *3.

114. *Id.*

115. *Id.* at *5.

116. 248 N.E.3d 1172, 1178–81 (Ill. App. Ct. 2024).

117. *Id.* at 1180.

118. *Id.*

could do whatever he wanted so she could leave.¹¹⁹ Defendant raped J.S. orally, vaginally, and anally.¹²⁰

This frequent violence coupled with the victim's characteristics demonstrates the victim's vulnerability. For instance, one of the workers in *United States v. Frey* "was homeless, had a history of bipolar disorder, and was battling a decade-long heroin addiction."¹²¹ These adversities led her to engage in sex work.¹²² While some sex workers, like the one in *Frey*, struggle with addiction or mental health challenges,¹²³ this does not hinder the worker's ability to consent to the initial commercial sex transaction while withholding consent to the subsequent, harmful act. Capacity to consent is based on the circumstances,¹²⁴ but courts disregard the prostitute's characteristics when the harm occurred.¹²⁵ Courts do not address whether the prostitute had the capacity to consent to the initial exchange due to intoxicants or coercion.¹²⁶ They only address the worker's consent to the criminal offense in question.¹²⁷ Because courts do not address the capacity to consent, this Note focuses on those characteristics as a basis for the sentencing enhancement rather than an ability to categorize the

119. *Id.*

120. *Id.*

121. 736 F. Supp. 3d 128, 135 (E.D.N.Y. 2024).

122. *See id.* ("[B]ecause she needed money to buy heroin and quell withdrawal symptoms, Danielle contacted Frey via text message and agreed to have commercial sex with him . . .").

123. *See United States v. Bell*, 761 F.3d 900, 903 (8th Cir. 2014) (noting an example where the prostitute formed a relationship with their abuser, entered a psychiatric facility, and resumed the relationship after being discharged).

124. *See People v. Miranda*, 132 Cal Rptr. 3d 315, 323 (Cal. Ct. App. 2011) (stating that consent is a factual inquiry).

125. *See State v. Higgins*, 821 A.2d 964, 972 (N.H. 2003) ("[V]ictim's status as a prostitute does not necessarily mean that she will accept every opportunity that comes along . . . regardless of her motivation for engaging in prostitution in the first instance."); *State v. Pooler*, No. 28619, 2021 Ohio App. LEXIS 636, at *38–39 (Ohio Ct. App. Mar. 5, 2021) (Hall, J., dissenting) ("The fact that a woman is a prostitute . . . has nothing to do with whether she consented to sexual intercourse with a particular defendant. *Even a prostitute can be raped.*" (emphasis added)).

126. *See cases cited supra* note 125 (referencing instances where courts sidestep the sex worker's capacity to consent to the initial transaction).

127. *See cases cited supra* note 125 (referencing instances where courts do not address the worker's capacity to consent).

entire exchange as violence. After entering this type of work, exiting is onerous because a majority of sex workers enter in their youth with little support,¹²⁸ and the customers further traumatize them on the job. This highlights the vulnerability that workers bring into and acquire from this line of work.

But “characteri[zing] all commercial sex encounters as involving victimisation is not accurate.”¹²⁹ Addressing the levels of victimization among different commercial sex acts is necessary because sex workers experience violence differently, depending on the *type* of work they were engaged in.¹³⁰ However, this Note’s purpose is to classify sex workers as vulnerable victims due to their mental, physical, and social afflictions.

B. Federal and State Level Sentencing Enhancements

Historically, the federal judiciary had broad discretion over punishments, and the United States Parole Commission decided when offenders were released on parole.¹³¹ This produced dissimilar sentences for similar crimes.¹³² Congress, through the Sentencing Reform Act of

128. Gloria Hillard, *Getting Out of the Commercial Sex Industry—With Help from Women Who’ve Been There*, NPR (Mar. 2, 2019, at 08:22 ET), <https://www.npr.org/2019/03/02/699336684/getting-out-of-the-commercial-sex-industry-with-help-from-women-who-ve-been-there> (discussing the difficulties of leaving the industry and Treasures, an outreach program which aims to offer resources to sex workers in “juvenile detention facilities, massage parlors and, of course, strip clubs”); *see also* Parker & Skrmetti, *supra* note 57, at 1020 (“The first common factor for victims of domestic sex trafficking is age. . . . 80% of women engaged in prostitution started before their eighteenth birthday.”).

129. Sanders, Scoular & Campbell, *supra* note 1, at 111.

130. *Compare* C.K. v. Rigueur, 24 Civ. 2778, 2024 U.S. Dist. LEXIS 145645, at *1 (Aug. 15, 2024) (content published without consent of the worker), *and* *OnlyFans and the Future of Sex Work on the Internet*, NPR (Aug. 26, 2021, at 15:37 ET) <https://www.npr.org/2021/08/26/1031404810/onlyfans-and-the-future-of-sex-work-on-the-internet> (piracy of OnlyFans content), *with* State v. Cruz-Pena, 234 A.3d 1241, 1245–46 (N.J. 2020) (rape of a prostitute).

131. FEDERAL SENTENCING: THE BASICS, U.S. SENT’G COMM’N 2 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [hereinafter FEDERAL SENTENCING].

132. *Id.*

1984,¹³³ created the Sentencing Commission to generate uniform sentencing.¹³⁴ After *United States v. Booker*, federal sentencing guidelines became “effectively advisory.”¹³⁵ Now, the sentencing guidelines are the “‘starting point and the initial benchmark’ in the federal sentencing process,”¹³⁶ and “‘district courts must . . . remain cognizant of them.’”¹³⁷ The federal sentencing process “involves a lengthy adversarial process” that includes the determination-of-guilt phase, the presentencing phase, and the sentencing hearing.¹³⁸

After the guilt phase, defendants undergo a presentencing interview.¹³⁹ The interview—where the Probation Office discusses the defendant’s offense, personal, and criminal history with the defendant—yields the presentencing report.¹⁴⁰ This information is coupled with the “statutory range of punishment and a calculation of the relevant sentencing guidelines (with a corresponding guideline sentencing range), as well as any bases that may exist for imposing a sentence outside of the applicable range.”¹⁴¹ This is when the imposition of an enhancement occurs. A similar process happens at the state level.¹⁴²

133. See *Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Oct. 11, 2025) (“The U.S. Sentencing Commission is an ongoing independent agency in the judicial branch created by Congress as part of the Sentencing Reform Act of 1984.”).

134. See FEDERAL SENTENCING, *supra* note 131, at 5. (“Departures from the range were limited in order to reflect Congress’s desire for general uniformity in sentencing of similarly situated offenders”); *Dorsey v. United States*, 567 U.S. 260, 265 (2012) (“[T]he Sentencing Reform Act of 1984 . . . sought to increase transparency, uniformity, and proportionality in sentencing.”).

135. FEDERAL SENTENCING, *supra* note 131, at 6 (citation omitted).

136. *Id.* (citation omitted).

137. *Id.* (citation omitted).

138. *Id.* at 8.

139. *Id.* at 9.

140. *Id.* at 9–10.

141. *Id.* at 10.

142. See Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 FED. PROBATION 28, 28 (2017) (discussing state aggravating factor frameworks that resemble the federal sentencing enhancement framework).

The state equivalent of sentencing enhancements are aggravating factors.¹⁴³ Like federal sentencing enhancements, state courts “must weigh a wide range of offence and offender-related factors in order to determine the severity of the sentence.”¹⁴⁴ State sentencing, as it presently stands, “may reflect the view that consideration of mitigation and aggravation is more properly left to the exercise of judicial discretion, with only minimal direction from the legislature.”¹⁴⁵ “In arriving at the appropriate sentence, the trial court’s exercise of discretion involves the weighing of various factors, including aggravating circumstances that may include the vulnerability of the victim.”¹⁴⁶ Since sentencing enhancements are a fact-intensive inquiry, with copious discretion given to the court, a broad application of the vulnerable victim sentencing enhancement is proper.

III. ACHIEVING VULNERABLE VICTIM STATUS FOR SEX WORKERS DURING THE SENTENCING PROCESS

The vulnerable victim sentencing enhancement should apply whenever an offender acts harmfully towards a sex worker in the course of their job. Section III.A discusses the vulnerable victim sentencing enhancement at the federal and state level. Section III.B explores logistical solutions that will allow this proposal to succeed. Section III.C addresses prosecutorial discretion and how to assist a victim—who at the time of their assault was also committing a crime (sex work). This

143. See, e.g., Julian V. Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 1, 1 (Julian V. Roberts ed., 2011) (discussing state level sentencing); Mitchell, *supra* note 142 (focusing “on the 15 non-federal systems that we have found exhibit the strongest characteristics of sentencing guidelines: Alabama, Arkansas, Delaware, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington, and Washington, D.C.”).

144. Roberts, *supra* note 143, at 1.

145. *Id.* at 5. This text further notes that appellate courts have trailblazed the application of sentencing. *Id.* at 7.

146. William D. Bremer, Annotation, *Vulnerability of Victim as Aggravating Factor Under State Sentencing Guidelines*, 73 A.L.R.5th 383 § 2[a] (1999).

proposal will lead to heightened reporting, alignment with law enforcement, and reduced violence against sex workers.¹⁴⁷

A. Employing Federal Sentencing Guideline 3A1.1 and State Aggravating Factors in Criminal Proceedings

Sex workers are vulnerable victims because they are usually impoverished, uneducated, underemployed,¹⁴⁸ young, or come from unfortunate backgrounds.¹⁴⁹ Employing the vulnerable victim sentencing enhancement would deter the alarmingly high rates of violence that sex workers endure, while avoiding the need for legislative decriminalization. State aggravating factors are the bedrock of this proposal because criminal law has traditionally been left to the states. However, an examination of federal sentencing enhancements is necessary because of federal offenses like sex trafficking¹⁵⁰ and child pornography.¹⁵¹

Under Federal Sentencing Guideline § 3A1.1(b)(1), a sentence may be increased by two levels if “the defendant knew or should have known that a victim of the offense was a vulnerable victim.”¹⁵² The commentary states that a vulnerable victim is one “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.”¹⁵³ If the “factor that makes the person a vulnerable victim is incorporated in the offense guideline,” the enhancement cannot apply.¹⁵⁴ This avoids double

147. See Sanders, Scoular & Campbell, *supra* note 1, for an international example that employed this approach.

148. *Sex Work and Adult Prostitution*, *supra* note 3, at 244.

149. See, e.g., *United States v. Nielsen*, 694 F.3d 1032, 1035 (9th Cir. 2012) (“[I]t would [be] inappropriate for the district court to apply § 3A1.1 on the basis of A.J.’s minority alone; ‘although any victim of abusive sexual contact with a minor might be described as vulnerable on account of her minority, her age does not make her any more vulnerable than other victims of this offense.’”).

150. For an example of a federal sex trafficking statute, see 18 U.S.C. § 1591.

151. For the federal offense of child pornography, see 18 U.S.C. §§ 2251, 2252, and 2252A.

152. U.S. SENT’G GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENT’G COMM’N 2024).

153. *Id.* cmt. n.2.

154. *Id.*

counting.¹⁵⁵ Prosecutors—at the state and federal level—must “prov[e] the limitations that render a victim particularly vulnerable,” and “should be prepared to present sufficient evidence . . . that the victim was especially vulnerable to the crime because of the factor.”¹⁵⁶ This language also appears in existing state aggravating factors.¹⁵⁷

Most states have either sentencing guidelines or a sentencing commission.¹⁵⁸ Some states with a sentencing guideline framework mirror § 3A1.1; for example, Alaska’s vulnerable victim aggravating factor states:

(c) The following factors shall be considered by the sentencing court . . . and may allow imposition of a sentence above the presumptive range . . . (5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, consumption of alcohol or drugs, or extreme youth or *was for any other reason substantially*

155. See, e.g., *United States v. Joiner*, 418 F.3d 863, 870 (8th Cir. 2005) (“Double counting occurs when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been . . . accounted for.”).

156. Bremer, *supra* note 146, at § 2[b].

157. See, e.g., ALASKA STAT. ANN. § 12.55.155(c)(5) (West 2025) (“[T]he defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, consumption of alcohol or drugs, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance.”); WASH. REV. CODE ANN. § 9.94A.535(3)(b) (West 2025) (“The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.”); MICH. COMP. LAWS ANN. § 777.40(1)(b) (West 2025) (“The offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.”).

158. See Mitchell, *supra* note 142 (“Though the Resource Center highlights information for 26 jurisdictions, including the federal government, not all of these jurisdictions have sentencing guidelines. Neither do all of the jurisdictions have sentencing commissions.”).

*incapable of exercising normal physical or mental powers of resistance.*¹⁵⁹

Because the federal sentencing enhancement and the state aggravating factors share similar language, the analyses at both levels are comparable.

Federal and state courts use their vulnerable victim sentencing enhancements liberally. Courts apply the enhancement when the victim is too intoxicated to defend themselves;¹⁶⁰ the victim has a weakened physique;¹⁶¹ the victim was unable to resist the offense because the defendant was in such a position of trust or power over the victim;¹⁶² the defendant established a pattern of abuse, lessening the victim's ability to resist;¹⁶³ and when the victim was young, and the defendant induced them with money.¹⁶⁴ For example, in *United States v. Hagen*, the Eighth Circuit upheld the application of § 3A1.1 because the victim,

159. ALASKA STAT. § 12.55.155(c)(5) (West 2025) (emphasis added). Other states have similar statutory language. *See, e.g.*, WASH. REV. CODE ANN. § 9.94A.535(3)(b) (West 2025) (“The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.”).

160. *See United States v. Schoenborn*, 793 F.3d 964, 965, 967–68 (8th Cir. 2015) (applying the enhancement to a victim unconscious from alcohol consumption); *State v. Charles*, No. 19224-1-II, 1997 WL 3197, at *8 (Wash. Ct. App. Jan. 3, 1997) (stating that intoxication qualified the victim as a vulnerable victim and that “[t]he issue is not the conduct of the victim in becoming vulnerable, but the conduct of the offender in taking advantage of the victim’s vulnerability”).

161. *See United States v. Pearce*, 967 F.2d 434, 435 (10th Cir. 1992) (applying the enhancement where the victim’s characteristics included a weakened physique and the victim “appeared elderly, weighed approximately ninety-seven pounds, and was less than five feet, three inches in height”).

162. *See State v. Hamilton*, C8-95-2678, 1996 Minn. App. LEXIS 731, at *3–4 (Minn. Ct. App. June 18, 1996) (stating that “[v]ulnerability due to trust” can warrant application of the enhancement). This could also apply for diminished capacity. *See United States v. Betone*, 636 F.3d 384, 388 (8th Cir. 2011) (applying the enhancement where the victim’s “diminished mental functioning [made] him more susceptible to pressure than the average person”).

163. *See Williams v. State*, 859 P.2d 720, 722 (Alaska Ct. App. 1993) (“Williams’ background of abuse toward his victim bears an intrinsic relationship to his assault and to his victim’s response to that assault.”).

164. *See People v. O’Connor*, 10 Cal. Rptr. 2d 530, 536 (Cal. Ct. App. 1992) (“The defendant induced the victims, very young victims, with money.”).

N.M., “suffered from bipolar disorder and attention deficit disorder with hyperactivity . . . [as well as sexual abuse] over the course of two years by one of her mother’s previous boyfriends.”¹⁶⁵ Other courts have applied this enhancement because the victim was a minor and their upbringing made them *more* susceptible to victimization.¹⁶⁶ The Fourth Circuit in *United States v. Muslim* sustained the application of the enhancement because the victim was young and came from an unstable home.¹⁶⁷

The enhancement’s versatility makes it applicable to sex workers. Characteristics of sex workers overwhelmingly align with previous applications of the vulnerable victim aggravating factor.¹⁶⁸ Intoxication is a key justification for classifying sex workers as vulnerable victims. One study showed that 83.8% of female sex workers in the United States experience lifetime illicit drug use.¹⁶⁹ This is often due to the high risk of their work environment.¹⁷⁰ Sex workers who struggle with substance use often engage in street prostitution and, “are more likely to experience difficulties negotiating condom use and have greater exposure to violence, police harassment, and arrest.”¹⁷¹ In addition to illicit substances, alcohol “tends to cause cognitive, perceptual, verbal,

165. 641 F.3d 268, 271 (8th Cir. 2021).

166. See *United States v. Muslim*, 944 F.3d 154, 168 (4th Cir. 2019) (refusing to disturb the sentence because the government’s grounds for vulnerability were that the victims were young, down on their luck, from unstable homes, and gave the defendant opportunity to exploit). *Contra* *United States v. Nielsen*, 694 F.3d 1032, 1035–36 (9th Cir. 2012) (holding that A.J.’s “pre-existing interest in sex and drug use, her boredom, and her inclination to get away from her divorced parents—at most support the court’s conclusion that A.J. was ‘more likely than other members of the general population to become a victim to the particular crime at issue,’ which we have held is insufficient to support the application of the upward adjustment”).

167. 944 F.3d at 168.

168. Compare *supra* notes 160–64 and accompanying text (listing attributes that make someone a vulnerable victim), with *infra* notes 174, 176, 199 and accompanying text (detailing sex worker traits that qualify them as vulnerable).

169. Jenny Iversen et al., *supra* note 30, at 102 tbl. 6.1.

170. Strathdee et al., *supra* note 33 (“Many FSWs use drugs and alcohol; for some, drug dependence may have precipitated their entry into sex work, whereas others may turn to substance use to cope or numb the challenging lifestyles associated with sex work.”).

171. *Id.* at S111.

and motor impairments as well as a loss of control.”¹⁷² Thus, alcohol and illicit substance use decreases the sex worker’s ability to resist violent offenses, while increasing the offender’s ability to “tak[e] advantage of the victim’s vulnerability.”¹⁷³ While intoxication contributes to the sex worker’s inability to resist attack, so does the power dynamic between them and the customer.

Unequal power dynamics can stem from the physical or mental fragility of the sex worker or the relationship between the buyer and seller. For example, the victim, C.M., from *State v. Cruz-Pena* was addicted to drugs and weighed ninety pounds when the defendant struck her in the face and threw her body into the wall.¹⁷⁴ The defendant physically overpowered C.M. by holding her at knifepoint.¹⁷⁵ C.M.’s vulnerability resembles that of other victims in cases where the sentencing enhancement applied, such as *United States v. Pearce*, where the defendant sexually assaulted an elderly woman who appeared “frail in stature” and “weighed approximately ninety-seven pounds.”¹⁷⁶ Moreover, *Cruz-Pena* and other cases, like *United States v. Frey*, highlight the survival sex that workers engage in to sustain their addiction, find shelter, and meet their needs.¹⁷⁷ Survival sex serves as the trap door for a defendant to exploit their victim’s needs and hold a position of power, both physically and emotionally, over their victims.

172. Kajol V. Sontate et al., *Alcohol, Aggression, and Violence: From Public Health to Neuroscience*, 12 FRONTIERS PSYCH. 1, 3 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8729263/> [https://doi.org/10.3389/fpsyg.2021.699726].

173. *State v. Charles*, No. 19224–1–II, 1997 WL 3197, at *8 (Wash. Ct. App. Jan. 3, 1997).

174. 234 A.3d 1241, 1245–46 (N.J. 2020).

175. *Id.* at 1246.

176. 967 F.2d 434, 435 (10th Cir. 1992).

177. See Parker & Skrmetti, *supra* note 57, at 1022 (“‘Survival sex’ refers to the selling of sex to meet subsistence needs. It includes the exchange of sex for shelter, food, drugs, or money.”); see also *United States v. Frey*, 736 F. Supp. 3d 128, 135 (E.D.N.Y. 2024) (finding that the victim “was homeless, had a history of bipolar disorder, and was battling a decade-long heroin addiction”).

Unequal power dynamics also derive from the relationship between the worker and perpetrator.¹⁷⁸ In *Matter of Smallman*, a disciplinary proceeding took place after an attorney “employed coercion, intimidation, or undue influence in entering into sexual relations” with a female client.¹⁷⁹ The disciplinary authority highlighted that not only did the attorney hold a powerful role in their relationship,¹⁸⁰ but given the victim’s turbulent background as a sex trafficking victim and current prostitute, “his actions confirmed that her value lay in what she could do sexually for him.”¹⁸¹ Similarly, the court in *State v. Hamilton* held that when a victim is subject to someone in power, that itself constitutes vulnerability.¹⁸² In that instance, the defendant was the victim’s sole caretaker when he sexually assaulted her, making her particularly vulnerable and justifying an increase to his sentence.¹⁸³ While the power dynamics are one basis for the enhancement, diseases are another.

The specter of AIDS and HIV, which are deeply intertwined with sex work,¹⁸⁴ forms another basis for the vulnerable victim sentencing enhancement. AIDS and HIV weaken the body by killing or impairing cells of the immune system.¹⁸⁵ People with AIDS and HIV have a lower chance of fighting infections and other diseases.¹⁸⁶ Moreover, female sex workers are twelve times more likely to carry HIV than other reproductive-age women.¹⁸⁷ “[R]isk environments” influence the

178. See *Matter of Smallman*, 220 N.Y.S.3d 853, 857–58 (N.Y. App. Div. 2024) (finding professional misconduct where the attorney became sexually involved with a victim of sex trafficking).

179. *Id.* at 855.

180. *Id.* at 857.

181. *Id.*

182. C8-95-2678, 1996 Minn. App. LEXIS 731, at *3–4 (Minn. Ct. App. June 18, 1996).

183. *Id.* at *4.

184. See SCOTT & DEDEL, *supra* note 15, at 3 (highlighting public health concerns).

185. *HIV and AIDS*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/hiv-and-aids> (last visited Oct. 17, 2025).

186. *Id.*

187. Strathdee et al., *supra* note 33.

prevalence of HIV and AIDS among sex workers.¹⁸⁸ A person is a vulnerable victim if “the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to . . . *ill health*.”¹⁸⁹ Defendants reasonably could know that a sex worker has AIDS or HIV because these illnesses present themselves through sores on the mouth or genitals, blotched skin, and severe weight loss.¹⁹⁰ Such signs would notify the defendant that the sex worker is vulnerable. Thus, sex workers with autoimmune disorders are vulnerable victims.¹⁹¹

Some courts have properly recognized sex trafficking and pimp-controlled prostitutes as vulnerable victims.¹⁹² For example, the victim in *United States v. Graham* was “addicted to heroin and engaged in prostitution to support her addiction.”¹⁹³ The defendant “verbally, emotionally, and physically abused” her, “directed her to post commercial

188. *Id.* at S111 (defining “risk environment” as “the social or physical spaces in which macro- and micro-level factors exogenous to the individual interact to influence HIV vulnerability”).

189. ALASKA STAT. ANN. § 12.55.155(c)(5) (West 2025) (emphasis added). For examples where circuit courts have recognized HIV as a basis for the vulnerable victim classification, see *United States v. Cope*, 24 F. App’x 414, 416 (6th Cir. 2001) and *United States v. Moskal*, 211 F.3d 1070, 1072–73 (8th Cir. 2000).

190. *See generally What are common symptoms of HIV?*, EUNICE KENNEDY SHRIVER NAT’L INST. OF CHILD HEALTH AND HUM. DEV. (last visited Oct. 17, 2025), <https://www.nichd.nih.gov/health/topics/hiv/conditioninfo/symptoms> (detailing HIV symptoms).

191. The author condemns Tennessee for criminalizing sex workers for this disease. *See Fact Sheet: Legal Challenge to Tennessee’s Discriminatory Aggravated Prostitution Law*, *supra* note 49 (discussing Tennessee’s criminalization of sex workers with HIV and AIDS for engaging in prostitution).

192. *See, e.g., United States v. Graham*, 976 F.3d 59, 61–63 (1st Cir. 2020) (affirming the enhancement where the defendant beat the victim on multiple occasions, emotionally abused the victim to control her, and fueled the victim’s heroin addiction to control the victim); *United States v. Smith*, 115 F.4th 370, 372, 378 (5th Cir. 2024) (finding that the minor was a vulnerable victim because she was a runaway and destitute, and the defendant was privy to her vulnerabilities and likely knew how to exploit them); *United States v. Backman*, 817 F.3d 662, 670–71 (9th Cir. 2016) (affirming the enhancement where the defendant tricked the victim into entering America on a work visa, she did not understand or speak any English, she was “effectively under lock and key” by her offender, and the defendant repeatedly reminded her that she could not leave because of her immigration status (quotation omitted)).

193. 976 F.3d 59, 60 (1st Cir. 2020).

sex advertisements,” “coerced her to engage in prostitution,” and—to maintain control over the victim—the defendant withheld her heroin, beat her, and threatened to kill her.¹⁹⁴ The enhancement was upheld because individuals with drug addictions and women like the victim are “quite vulnerable to the predations of men like [the defendant].”¹⁹⁵

Similar outcomes occur with young trafficking victims. In *United States v. Smith*, the defendant took MV “to multiple locations over twelve days; MV engaged in commercial sex with at least eight men.”¹⁹⁶ The victim also posted commercial sex advertisements.¹⁹⁷ The court held that MV was a vulnerable victim, reasoning that she was “a thirteen-year-old, a runaway, a ward of the state, desperate for money and willing to sleep in a car. Smith spent two weeks with her and quite likely learned about most of her vulnerabilities.”¹⁹⁸

Some courts have also properly applied this enhancement to prostitutes due to the nudity and physical vulnerability of the victim. For example, the defendant in *State v. Jackson* strangled and killed a prostitute during intercourse.¹⁹⁹ The court upheld the application of the vulnerable victim aggravating factor, reasoning that the victim “was nude and was engaged in an act of consensual sexual intercourse with Jackson when he *exploited her vulnerability* and strangled her.”²⁰⁰ *Jackson* should not serve as the sole precedent, but rather be considered in tandem with other cases where the enhancement is applied.

For some, this solution is hard to reconcile with the fact that the sex worker chose this line of work. How can someone be a victim when they chose a profession that led to their demise? Nevertheless, they are worthy of the vulnerable victim sentencing enhancement. The law does not distinguish *who* qualifies as a victim of a criminal offense, nor does a person lose victim status because of their actions at the time of the offense.²⁰¹ “A direct victim is a victim against whom a defendant has

194. *Id.*

195. *Id.* at 62.

196. 115 F.4th 370, 372 (5th Cir. 2024).

197. *Id.* at 373.

198. *Id.* at 378.

199. 370 N.W.2d 72, 74 (Minn. Ct. App. 1985).

200. *Id.* (emphasis added).

201. *See People v. Sy*, 166 Cal. Rptr. 3d 778, 794–95 (Cal. Ct. App. 2014) (discussing what a direct victim is).

committed a crime.”²⁰² Over time, observers and victimology scholars have excoriated the notion that a victim is a lesser-victim because they caused their own harm.²⁰³ Though this bias exists, the law does not indulge in it.²⁰⁴ Criminal law does not rank victimhood based on fault, the way it might in tort law for contributory negligence.²⁰⁵ Knowledge of perilous working conditions does not negate one’s classification as a vulnerable victim.²⁰⁶ This is so because “the Guidelines Manual has specified that a ‘victim’ for purposes of USSG § 3A1.1 includes . . . a victim of the ‘offense of conviction.’”²⁰⁷ It is immaterial that the sex worker voluntarily chose this work or was trafficked—all that matters is that they were a victim of the offense.²⁰⁸ When someone rapes, assaults, robs, or harms a sex worker, the sex worker is a *direct victim*. This sets the foundation for sex workers to qualify as vulnerable victims.

202. *Id.*

203. DOERNER & LAB, *supra* note 22, at 8–9 (discussing Benjamin Mendelsohn’s model which categorizes “the *completely innocent victim*,” versus “the victim who is *more guilty than the offender*” in their victimization).

204. *See* State v. Pooler, No. 28619, 2021 Ohio App. LEXIS 636, at *54 (Ohio Ct. App. Mar. 5, 2021) (Hall, J., dissenting) (discussing the irrelevance of the victim’s prior role as a prostitute and rejecting the notion that engaging in prostitution equals consent to sexual intercourse).

205. *See generally* RESTATEMENT (SECOND) OF TORTS § 467 (A.L.I 1964) (“[T]he plaintiff’s contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.”).

206. Just like criminal law does not fault a robbery victim for living in a high crime area, it does not fault a sex worker for having a higher rate of victimhood. *See generally* JUDITH D. FEINS, JOEL C. EPSTEIN & REBECCA WIDOM, U.S. DEP’T OF JUST., SOLVING CRIME PROBLEMS IN RESIDENTIAL NEIGHBORHOODS: COMPREHENSIVE CHANGES IN DESIGN, MANAGEMENT, AND USE (1997), <https://www.ojp.gov/pdffiles/164488.pdf> (discussing how to address victimhood in high crime areas).

207. United States v. Cope, 24 F. App’x 414, 415–16 (6th Cir. 2001).

208. Proponents of broadening the Violence Against Women Act stated, “Congress couldn’t ‘pick and choose’ which victims to protect under the legislation,” and “the purpose of VAWA was to protect all victims of sexual assault or domestic violence, declaring ‘a victim is a victim is a victim and violence is violence is violence.’” Alizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 255 (2013).

Sex workers admittedly pose a lot of nuances. Characteristics that make them a vulnerable victim are not “one size fits all.” While “it is not enough to support a finding of particular susceptibility under § 3A1.1 that the victim[] [is] more likely than other members of the general population to become a victim to the particular crime at issue,”²⁰⁹ this hurdle is easily surmounted by sex workers. “[C]riminals will always tend to target their victims with an eye toward success in the criminal endeavor.”²¹⁰ Yet, the sex worker qualifies as a vulnerable victim because they enter this system with vulnerable qualities²¹¹ and become more vulnerable as their needs are exploited²¹² or their working conditions subject them to increased harm.²¹³ Regardless, imposing the enhancement harkens back to the victim’s inability to *resist* the defendant’s criminal endeavor.²¹⁴ Addressing the varied ways that a victim qualifies as a vulnerable victim appropriately reflects the individual’s lived experiences that made them more susceptible to exploitation.²¹⁵ Intersectionality occurs in sex work because sex workers are “likely to

209. United States v. Castellanos, 81 F.3d 108, 110 (9th Cir. 1996).

210. *Id.*

211. See, e.g., *Grooming and Recruitment*, SHARED HOPE INT’L, https://sharedhope.org/wp-content/uploads/2016/05/Intervene_Grooming-and-Recruitment-Overview.pdf (last visited Oct. 17, 2025) (describing recruitment practices and how groomers select their victims); Parker & Skrmetti, *supra* note 57, at 1021 (“Domestic sex trafficking victims also frequently come from very dysfunctional families. Their family life is rife with physical abuse, verbal abuse, neglect, and family abandonment.”); see also discussion *supra* Section II.A.1 and Section II.A.2 (discussing the involuntary and traditional sex worker, their vulnerability, and victim characteristics).

212. See United States v. Graham, 976 F.3d 59, 61–63 (1st Cir. 2020) (showing an instance where the defendant used the victim’s drug addiction to exploit and control her).

213. See generally *Sex Work and Adult Prostitution*, *supra* note 3 (“The occupational hazards of street-based sex work are unique: exploitation, violence, rape, and murder.”).

214. Some believe the enhancement centers on opportunity. See Sanders, Scoular & Campbell, *supra* note 1, at 112 (“The motivation behind offences against sex workers might not necessarily be hatred but rather opportunity.”).

215. There is criticism for ignoring the intersectionality of victims. See *id.* at 114 (“[T]he concept and operationalisation of ‘hate crime’ considers *one* characteristic, or identity, at a time. As a result, within this framework, intersectional experiences are stifled and often do[] not represent individual’s lived experiences.”).

face compound marginalisation around ethnicity, migrant status, [and] sexuality.”²¹⁶ While a sex worker should qualify as a vulnerable victim, this Note must offer additional, logistical solutions. Specifically, this Note offers guidance on how to acquire victim testimony from victims who are disinclined to cooperate with the justice system, and how to combat pervasive bias from jurors, prosecutors, and judges.

B. Logistics in Application

“Where sexual violence is present there is often even less sympathy for the victim.”²¹⁷ Because of this lack of sympathy, Sections III.B.1 and III.B.2 discuss how to incentivize the victim to testify and address the credibility of the victim. Section III.C then discusses the prosecutor’s latitude to ensure victim compliance. A central component of this solution’s success is the victim’s compliance with the justice system.

1. Victim Compliance and Testimony

Our criminal justice system does not provide victims with the opportunity to be heard, whether through structural barriers like prioritizing the defendant’s rights or through social hurdles like jury biases.²¹⁸ For this reason, acquiring victim testimony can prove difficult.²¹⁹ In response, prominent scholars state that victim advocates should allow the “survivor [to] self-define their needs and work . . .

216. *Id.*

217. *Id.* at 112.

218. Juan G. Villaseñor & Mariah Bauguess, *Restorative Justice: A New Conversation for Victims and Offenders*, 108 JUDICATURE, BOLCH JUD. INST. DUKE L. SCH., 31, 34 (2025) (“The criminal justice system is not necessarily structured to give victims a voice. Because of our constitutional framework, the focus is principally on protecting the defendant’s rights to ensure that only the guilty face consequences for their actions. In my experience presiding over criminal cases, it is not unusual for victims to report feeling unheard or unsatisfied with the process.”)

219. See Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 235 (2005).

with them to achieve their goals.”²²⁰ If victim services are done incorrectly, there is a risk that survivors’ needs will be neglected because members of the justice system equated the survivor to a mere witness.²²¹ This error reduces the survivor to a piece of evidence.²²²

Law enforcement and prosecutors can avoid this error “not by denying her benefits in an environment fraught with judgment and conditions, but by inviting her to heal through the use of these victim compensation benefits.”²²³ One way to achieve this is by lobbying for victim support services that meet the needs of the victim and make testifying achievable. While these victim services are not free, law enforcement officers—with knowledge that prostitution will not be prosecuted—will be enforcing the law in vain.²²⁴ Enforcing prostitution laws costs major cities exorbitant amounts.²²⁵ For example, one study from 2020 showed that “cities spend an average of \$7.5 million each

220. Butler, *supra* note 21, at 759–60. Butler criticizes typical responses to sexual violence, stating this type of violence “is often met with strategies that are definitionally opposed to survivor-centered practice, such as mandatory arrest and no-drop prosecution policies.” *Id.* at 760. Such actions from prosecutors and law enforcement can retraumatize or deter the victim from coming forward.

221. *See id.* at 761 (citing Sabrina Balamwala, *Trafficking Rescue Initiatives as State Violence*, 122 PENN ST. L. REV. 171, 197 (2017)).

222. *Id.* (citation omitted).

223. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 604 (1999). “It should be legislated that intimate abuse crimes are different from other crimes and involve victims who have unique safety, cultural, and emotional needs. Because the battered woman’s mental and physical health depend on the provision of those benefits, the battered woman must receive these benefits without strings attached.” *Id.* at 603. *Contra* DOERNER & LAB, *supra* note 22, at 96 (“One prominent feature of victim compensation is its close alliance with the criminal justice system.”).

224. *See* Jack Nissen, *Washtenaw County’s Top Cop Won’t Prosecute Sex Workers*, FOX 2 DETROIT (Jan. 14, 2021, at 22:30 ET), <https://www.fox2detroit.com/news/washtenaw-countys-top-cop-wont-pursue-charges-against-sex-workers> (discussing prosecutor’s new department policy against prosecuting sex workers).

225. *See* Pearl, *supra* note 28, at 772 (“The estimated expenditures on prostitution arrests of all sixteen [of the nation’s largest] cities combined were over \$120 million.”).

year enforcing prostitution laws.”²²⁶ Victim rehabilitation is a better allocation of funds than enforcement.²²⁷

One rehabilitative example is the G.R.A.C.E. Court—created for underage victims of trafficking.²²⁸ When the G.R.A.C.E. Court accepts a child, it “evaluates his or her needs and ensures that the child is referred to appropriate service providers.”²²⁹ Victims receive core services like “food and clothing, housing, medical care, counseling, substance abuse treatment, education and vocational support, employment opportunities, mentoring, and intensive case management.”²³⁰ Moreover, this court employs screening procedures when it suspects that the individual is a victim of trafficking.²³¹ Screening includes: acknowledgement of trafficking, association with other victims of sex trafficking or age-inappropriate friends or partners, exhibitions of submissiveness or grooming.²³² The bench book further acknowledges that to assist trafficking victims, actors acknowledge behaviors of the minor

226. *The Harmful Consequences of Sex Work Criminalization on Health and Rights*, YALE GLOB. HEALTH JUST. P'SHIP (June 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/consequences_of_criminalization_v2.pdf; see also Pearl, *supra* note 28, at 769 (highlighting an older study wherein Dallas police made 7,280 prostitution arrests at a cost of more than \$10 million to local taxpayers).

227. Restorative justice empowers the victim to control their narrative, allows for emotional healing, and addresses the specific needs of the victim. See Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 DENV. L. REV. F. 1, 14 (2021) (“Two of the primary ways in which restorative justice positively impacts victim-survivors include (1) victim-survivors are more satisfied with the criminal justice system, and (2) victim-survivors feel more emotionally restored.”). Additionally, some argue that restorative or rehabilitative programs are more cost efficient and beneficial for society. See Amber Massey, Note, *An Eye for an Eye Will Make the Whole World Blind: How Restorative Justice Will Help Florida See Again*, 43 NOVA L. REV. 79, 89–90 (2018) (“It is apparent though, based on the studies done in other countries, that there is a link between restorative programs and a decrease in recidivism The costs of using restorative justice are significantly lower than the traditional justice system.”).

228. ELEVENTH JUD. CIR. MIA. DADE CNTY., FLA., G.R.A.C.E. COURT BENCH BOOK 1 (2017), https://flcourts-media.flcourts.gov/content/download/217037/1968168/GRACE_Court_Benchbook.pdf (last visited Dec. 17, 2025).

229. *Id.* at 19.

230. *Id.*

231. *Id.* at 33.

232. *Id.*

as trauma responses, rather than acts of defiance or criminal culpability,²³³ and provide intensive case management. The bench book provides a thorough guide on the services a victim may need to depart from the industry²³⁴ or offset the harm inflicted by the trafficker. Effective victim support may also include informing the victim about the status of the criminal proceeding, arranging for victim support services during trials, or filing pre-trial motions as procedural safeguards.²³⁵ “Once a criminal case [begins], the need for testimony and cooperation with law enforcement may also act to retraumatize survivors *if not done properly*.”²³⁶ “Credibility discounts” may also retraumatize the survivor.²³⁷ Thus, combatting bias is necessary.

2. Addressing Pervasive Bias

When the victim testifies, they “may face a ‘credibility discount’ because of ‘[r]ecurring tropes of disbelief’ embedded in our culture,

233. *Id.* at 91 (“In the court setting, we may perceive these youth as inherently disrespectful, defiant, or antisocial, when, in fact, their disruptive behavior may be better understood in the context of traumatic stress disorders. These two Bench Cards provide judges with useful questions and guidelines to help them make decisions based on the emerging scientific findings in the traumatic stress field.”).

234. *See id.* at 19. Victims may need assistance leaving this profession to avoid prosecution. Andrea Powell, *Why Do We Lock Up Survivors of Sex Trafficking?*, N.Y. TIMES (Sep. 28, 2016, at 16:57 CT), <https://archive.nytimes.com/kristof.blogs.nytimes.com/2016/09/28/why-do-we-lock-up-survivors-of-sex-trafficking> (“[S]urvivors are being arrested, and often prosecuted for prostitution. With a record of prostitution, it’s much harder for these young women to attend college, receive public assistance, and live independent lives. Sometimes they are even required to register as sex offenders.”).

235. Prosecutors can help to counter these feelings by keeping victims informed of court dates and plea negotiations. Also, prosecutors can invite victims to participate in proceedings when appropriate, such as at a bail review hearing. When the case goes to trial, prosecutors should arrange for victims to have support persons available, and they should file pre-trial motions asking the judge to exclude evidence of the victim’s dress or sexual history unless it is relevant for a permissible purpose.

Tamara Rice Lave, *The Prosecutor’s Duty to “Imperfect” Rape Victims*, 49 TEX. TECH. L. REV. 219, 246–47 (2016).

236. Butler, *supra* note 21, at 761 (emphasis added).

237. *Id.* at 761–62 (citation omitted).

such as her maliciousness (meaning that she is therefore lying about assault), regretting giving consent (and therefore lying), or incapable of assessing whether she gave consent due to intoxication (and therefore lying).²³⁸ The non-paradigmatic victim might feel shame about going to the police or testifying, anxiety from cross-examination, or culpability due to the profession they are in. It would befit prosecutors to admit expert testimony on the credibility of sex workers to show that they may testify differently than other victims.²³⁹

Subduing bias is a burden further shared by the court. Some have progressed in the right direction. The court in *State v. Porter*, reviewing the corroboration rule, stated:

[t]here is no reason to assume that the victim of a sexual assault is less credible than the victim of a non-sexual assault [Where the Idaho Supreme Court] abolished that state’s corroboration rule, “there [was] no evidence showing that sex crime charges are frequently falsified or that sexual victims are an inherently unreliable class whose testimony should not be believed.”²⁴⁰

Courts combat bias by prohibiting the defendant from asking about the prostitute’s past consensual activity.²⁴¹ Those courts reason that jurors could be offended by that type of questioning because “such conduct

238. *Id.* (quoting Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 7–9 (2017)).

239. *See Lave, supra* note 235, at 230–36 (describing the characteristics of the imperfect victim, qualities that a prosecuting attorney should look to, acknowledge, and alleviate to ameliorate jury bias); *see also Poole v. State*, 284 So. 3d 604, 605–06 (Fla. Dist. Ct. App. 2019) (discussing testimony of a special agent who “explained the traits of a human trafficking victim, i.e., avoiding eye contact, suffering from physical injuries, exhibiting malnutrition, dressing provocatively, and displaying certain tattoos”).

240. 439 S.W.3d 208, 212 (Mo. 2014) (quoting *State v. Byers*, 627 P.2d 788, 790 (Idaho 1981)); *see also State v. Higgins*, 821 A.2d 964, 972 (N.H. 2003) (rejecting defendant’s argument that he should have been allowed to ask about previous sexual conduct because such questions might taint the jury’s view).

241. *Higgins*, 821 A.2d at 972.

[is] alien to their own experience and contrary to their morals.”²⁴² This results in jurors “unable to comprehend how such a person could be raped.”²⁴³

The thought of an “imperfect” victim should embolden prosecutors to confront their own biases. “If the measure of victory is not a guilty verdict and if prosecutors should choose the most flagrant cases with the greatest harm, then prosecuting rape cases with unsympathetic but highly vulnerable victims is a *just* thing to do.”²⁴⁴ The standard of prosecutors is that “justice shall be done.”²⁴⁵ Ethical rules governing attorneys require this.²⁴⁶ “[W]hen prosecutors are determining whether there is sufficient evidence to go forward, they must not consider certain traits the victim has unless they are relevant in one of *two* ways: to the elements of the crime or to the motive of the perpetrator.”²⁴⁷

C. Declining Prosecution to Increase Reporting

The government must exercise prosecutorial restraint to facilitate higher reporting because “[o]ne prominent feature of victim compensation is its close alliance with the criminal justice system.”²⁴⁸ Though prosecutors wield immense power in their decisions to pursue or eschew prosecution, their restraint is largely unquestioned.²⁴⁹

242. *Id.* at 972. “[T]he line of questioning . . . created undue risk of improperly diverting the jury’s attention to matters of a prurient nature and potentially affronting those who disagree with the propriety of that type of sexual activity.” *Id.*

243. *Id.*

244. Lave, *supra* note 235, at 238 (emphasis added). “[T]he prosecutor should be ‘animate[d]’ by ‘the spirit of fair play and decency.’ Thus, the measure of a successful case is not always a guilty verdict. ‘Although the government technically loses its case, it has really won if justice has been done.’” *Id.* at 237–38 (quoting Robert H. Jackson, Att’y Gen. of the U.S., The Federal Prosecutor, An Address at the Second Annual Conference of United States Attorneys 3 (Apr. 1, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>).

245. *Berger v. United States*, 295 U.S. 78, 88 (1935).

246. *See* Lave, *supra* note 235, at 239 (referencing ABA Rule 2.1(d) and interpreting it as “a hermeneutic for other parts of the ABA Standards”).

247. *Id.*

248. DOERNER & LAB, *supra* note 22, at 96.

249. *See* *United States v. Kennard*, 1:19-cr-00074, 2021 U.S. Dist. LEXIS 220082, at *15 (D. Me. Nov. 15, 2021) (“[P]rinciples of judicial deference

The victim often meets with law enforcement before the prosecutor, but this can be a barrier to justice.²⁵⁰ Victims fear that police officers will arrest them, while letting the offender go unpunished since some police officers do not believe that sex workers can be victimized.²⁵¹ For instance, Karen was prostituting when her offender “pull[ed] an ice pick out and rape[d] [her]. He kept [her] about three hours, and . . . said he was going to kill [her].”²⁵² After friends intervened, they later cornered the man, and took the ice pick.²⁵³ Police came to arrest them for assaulting the offender.²⁵⁴ The officer told Karen’s friend the rape “was impossible because [Karen] was a prostitute and *could not be raped*.”²⁵⁵ After showing them the ice pick, the officers “grudgingly decided it had happened.”²⁵⁶ Officers refused to take a police report.²⁵⁷ Karen wrote, “I was only seventeen years old and still believed in our justice system. Even though I am a prostitute, I feel *I*

to prosecutorial discretion make inappropriate [defendant’s] discovery requests about the prosecutor’s decision-making.”).

250. “[M]isidentification by law enforcement and other stakeholders is one of the most significant barriers to helping youth at risk for [commercial sex exploitation]. Misidentification occurs when first responders . . . classify CSE victims as delinquents rather than victims.” *Child Protective Services Involvement Among the Commercially Sexually Exploited*, *supra* note 18, at 365. See Lyn Archer, *Criminalizing Strippers’ Work Makes Young Women More Vulnerable*, NOLA (Feb. 6, 2018), https://www.nola.com/opinions/article_603274cf-3833-5aa2-88e6-624c6149ab9f.html, for an example of why sex workers may not engage with law enforcement officers. During Carnival season in New Orleans, law enforcement agencies pulled liquor licenses and took actions that, in the opinion of a strip club worker, impact them negatively. Critical of their police methods, she stated, “Bourbon Street workers could offer critical and sensitive information to help stop violence, if only law enforcement could foster trust by demonstrating they are capable of treating us with respect.” *Id.*

251. See *infra* notes 255–257 and accompanying text (describing an instance where the officer failed to make a police report when a sex worker was raped because he believed she could not be raped).

252. Karen, *The Right to Protection from Rape*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 145, 145 (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998).

253. *Id.*

254. *Id.*

255. *Id.* (emphasis added).

256. *Id.*

257. *Id.* at 146.

should still be entitled to protection.”²⁵⁸ Sex workers also will not seek help from police officers for fear of stigmatization, mishandling, assault, or sexual assault.²⁵⁹ Police officers require more training.²⁶⁰

However, refusing to prosecute the sex worker in exchange for their cooperation with the justice system is within the prosecutor’s purview.²⁶¹ Prosecutors decide when to initiate prosecution and determine

258. *Id.* (emphasis added).

259. *Sex Work and Adult Prostitution*, *supra* note 3 (“[T]here are reports of police officers raping prostitutes or demanding free sex for police protection.” (citation omitted)); Gloria Lockett, *What Happens When You Are Arrested*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 39, 39–40 (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998) (describing how officers in California would demand blowjobs, leave sex workers in dark areas, or respond to ads in unmarked vehicles demanding sexual intercourse). An officer’s demeanor can deter sex workers from seeking help. See Josephine Ramage, Note, *A Second Chance at the Good Life: Vacatur for Human Trafficking Survivors in Nebraska*, 14 NEB. L. REV. 1, 1 (2024) (“Too afraid of her trafficker to ask the law enforcement officers for help, Macy appeared to officers as a consenting sex worker. Macy was only released from police custody after she was forced into promising that she would testify against her trafficker. Instead of treating her as a victim of a horrendous crime in need of medical and legal assistance, the law enforcement officers perceived Macy as an asset to be utilized in criminal prosecution and even as a co-defendant to be penalized.”). Sting operations perpetuate the notion that sex workers are mere co-defendants or assets. See Kelley Frances Stielor, Note, *The Government Menage ‘a Trois: Unraveling the Government Sex Partner in Undercover Prostitution Strings*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 453, 455–57 (2009) (arguing that sting operations demonstrate government policy stances against sex workers and that this practice should be scrutinized).

260. See Sanders, Scoular & Campbell, *supra* note 1, at 118 (discussing how UK law enforcement is bridging the gap by learning how to communicate with sex workers safely and effectively). Police practices also perpetuate violence. See Strathdee et al., *supra* note 33, at S113 (“[W]orkplace raids, arrest and threats of arrest, confiscation of condoms, forcing [female sex workers] to pay bribes or provide sexual favors to avoid arrest are associated with decreased condom use with clients and increased violence. Monetary bribes and arrests deplete women’s earnings, which can create an urgency to compensate by taking on more clients or agreeing to riskier clients.”); SCOTT & DEDEL, *supra* note 15, at 3 (law enforcement agency identifying prostitution as a nuisance and offensive to “some citizens’ moral standards”).

261. Some prosecutors are pushing this initiative. See Nissen, *supra* note 224 (“When sex workers fear prosecution, they are less likely to report serious crime—crime like human trafficking, sexual assault, and physical assault.”).

the specific legal violations to pursue.²⁶² Defendants that petition the court to question a prosecutor's decisions face an uphill battle because courts perceive that inquiry as beyond the "court's discretionary control."²⁶³ Prosecutorial discretion:

rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.²⁶⁴

Inquiring into prosecutorial decision-making further encroaches on the separation of powers because prosecutors are a part "of the executive branch, not the judiciary."²⁶⁵ Thus, prosecutors wield immense power in choosing not to prosecute the worker in exchange for their compliance with the justice system.²⁶⁶

IV. CONCLUSION

Classifying sex workers as vulnerable victims during sentencing is reactive, not proactive. However, the solution is a conduit for those

262. *Seun Ogunkoya v. Monaghan*, 913 F.3d 64, 71 (2d Cir. 2019) ("The decision to initiate prosecution, what charges to bring, and how to perfect and consolidate those charges is a quintessential prosecutorial function."); *see also* *United States v. Pretlow*, 779 F. Supp. 758, 776 (D.N.J. 1991) ("The government is generally afforded wide discretion as to whom to prosecute."). If "the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests in his [or her] discretion." *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

263. *United States v. Zabawa*, 39 F.3d 279, 284 (10th Cir. 1994).

264. *Id.*

265. *Id.*

266. *See* YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE* 10, n.g (15th ed. 2019) (describing diversion programs which could also support this proposal's scheme).

who push for decriminalization and deterrence of heightened violence. Sex workers face increased violence because they are seen as immoral or unworthy.²⁶⁷ But this group, like other victims, are vulnerable because of substance dependency, destitution, lack of schooling or communal support, and pervasive ailments.²⁶⁸ Though less sympathetic, this should not preclude the application of the enhancement. The sex worker “can identify with that, you know, stigma. . . . [But] people need to recognise that [they] are *human beings*.”²⁶⁹ Applying the vulnerable victim sentencing enhancement to sex workers recognizes them as worthy victims and deters the violence they face at alarmingly high rates.

267. Farley and Barkan reported that 68% of street-level prostitutes interviewed in San Francisco had been raped since becoming prostitutes, with 48% who were raped more than five times. Even more troubling, Brewer et al. reported that prostitutes have the “highest homicide victimization rate of any [population] of women ever studied.” They conservatively estimated that “2.7% of all female homicides in the United States during the 1982–2000 period” were prostitutes.

Lave, *supra* note 235, at 242–43.

268. See *supra* Section III.A (discussing prior precedent where courts imposed the vulnerable victim sentencing enhancement).

269. Sanders, Scoular & Campbell, *supra* note 1 (emphasis added).