Kids For Sale: Does America Recognize Its Own Sexually Exploited Minors As Victims Of Human Trafficking?

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I. INTRODUCTION

In the United States, human trafficking is a major epidemic.[1] The Obama Administration has estimated that "more than 20 million men, women and children are victimized by forced labor and sex trafficking worldwide, including in the United States."[2] Many of the victims who are trafficked for commercial sex are minors.[3] International child sex trafficking—the trafficking of minors from foreign countries for commercial sex—is a vexing part of the problem.[4] Of the estimated 700,000 persons trafficked into the United States each year from abroad, an estimated 50,000 are women and children trafficked from other countries for commercial sex.[5]

Yet, domestic child sex trafficking[6]—the commercial sexual exploitation of minors from within U.S. borders—is an equally

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[1] THE WHITE HOUSE, COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICE FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017 5 (2013) *available at* http://www.ovc.gov/pubs /FederalHumanTraffickingStrategicPlan.pdf.

[2] *Id.*

[3] Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013) ("Recent reports on sex trafficking estimate that hundreds of thousands of children and youth are at risk for domestic sex trafficking."); LINDA A. SMITH ET AL., SHARED HOPE INTERNATIONAL, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 4 (May 2009), *available at* http://sharedhope.org /wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

[4] For legal scholarship on the pervasiveness of international sex trafficking and the need for innovative solutions, see Geneva O. Brown, *Women and Children Last: The Prosecution of Sex Offenders and the Need for a Sex Trafficking Registry*, 31 B.C. THIRD WORLD L.J. 1, 1 (2011) (arguing for the creation of an international sex offender registry as part of an effective international law enforcement response); Michelle Madden Dempsey et al., *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT'L L. REV. 137 (2012); Erika R. George, Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT'L L. & POL. 55 (2013); Janet E. Halley, et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitutional/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335 (2006).

[5] Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(1) (2006), *available at* http://www.justice.gov/archive/olp/pdf/tvpa2000.pdf.

[6] SMITH ET AL., *supra* note 3; SHARED HOPE INTERNATIONAL, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK FOR THE PROTECTION OF THE NATION'S CHILDREN 6 (2013) ("Domestic minor sex trafficking is the commercial sexual exploitation of American children within U.S. borders and is synonymous with child sex slavery, child sex trafficking, child prostitution, and commercial sexual exploitation of children (CSEC)."); *see* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS (TIP) REPORT 372 (2011), *available at* http://www.state.gov/documents /organization/164458.pdf ("U.S. citizen victims, both adults and children, are predominantly found in sex trafficking.").

serious problem.[7] In the United States, the prostitution is a major lucrative enterprise in which pimps make millions of dollars in profits.[8] The most profitable legal paradigm involves "pimps"—adults who use psychological methods to target minors because they are "easier to manipulate, work harder to earn money and are more marketable."[9] The minors may reach quotas of as much as $400 a day and then turn over all of the money to the adult.[10] The majority of these child prostitution cases in the United States involve native, as opposed to foreign, youth.[11] According to the United States Senate, 200,000 to 300,000 domestic minors are at risk of exploitation by America's commercial sex industry.[12] Moreover, the average age in which minors are trafficked for commercial sex is between twelve and fourteen years old.[13] Children as young as five years old have been sold for sex, some even by their own parents.[14] In attempts to escape

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[7] Chuck Neubauer, *Sex Trafficking in the U.S. Called "Epidemic,"* WASH. TIMES (Apr. 23, 2011), http://www.washingtontimes.com/news/2011/apr/23/sex-trafficking-us-called-epidemic/html; *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 1 (2010) (statement of Hon. Richard Durbin), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg58003/pdf/CHRG-111shrg58003.pdf ("But despite the efforts of Congress and the executive branch, the scourge of human trafficking continues to plague our nation and our world. There is no more heartbreaking part of this problem than the sexual exploitation of children.").

[8] MATTHEW JOHNSON, MEREDITH DANK. URBAN INSTITUTE, THE HUSTLE: ECONOMICS OF THE UNDERGROUND COMMERCIAL SEX INDUSTRY 2 (March 2014) ("Atlanta had the largest underground commercial sex economy in 2007 at $290 million" as compared to Dallas, Denver, Miami, San Diego, Seattle and Washington, D.C.) (hereinafter "URBAN INSTITUTE REPORT"), *available at* http://datatools.urban.org/features/theHustle/index.html.

[9] *Id.* at 4–5.

[10] *Id.* at 6–7. (As one pimp confided, "these girls, they don't get no cut or anything, but they do get anything they want or need . . . the reason you don't give them their own money, they would be like, 'I can just keep this.'")

[11] Press Release, The White House, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative.

[12] S. 340, 113th Cong. (2014), *available at* http://www.govtrack.us/congress/bills/113/sres340/text; Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013) ("Recent reports on sex trafficking estimate that hundreds of thousands of children and youth are at risk for domestic sex trafficking."). For such reports, see SMITH ET AL., *supra* note 3, at 4 (quoting the DVD, Prostituted Children in the United States: Identifying and Responding to America's Trafficked Youth, Seg. 1 (Shared Hope International and Onanon Productions 2008)).

[13] S. 340, 113th Cong. (2014), *available at* http://www.govtrack.us/congress/bills/113/sres340/text; SMITH ET AL., *supra* note 3, at 30.

[14] *See, e.g.*, Martha Bellisle, *Police: Girl Forced into Prostitution at Age 11*, USA TODAY (July 31, 2013), http://www.usatoday.com/story/news/nation/2013/07/31/police-girl-forced-into-prostitution-at-age-11/2607269/; Sammy Saltzman, *Shaniya Davis*

sexual abuse in their homes, many kids run away from home only to be lured into the commercial sex industry.[15] They become at risk for all forms of sex trafficking, including pornography, stripping, modeling, and prostitution.[16] If arrested or detained for prostitution, they face criminal prosecution or adjudication as juvenile delinquents.[17]

Yet, arguably, the issue of domestic sex trafficking has not received the same degree of public attention.[18] New legal scholarship is emerging that draws attention to the plight of the issue of domestic child sex trafficking.[19] For several reasons, the American public has lacked awareness about the pervasiveness and nature of domestic

Found Dead; Mother Turned Little Girl into Sex Slave, Say Police, CBS NEWS (Nov. 16, 2009), http://www.cbsnews.com/news/shaniya-davis-found-dead-mother-turned-little-girl-into-sex-slave-say-police/.

[15] S. 340, 113th Cong. (2014), *available at* http://www.govtrack.us/congress/bills/113/sres340/text ("[s]ex trafficking victims are often abducted or lured into running away by traffickers . . ."); *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 9 (2010) (statement of Beth Phillips, U.S. Attorney Western District of Missouri), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg58003/pdf/CHRG-111shrg58003.pdf.

[16] *See* CHILDREN AT RISK, THE STATE OF HUMAN TRAFFICKING IN TEXAS 11 (ROBERT SANBORN ET AL. EDS., 2011).

[17] *See* Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL. REV. 1, 24-30 (2011); Sanborn, *infra* note 21, at 37, 44.

[18] As Professor Sally Green noted, "[w]hile [sex trafficking] has garnered an appropriate amount of attention from lawmakers and legal scholars, there has been less focus on the specific challenges faced by child sex victims of human trafficking and the available protections afforded them." Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309, 312 (2008) (focusing on the need to protect international child victims).

[19] For legal scholarship on the emerging new legal responses to domestic sex trafficking, see generally Wendi Adelson, *Child Prostitute or Victim of Trafficking?* 6 U. ST. THOMAS L.J. 96, 96–97 (2008); Annitto, *infra* note 17, at 21–25 (2011); Tamar Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011); Janie Chuang, *Rescuing Traffic From Ideological Capture: Prostitution Reform & Anti-Trafficking Law & Policy*, 158 U. PA. L. REV. 1655 (2010); Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783 (2012); Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America's Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619 (2013); Krystle M. Fernandez, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 ARIZ. ST. L.J. 859 (2013). Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091 (2014); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107 (2012); Jonathan Todres, Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking, 89 N.C. L. Rev. 447 (2011); Anders Walker, *Strange Traffic: Sex, Slavery and the Freedom Principle*, 46 CONN. L. REV. 561 (2013).

child sex trafficking. In part, this lack of understanding was due to the sometimes hidden nature of child sexual exploitation and the reality that prostituted minors do not always self-identify as trafficking victims.[20] Yet, adults have also been in denial. The failure to effectively address this epidemic has also stemmed the "not in my backyard syndrome"—the stubborn refusal to believe the fact that children are bought and sold, "in our own backyard" that is, here in the United States.[21] Indeed, the media and policy makers have focused primarily on international child sex trafficking.[22] However, U.S. government leaders now are growing increasingly aware that domestic sex trafficking is much more complex and disturbing than such stereotypes lead us to believe. As President Barack Obama acknowledged to the world in his speech before the Clinton Global Initiative, "the bitter truth is that trafficking also goes on right here, in the United States . . . the teenage girl, beaten, forced to walk the streets. This should not be happening in the United States of America."[23]

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[20] JONATHAN TODRES ET AL., US DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, INSTITUTE OF MEDICINE, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES, 2 (2013) ("Numerous factors contribute to a lack of understanding or awareness of . . . sex trafficking in the United States. These crimes may be overlooked, as they often occur at the margins of society and behind closed doors."), available at http://www.iom.edu/~/media/Files/Report%20Files/2013/Sexual-Exploitation-Sex-Trafficking/sextraffickingminors_rb.pdf (hereinafter "IOM Report").

[21] CHILDREN AT RISK, THE STATE OF HUMAN TRAFFICKING IN TEXAS 7 (Robert Sanborn et al. eds., 2011) ("Human trafficking once was thought to be a problem beyond America's borders. This is, however, far from reality."); *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 14 (2010) (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational and Mentoring Services (GEMS)), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg58003/pdf/CHRG-111shrg58003.pdf ("In Our Own Backyard is a very fitting title for this hearing, and I think the predominant response over the last few years has been 'not in my backyard' to this issue. We have had a rough time getting people to recognize this is really happening . . . it is happening here.").

[22] Wendi Adelson, *Child Prostitute or Victim of Trafficking?* 6 U. ST. THOMAS L.J. 96, 96–97 (2008); Tamar Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059–60 (2011) ("While the United States is a signatory to its Global Declaration & Agenda for Action for Action, the bulk of its attention and resources has been directed at the international sex trafficking of adults and children rather than the growing number of preteens and adolescents who are prostituted within its borders.").

[23] Press Release, The White House, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative.

The President's remarks raise important questions. Does America's current legal approach to child sex trafficking adequately protect its own minors? Are America's federal and state laws regarding consistent and in tandem with respect to protecting minors from, sexual exploitation?[24] Legal scholars have long argued that, on a variety of fronts, America's federal legal approach has failed to effectively address human trafficking.[25] Moreover, scholars have argued that America's legal approach to human trafficking has marginalized certain groups, including men[26] and minorities.[27]Arguably, America's own sexually exploited minors also have been marginalized by anti-trafficking laws and approaches.[28]

A major issue is whether American laws will consistently recognize all prostituted minors as "victims of human trafficking." In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA) and reauthorized this federal legislation as the Trafficking Victims Protection Reauthorization Act (TVPRA) in 2003, 2005, 2008, and, most recently, in 2013.[29] The TVPRA prohibits various forms of human trafficking, including child sex trafficking.[30] Under the TVPRA, consent to commercial sex is irrelevant to the legal definition of trafficking in cases where the prostituted person is a minor.[31]

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[24] *See* Birckhead, *supra* note 19, at 1059; Adelson, supra note 19, at 96–97.

[25] *See* Adelson, *supra* note 19, at, 96–97; Jennifer M. Chacon, *Misery & Myopia: Understanding the Failures of the U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2978–79 (2006); Chuang, *supra* note 19, at 1667; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Procedural and Legal Failures Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 3, 11–13 (2007).

[26] For arguments that men have been marginalized in the war against human trafficking, see Samuel V. Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143 (2010); Chuang, *supra* note 19, at 1711.

[27] For arguments that certain minority groups have been marginalized in the war against human trafficking, see Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 498 (2011); Andrea Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women & Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 622 (2012);Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 621 (2009); *see also* Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L. J. 207, 278 (2007).

[28] For scholarly discourse on America's response to domestic child sex trafficking, see Birckhead, *supra* note 19, at 1059.

[29] Trafficking Victims Protection Act of 2000, 22 U.S.C §§ 7101–7110 (2000); Victims of Trafficking and Violence Protection Reauthorization Act of 2013, Pub. L. No. 113-14, 127 Stat. 54 (2013).

[30] Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8)(A) (2006); SMITH ET AL., *supra* note 3, at iv.

[31] *Id.*

In stark contrast, states have adopted varied legal approaches to child sex trafficking, some of which are inconsistent with the TVPRA's presumption that a minor cannot consent to commercial sex.[32] In particular, several states decline to follow the TVPRA's policy of recognizing all prostituted minors as victims of human trafficking.[33] State laws that presume that a minor can consent to prostitution reflect this departure. Specifically, several state laws presume that prostituted minors consent to commercial sex.[34] Thus, to rebut this presumption of consent to a commercial sex act, several state laws require proof of force, fraud, or coercion (FFC), a policy position that anti-trafficking advocates strongly critique.[35] Moreover, under several state laws, if a prosecutor cannot rebut a minor's presumed consent to prostitution, then the minor can be punished as a criminal.[36] Congress has expressed concern over this "legal dichotomy in America in which the Federal Government views prostituted children as victims, yet, most states treat them as criminals."[37] Moreover, adults who purchase minors for commercial sex are rarely punished criminally for their role in the same act of

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[32] *See* SMITH ET AL., *supra* note 3, at 9–15 (grading states based on their varying legal approaches to domestic minor sex trafficking).

[33] *Id.*

[34] *See* SHARED HOPE INTERNATIONAL, DEMANDING JUSTICE PROJECT: BENCHMARK ASSESSMENT 8 (2013) ("A persistent confusion exists regarding the agency of a minor in prostitution and that of a minor engaged in commercial sex, frequently resulting in the invocation of age of consent laws when considering heightened penalties for those buying sex acts with a child. This has led to some states using the age of consent laws to draw the line, rather than the age of majority."), *available at* http://sharedhope.org/wp-content/uploads/2013/11/Demanding-Justice-Project-Benchmark-Assessment-Report-2013.pdf

[35] *Id.; See* SHARED HOPE INTERNATIONAL, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK FOR THE PROTECTION OF THE NATION'S CHILDREN 27 (2013) ("To ensure identification of sexually exploited children as victims and to prevent traffickers from escaping criminal liability through manufactured evidence of consent, all minors under the age of 18 should be deemed unable to consent to involvement in commercial sex acts, this rendering the elements of force, fraud, or coercion irrelevant in domestic minor cases,"), *available at* http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf.

[36] *In Our Own Backyard*, *supra* note 7, at 1 ("We have created a legal dichotomy in America in which the Federal Government views prostituted children as victims, yet most states treat them as criminals.").

[37] *Id.*; Bravo, *supra* note 27, at 482 (2011) ("Although the Trafficking Victims Protection Act has been enforced at the federal level and many states have enacted their own anti-trafficking legislation, the anti-trafficking policies have been slow to take hold at state and local levels at a time when soaring child poverty rates are increasing the involvement of girls in commercial sexual exploitation.").; Adelson, *supra* note 19, at 96–97.

prostitution.[38]

This Article argues that laws that presume that minors consent to commercial sex undermine efforts to effectively combat child prostitution and thus, a new legal framework is needed to protect minors.[39] Current laws and policies obscure the reality that most minors do not choose prostitution and instead, are manipulated by third parties who take advantage of a minor's emotional vulnerabilities. The collateral consequences that stem from legal rules that presume that minors can consent to sex are devastating to minors and society and therefore highlight the need for new and consistent approaches to child prostitution and minor sex trafficking. For example, in the United States, the inconsistencies between federal and state law approaches to child prostitution undermine the ability of law enforcement officials and other advocates to identify sexually exploited minors as "victims of human trafficking."[40] As a result, minors may face criminal prosecution.[41] Furthermore, the failure to properly identify sexually exploited minors as trafficking victims perpetuates a myriad of social problems that ensue from child sexual exploitation.[42] The prostitution of minors creates health risks for these minors and their communities.[43] Prostituted minors who

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[38] Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in* United States v. Jungers, 43 MEM. L. REV. 917, 931 (2013)("In 2005, Congress stated in findings supporting the End Demand for Sex Trafficking Act of 2005 that eleven females engaged in commercial sex acts were arrested in Boston for every one arrest of a male purchaser, nine to one in Chicago, and six to one in New York City."). Courts have begun to find the purchasers of commercial sex guilty of human trafficking. *See* United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013); Furthermore, the federal government has clarified that purchasers of sex with a minor are considered criminally liable under the TVPRA, *see* SHARED HOPE INTERNATIONAL, DEMANDING JUSTICE PROJECT: BENCHMARK ASSESSMENT 10–12 (2013).

[39] *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS (TIP) REPORT 12 (2010) ("Sex trafficking has devastating consequences for minors, including long lasting physical and psychological trauma, disease [including HIV and AIDS], drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death.").

[40] *See generally id.* at 7 ("The United States recognizes that, like other countries, it has a serious problem with human trafficking for both labor and commercial sexual exploitation."); SMITH ET AL., *supra* note 3, at 4, 9; *In Our Own Backyard*, *supra* note 7.

[41] S. 29, 113th Cong. (2013) ("[M]any child sex trafficking victims who have not yet attained the age of consent are arrested or detained for juvenile prostitution or status offenses directly related to their exploitation."); Adelson, *supra* note 17, at 107–09.

[42] *See* TIP REPORT 2010, *supra* note 39, at 12 ("Sex trafficking has devastating consequences for minors, including long lasting physical and psychological trauma, disease [including HIV and AIDS], drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death.").

[43] Jonathan Todres, The *Private Sector's Pivotal Role in Combating Human*

are identified as delinquent or criminal may be denied special services reserved for people identified as victims of sex trafficking.[44]

To address these issues, legislators and courts should abandon the consent framework in commercial sex cases involving minors and adopt in its place a vulnerabilities framework for child sex trafficking laws. A vulnerabilities framework would eliminate the need for proof of FFC in child sex trafficking cases and instead would recognize all minors prostituted by adults as victims of human trafficking. A vulnerabilities framework could offer a comprehensive response to child sex trafficking. Moreover, this new framework would encourage governmental leadership in providing victim services to sexually exploited minors.

Part I introduces the epidemic of U.S. domestic child sex trafficking and the need for effective legal and policy responses. Part II examines the conflicting federal- and state-law approaches to child prostitution. Part III analyzes the legal precedents and theoretical frameworks that undergird the role of the FFC test in sex trafficking jurisprudence. One influence is the conflicting treatment of age and sexual consent in state criminal and family law statutes. Another influence is the misapplication of feminist debates on prostitution and consent beyond cases involving adults to cases involving minors.

Part IV analyzes the various means that traffickers use to exploit minors in prostitution in the United States. In exploring the facts, Part III shows that the FFC/consent paradigm is inappropriate for child prostitution cases for several reasons. First, while some cases fit the FFC paradigm, others do not. Second, minors rarely consent to prostitution, even in those cases that do not fit the FFC paradigm. Third, Part IV indicates that the common factor in child prostitution is the exploitation of a minor's vulnerabilities. Therefore, effective policy responses should focus on minors' vulnerability to sexual exploitation as opposed to legal tests which purport to measure or rebut the presumption of consent.

Trafficking, 3 CAL. L. REV. CIR. 80, 82–83 (2012) ("Trafficked individuals frequently suffer beatings and broken bones, face increased risk of contracting HIV and other sexually transmitted infections, are forced to live in overcrowded and unsanitary conditions with insufficient amounts of food, and are exposed to toxic chemicals, carcinogens, and other harmful substances."). On the public health risks of sex trafficking, see generally, Jonathan Todres, *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL'Y 93 (2012).

[44] Cheryl Nelson Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors*, 45 AKRON L. REV. 843, 857 (2011).

Part V examines how international law and other legal precedents support the view that a framework focused on a minor's vulnerability to sexual exploitation, rather than consent, is the most effective legal response to domestic child sex trafficking. First, international law—particularly the Palermo Protocol— provides an alternative framework. Second, Part V examines how United States Supreme Court precedents on adolescent brain development can be applied to child prostitution cases. Third, the legal treatment of minor's capacity to consent under state law also lays down the framework for the application of a vulnerabilities framework for child sex trafficking.

II. CONFLICTING LEGAL APPROACHES TO CHILD SEX TRAFFICKING

A. Federal Law

Of the various federal laws Congress has enacted to proscribe domestic child sex trafficking,[45] the TVPRA[46] has been hailed as the most comprehensive.[47] To combat human trafficking crimes abroad and at home, the United States enacted the TVPA in 2000 and reauthorized this federal legislation as the TVPRA in 2003, 2006, 2008,[48] and in 2013.[49] The TVPRA's self-proclaimed goals, known as

[45] The Mann Act proscribes the sexual exploitation of minors. Likewise, the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, or the "PROTECT Act" defines "illicit sexual conduct" to mean a sexual act with a person under eighteen years old or one that would violate the TVPRA. 18 U.S.C. § 2423(f) (2006). The PROTECT Act is best known for establishing the national Amber Alert Program, a powerful tool for capturing perpetrators who engage in intrastate travel to commit sex crimes against minors. The Act combats child exploitation involving interstate and foreign travel or commerce. Section 2423(c) criminalizes "child sex tourism," the process of "engaging in illicit sexual conduct in foreign places." *See* 18 U.S.C. § 2423(c); *see also* H.R. REP. NO. 108-66, at 51 (2003); Mark Orndorf, *The Secret World of Child Sex Tourism: Evidentiary and Procedural Hurdles of the Protect Act*, 28 PENN. ST. INT'L L. REV. 789, 790–91 (2010); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 950, 995 (2010). Section 2423(d) reaches organizers of child sex tourist excursions or other facilitators. 18 U.S.C. § 2423(d).

[46] Trafficking Victims Protection Act of 2000, 22 U.S.C §§ 7101–7113 (2006).

[47] Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 CARDOZO J.L. & GENDER 855, 876–77 (2006).

[48] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION REAUTHORIZATION ACT OF 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

[49] *Id.* Congress delayed reauthorization of the TVPRA in 2012 due to political conflicts. Jacqueline Zimowski, Editorial, *The Fight Against Modern Slavery*, N.Y. TIMES (Mar. 21, 2012), http://www.nytimes.com/2012/03/22/opinion/the-fight-against-modern-slavery.html?_r=0; *Now, Not Later: Leading By Example in the Fight Against Modern-Day Slavery*, WORLD VISION GLOBAL YOUTH COMMUNITY (Aug. 30, 2012),

the "four Ps," are "to punish traffickers, [to] protect victims, to prevent trafficking from occurring,"[50] and to create "partnerships" between various community stakeholders in the battle against human trafficking.[51]

In cases involving adults, the TVPRA adopts a consent paradigm to distinguish prostitution from sex trafficking. The TVPRA requires proof of FFC in sex trafficking cases involving adults.[52] The statute distinguishes between human trafficking and "severe forms of trafficking," and guarantees certain legal protections only to victims of the latter.[53] Under the TVPRA, "severe forms of trafficking" include prostitution of an adult by means of force, fraud, or coercion.[54]

In contrast, the TVPRA recognizes all prostituted minors as victims of sex trafficking.[55] All minors under the age of eighteen who are caused by another person to engage in a commercial sex act are victims of "severe forms of trafficking."[56] The TVPRA eliminates force, fraud, or coercion as elements of a federal child sex trafficking claim.[57] Thus, under the TVPRA, consent to commercial sex is irrelevant whenever the prostituted person is a minor. The TVPRA is violated whenever a perpetrator knowingly "recruits, entices, harbors, transports, provides, obtains, or maintains by any means" a minor for the purposes of a commercial sex act.[58] Furthermore, the TVPRA bars consent by a minor to a commercial sex act as a defense in a child sex trafficking case.[59]

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http://blog.worldvisionyouth.org/2012/08/30/tvpra-why-now/; Jessica Bousquette, *Human Trafficking: Consequences of Congressional Inaction*, WORLD VISION BLOG (July 6, 2012), http://blog.worldvision.org/advocacy/human-trafficking-consequences-of-congressional-inaction.

[50] *Id.*

[51] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS (TIP) REPORT 1(2013); 22 U.S.C. § 7102(8)(A) (Supp. 2009).

[52] TVPA § 103(8) (codified at Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8)(A) (2006);

[53] 22 U.S.C. § 7102(8)(A) (Supp. 2009).

[54] 22 U.S.C. § 7102(9) (Supp. 2009).

[55] Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8)(A) (2006); SMITH ET AL., *supra* note 3, at iv.

[56] 22 U.S.C. § 7102(8)(A)–(B) (Supp. 2009).

[57] Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8)(A) (2006); SMITH ET AL., *supra* note 3, at iv.

[58] *Id.*

[59] Adelson, *supra* note 19, at 106 (citing TVPRA, 22 U.S.C. §§ 7101–12 (Supp. 2009)). The 2008 TVPRA lowered the mens rea for FFC in sex trafficking cases from "knowing" to "reckless disregard." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. § 222(b)(3) (2008);

B. State Law Approaches

The debate over whether the law should recognize a minor's consent to sex has created inconsistent legal approaches. First, state prostitution statutes and rape laws have treated the issue of a minor's consent to sex in conflicting ways.[60] Second, new state anti-trafficking legislation also reflects this lack of consensus on whether or not an FFC rule is needed to measure a minor's consent to commercial sex.

In contrast to the federal TVPRA's strict proscriptions against child prostitution, there is no uniform state law approach to the issue.[61] Several states have been slow to enact legislation recognizing child sex trafficking as a distinct crime.[62] As of 2012, Virginia, Pennsylvania, Nevada, Maine, Hawaii, and Colorado had no separate laws for child sex trafficking at all.[63]

Even though the TVPRA only requires proof of FFC in cases involving adults, states have used the TVPRA's FFC rule in child sex trafficking cases. Among the states that have adopted anti-trafficking legislation, some have declined to follow the TVPRA's policy of eliminating the FFC rule in child sex trafficking cases.[64]

State courts that have applied the FFC test in cases involving minors have failed to adopt the broad test used under the TVPRA. Arguably, it seems that state laws have misconstrued the federal FFC test by adopting a narrowed construction of "coercion" in child sex trafficking cases. While the TVPRA's FFC test recognizes abuse of power as a form of coercion, judges in child prostitution cases still hold that minors consent to sex even in cases where such abuse of power is present. For example, in some cases an adult seduces, coerces, or otherwise compels the child to engage in "survival sex" — prostitution in exchange for food, shelter, or other needs.[65]

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18 U.S.C. § 1589(b) (2003). Thus, a defendant violates the TVPRA if he or she knew or had reckless disregard for the fact that the trafficked person was a minor. § 222(b)(3).

[60] Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 21–25 (2011).

[61] *Id.* at 25 ("While the response of authorities to [child prostitution] is changing on the national level, states have been slower to follow suit); *see also* SHARED HOPE INT'L, THE PROTECTED INNOCENCE CHALLENGE 128, 140, 156, 174, 194, 210 (2012), *available at* http://sharedhope.org/wp-content/uploads/2012/09/ProtectedInnocenceChallenge_FINAL_2012_wcover_web.pdf.

[62] Annitto, *supra* note 60, at 25.

[63] *See* SHARED HOPE INT'L, *supra* note 61, at 128, 140, 156, 174, 194, 210.

[64] *See* Annitto, *supra* note 60, at 25 ("[T]he prosecution of domestically trafficked youth under state law contradicts federal law and international protocols on human trafficking.").

[65] *See* Jill P. Rawal, *et. al., State Safe Harbor Laws & Recommendations for Future*

An examination of the TVPRA's FFC rule sheds light on how the rule has been misapplied in state child prostitution cases. The TVPRA's FFC rule limits the list of acts that give rise to the crime of sex trafficking and, therefore, narrows the legal definition of sex trafficking. The TVPRA's definition of "force" "includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion."[66] The TVPRA's construction of "fraud" focuses primarily on employment fraud schemes.[67] For example, in enacting the TVPRA, Congress recognized that traffickers "lure women and girls into their networks through false promises of good working conditions at relatively high pay as nannies, maids, [or] dancers . . . ."[68]

The TVPRA recognizes as "coercion" many of the classic means that traffickers use to recruit minors. Under the TVPRA, classic forms of "coercion" include: (1) threats to the victim, family, or other victims; (2) economic dependence such as taking identification documents, money, and other assets; (3) supplying drugs, alcohol, and other indulgences to create or perpetuate chemical and emotional dependencies;[69] (4) blackmail; and (5) physical and emotional isolation.[70]

The 2008 reauthorization of the TVPRA adopted a more comprehensive definition of coercion than was set forth in the prior versions of the statute.[71] The TVPRA now embraces what Professor Kathleen Kim has called "a new coercion standard" in which not only physical coercion but also "psychological, financial or reputation harm . . . to compel a reasonable person . . . to perform a commercial sex act" is evidence of coercion.[72]

The TVPRA's new "situational coercion" framework expands the concept of FFC.[73] Courts determining "situational coercion" under the TVPRA evaluate the worker's vulnerabilities and the power

Legislation, 46 CLEARINGHOUSE REV. 525, 525 (2013) (describing "survival sex" as a "desperate measure" in which kids exchange sexual services "to gain a few dollars for food.").

[66] 22 U.S.C. 7107, § 102(b)(6).

[67] 22 U.S.C. § 7101(b) (4) (Supp. 2009).

[68] *Id.*

[69] *See generally* JANICE G. RAYMOND & DONNA M. HUGHES, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 51 (2001), *available at* http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf.

[70] Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 451 (2010).

[71] *Id.*

[72] *Id.* at 436, 451; *see also* 18 U.S.C. § 1589(c)(2) (2003).

[73] Kim, *supra* note 70, at 451.

inequalities between the worker and the employer.[74] Vulnerabilities include immigration status, cultural and linguistic isolation, poverty, impoverished dependent family members, illiteracy, and youth.[75] Power differentials are apparent from the worker's fear of the employer's ability to inflict some harm on the worker.[76] The "situational coercion" framework asks whether the alleged trafficker took advantage of vulnerabilities and power differentials to obtain labor and services at an exploited price.[77]

Thus, the TVPRA's definition of situational coercion reflects a subjective standard which considers "the victim's background and all surrounding circumstances" to judge whether the victim consented to sex.[78] Professor Kim further argues that the "situational coercion" standard should be applied to recognize the role of poverty, immigration status, and cultural differences in coercing migrant workers.[79]

Significantly, federal and state officials are at odds on the issue of whether this expanded definition of coercion is applicable to child sex trafficking cases. Even though proof of FFC is not required in child sex trafficking, the federal government has opined that the means used to traffic minors should meet the FFC test in any case. For example, the State Department interprets the TVPRA's coercion standard to encompass what one might call "coercive seduction," that is, pretending to fall in love with a minor to persuade or solicit his or her participation in commercial sex acts.[80] As discussed below, however, states have adopted FFC tests in cases involving minors but have failed to adopt this broad interpretation of "situational coercion."[81]

These inconsistent legal approaches have collateral consequences for minors. The have undermined the ability of federal law enforcement officials and other advocates to identify sexually exploited minors as "victims of human trafficking."[82] As a result,

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[74] Kim, *supra* note 70, at 461–62.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 457.

[79] Kim, *supra* note 70, at 470.

[80] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS (TIP) REPORT 1, 31 (2013).

[81] *See, e.g.*, In re B.W., No. 08-1044, 313 S.W.3d 818, at *1 (Tex. June 18, 2010).

[82] *See generally* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010) [hereinafter U.S. DEP'T OF STATE] ("The United States recognizes that, like other countries, it has a serious problem with human trafficking for both labor and commercial sexual exploitation."); SMITH ET AL., *supra* note 3, at 4, 9; *In Our Own*

minors may face criminal prosecution.[83] Furthermore, the failure to properly identify sexually exploited minors as trafficking victims perpetuates a myriad of social problems that ensue from child sexual exploitation.[84] The prostitution of minors creates health risks for these minors and their communities.[85] Prostituted minors who are identified as delinquent or criminals may be denied special services reserved for people identified as victims of sex trafficking.[86]

The tide is changing, however. In the past two years, state governments have made significant strides in eliminating the FFC rule from child sex trafficking cases.[87] In 2013 alone, thirty-nine states enacted new anti-trafficking laws.[88] According to the Polaris Project's annual assessment for 2013, forty-two states and the District of Columbia passed legislation that does not require proof of FFC in child sex trafficking cases.[89]

III. LEGAL AND POLICY BASES FOR THE FFC / CONSENT FRAMEWORK

A. *Feminist Legal Theory, Prostitution, and Consent*

While the use of the FFC test in sex trafficking cases involving

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Backyard, *supra* note 7.

[83] S. Con. Res. 29, 113th Cong. (2013) ("many child sex trafficking victims who have not yet attained the age of consent are arrested and detained for juvenile prostitution or status offenses directly related to their exploitation."); Adelson, *supra* note 24, at 107–09.

[84] *See* U.S. DEP'T OF STATE, *supra* note 39, at 12 ("Sex trafficking has devastating consequences for minors, including long lasting physical and psychological trauma, disease [including HIV and AIDS], drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death.").

[85] Jonathan Todres, The *Private Sector's Pivotal Role in Combating Human Trafficking,* 3 CAL. L. REV. CIRCUIT 80, 82 (2012) ("Trafficked individuals frequently suffer beatings and broken bones, face increased risk of contracting HIV and other sexually transmitted infections, are forced to live in overcrowded and unsanitary conditions with insufficient amounts of food, and are exposed to toxic chemicals, carcinogens, and other harmful substances."); On the public health risks of sex trafficking, see generally, Jonathan Todres, *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL. 93 (2012).

[86] Cheryl Nelson Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors*, 45 AKRON L. REV. 843 (2011).

[87] POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 6–7, *available at* http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf. ; *see* Butler, *supra* note 60, at 863–64 (discussing efforts to eliminate the FFC requirement from the Texas anti-trafficking law).

[88] POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 6–7, *available at* http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf.

[89] *Id.* at 37.

adults has become a hotly contested issue, the use of the test in cases involving minors has not been adequately explored.[90] Much of the debate over the FFC rule has centered on its impact on women's sexual autonomy, namely, whether prostituted women exercise their sexual agency and freely choose prostitution. Feminist advocates have fought hard to preserve the FFC test as a means to legally distinguishing between sex trafficking and prostitution.[91] Accordingly, child sex trafficking laws that require proof of FFC in cases involving minors are plagued by misplaced concerns about the need to protect a woman's right to sexual autonomy, including the right to choose prostitution.

The FFC requirement became a cornerstone of anti-trafficking jurisprudence in large part because feminist advocates fought for a brightline legal distinction between prostitution and trafficking.[92] Proponents argued that such a rule was needed to protect a woman's capacity to consent to commercial sex.[93] In contrast, feminist abolitionists oppose efforts to legally distinguish prostitution from sex trafficking. For these feminists, all prostitution is gender violence and, thus, women never fully consent to prostitution.[94]

Certain feminist models of anti-trafficking laws aim to protect notions of personal autonomy, agency, and gender equality by advancing the view that women can freely choose prostitution and other sex work.[95] For example, some state legislatures have enacted what Professor Barnhardt calls a "governance feminist model" of state

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[90] Advocates have begun to discuss the implications for minors. Scholars and advocates have argued against applying the test in cases involving minors. *See generally* Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265 (2010).

[91] *See, e.g.*, Shelley Cavalieri, *Between Victim and Agent, A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1409–39 (2011) (comparing the arguments of dominance feminists who argue that all prostitution is exploitation with those of liberal feminists who argue that women have agency and choice to choose sex work).

[92] Unlike prostitution, the woman does not consent to commercial sex. *See, e.g.*, Birckhead, *supra* note 19 at 1094.

[93] *See generally* Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581, 607–25 (2009) ("Criminal rape laws negatively affect female agency."); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 336–37 (2004) (arguing that attitudinal consent is not the same as expressive consent and, conversely, you cannot judge conversion based on expressive acts).

[94] ; Maria S. Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation through the Lenses of Rape Law and Prostitution*, 6 St. Thomas L. Rev. 54, 66 (2008); Chuang, *supra* note 19, at 1664–65.

[95] *Id.* at 72–75.

anti-trafficking legislation that is "individualist."[96] Governance feminist models recognize "individualist" feminist values in that they support the notion that trafficked persons, particularly women, have the agency to choose prostitution and sex work and, indeed, exercise such agency even in cases where they are commercially exploited by pimps or other third parties.[97] Thus, individualist feminists advocate "for definitions that recognize an explicit separation between consensual sex work and non-consensual, coerced sex trafficking."[98] Feminists in this camp further argue against conflating "trafficking" with "prostitution" and, instead, support using proof of FFC to distinguish the two.

In contrast, feminist abolitionists oppose the use of the FFC requirement to distinguish prostitution from sex trafficking. Feminist abolitionists have argued that all prostitution is gender violence and, thus, women never fully consent to prostitution.[99] For feminist abolitionists, prostitution is never an "empowering choice" for women.[100]

This ideological battle over whether an FFC test should be used to distinguish between sex trafficking and prostitution peaked during the legislative debates over the reauthorization of the TVPRA in 2008. The U.S. House of Representatives passed H.R. 3877, the House version of the William Wilberforce Trafficking Victims Protection Reauthorization Act, which proposed that the TVPRA redefine sex trafficking to include all cases involving the "persuad[ing], induc[ing], or entic[ing] [of] any individual to engage in prostitution."[101] By eliminating proof of FFC from the legal definition of sex trafficking, the amendment proposed the federalization of all prostitution cases involving both adults and minors.[102]

The FFC requirement became a cornerstone of trafficking jurisprudence because feminist advocates sought a legal rule that would distinguish consensual and non-consensual prostitution.

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[96] *See* Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 110–18 (2009) (discussing the California anti-trafficking statute as an "individualist" feminist governance model).

[97] *See id.* at 113–14.

[98] *Id.* at 112.

[99] Cianciarulo, *supra* note 94, at 66; Chuang, *supra* note 19, at 1664–65.

[100] Chuang, *supra* note 19, at 1711.

[101] H.R. 3887, 110th Cong. § 221 (f)(1) (2007).

[102] Letter from James P. Fox, President, Nat'l Dist. Attorneys Ass'n, to Patrick J. Leahy, Chairman, Comm. on the Judiciary and Arlen Specter, Ranking Member, Comm. on the Judiciary (Jan. 22, 2008), at 1, *available at* http://www.justice.gov/olp/pdf/ndaa.pdf.

Opponents of the FFC rule, most notably the Coalition Against Trafficking in Women (CATW), supported H.R. 3877's federalization of prostitution.[103] CATW argued that the FFC test undermined trafficking prosecutions because the standard is too difficult to prove.[104]

In contrast, a broad coalition, including women's rights groups and law enforcement associations, protested against the elimination of the FFC rule in sex trafficking crimes on a variety of grounds.[105] National law enforcement agencies expressed to Congress their view that "simple prostitution" is distinct from trafficking and that prostitution is "adequately" addressed on the local level.[106] The Fraternal Order of Police (FOP), a national coalition, argued in favor of the FFC rule, reasoning that trafficking and prostitution are distinct crimes that do not automatically overlap and that the latter is better suited for state and local enforcement.[107] In a letter to

[103] Jerry Markon, *Anti-Human Trafficking Bill Would Send FBI Agents on Trial of Pimps*, WASH. POST (Nov. 29, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/28/AR2007112802282.html. The CATW coalition included leaders of national women's and anti-trafficking organizations, such as The National Congress of Black Women, Inc., GEMS, the Southern Baptist Convention, National Organization of Women, Equality NOW, EPCAT-USA, SAGE, and the Polaris Project, as well as women's rights scholars, such as Catharine A. MacKinnon and Donna M. Hughes. *See* Letter from Coalition Against Trafficking Women to Peter Keisler, Acting Attorney Gen., Dep't of Justice (Oct. 5, 2007), *available at* http://www.justice.gov/olp/pdf/catw-letter.pdf.

[104] Letter from Coalition Against Trafficking Women to Peter Keisler, Acting Attorney Gen., Dep't of Justice (Oct. 5, 2007), *available at* http://www.justice.gov/olp/pdf/catw-letter.pdf. (the DOJ's trafficking policy "dangerously ignores . . . the acute difficulty of gaining testimonial evidence of fraud, force or coercion from terrified and brutalized victims of trafficking, and the potential danger that such a requirement poses on victims' safety").

[105] The section would have amended the Mann Act by creating a new crime—"sex trafficking"—under that statute which would "authorize the DOJ to prosecute any individual whose action within a territory or possession, affecting interstate or foreign commerce, induces another to engage in prostitution." *Model Letter to Send to Your Senator*, *Resisting the Repression: When the Alliance of Progressives, Christian and Feminist Fundamentalists Attempt to Make Prostitution a Federal Crime*, TRAFFICKING POLICY RESEARCH PROJECT (Jan. 2008), http://www.bayswan.org/traffick/HR3887.html#4.

[106] Moira Heiges, Note, *From the Inside Out: Reforming State & Local Prostitution Enforcement to Combat Sex Trafficking in the United States & Abroad*, 94 MINN. L. REV. 428, 448–49 (2009) (quoting Letter from Chuck Canterbury, Nat'l President, Fraternal Order of Police, to Patrick J. Leahy, Chairman, Comm. on the Judiciary and Arlen Specter, Ranking Member, Comm. on the Judiciary (Dec. 6, 2007), *available at* http://www.justice.gov/olp/pdf/fop-hr3887.pdf and Letter from Nat'l Ass'n of Attorneys Gen., to Patrick J. Leahy, Chairman, Comm. on the Judiciary and Arlen Specter, Ranking Member, Comm. on the Judiciary (Mar. 7, 2008), at 2, *available at* http://www.justice.gov/olp/pdf/naag.pdf).

[107] In the FOP's view, pimping and prostitution offenses are not always committed "as part of or in furtherance of a human trafficking operation." Letter

Congress, the National District Attorneys Association (NDAA) agreed, reasoning that, in the eyes of law enforcement officers, FFC are "elements traditionally envisioned when referencing human trafficking for sexual purposes."[108] The FOP pointed out that most states had already implemented state trafficking statutes and state prostitution-related statutes.[109]

The Department of Justice (DOJ) also agreed.[110] In a letter opposing H.R. 3877, the DOJ argued that the federal government should focus on adult cases involving FFC, while state resources were better allocated for "pandering, pimping, and prostitution-related offenses."[111] Thus, the DOJ took the position that not all prostitution cases involve FFC and that FFC distinguishes human trafficking from prostitution.[112] Further, the DOJ disputed the claim that the FFC rule was too difficult to prove in adult cases.[113] Yet, as discussed below in Part V, these arguments favoring an FFC rule to protect adult sexual autonomy are misplaced with respect to minors and public policy concerns warrant removal of an FFC requirement in many states.

B. Family and Juvenile Law Jurisprudence

The use of the FFC rule in state anti-trafficking law also stems from tensions within juvenile justice laws and family law codes over

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from Chuck Canterbury, *supra* note 106 ("Given that State laws address crimes like pimping, pandering, and solicitation, it is not clear, or even advisable, that the federal government become active on these local issues in the absence of evidence that the offenses were committed as part of or in further of a human trafficking operation.").

[108] Letter from James P. Fox, *supra* note 102.

[109] Letter from Chuck Canterbury, *supra* note 106.

[110] Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., Dep't of Justice, to John Conyers, Jr., Chairman, Comm. on the Judiciary (Nov. 9, 2007), *available at* http://www.justice.gov/olp/pdf/dept-view-letter-hjc-on-hr3887.pdf.

[111] *Id.* at 8.

[112] *Id.*

[113] *Id.* DOJ officials have reasoned that:

> As our results over the last six years have demonstrated, we have faced no problems convicting traffickers under the standards requiring proof of force, fraud, or coercion. . . . Any suggestion that testimonial evidence on force, fraud, or coercion is not attainableis inaccurate. . . . In most instances, even where no proof of force, fraud, or coercion is necessary, the elements of these crimes cannot be proven beyond a reasonable doubt without victim testimony.

Letter from Jennifer Korn, Dir., Dep't of Justice Office of Intergovernmental and Pub. Liaison, to Dorchen Leidholdt, President, Coalition Against Trafficking in Women-Int'l (Nov. 27, 2007), at 2–3, *available at* http://www.justice.gov/olp/pdf/coalition-letter.pdf.

the question of whether minors can consent to sex. First, the conflict between state prostitution and statutory rape laws reflects this longstanding tension on the issue of whether the law should presume that minors consent to sex.[114] Traditionally, state statutory rape laws presumed that minors are too young to consent to sex.[115] Nineteenth-century reformers, known as "child savers," advocated for statutory rape laws for under-aged girls to protect their childhood and to foster their safe transition into adulthood.[116] During this period, new laws were enacted that changed the age of sexual consent from thirteen years old to *at least* sixteen years old.[117] In part, these age of consent laws suggested that minors lacked the capacity to consent to sex.[118] Some scholars maintain the view that the statutory rape laws were also based on a desire for social control.[119] In other words, lawmakers acknowledge that minors do have the capacity to consent to sex in fact, but determine nevertheless that the law has to limit legal consent in order to protect the child's best interests.[120]

Yet, notwithstanding the prevalence of statutory rape statutes, state laws still showed evidence of a cultural belief that minors can consent to sex. Statutory rape laws do not completely eliminate legal recognition of a minor's consent to sex.[121] In particular, the statutory age of consent varies greatly, indicating that there is no national consensus that minors below a certain age cannot consent to sex.[122] About half of all states have set the age of consent below the age of eighteen, and only a handful have limited the age of legal consent to eighteen.[123] Furthermore, many states enacted prostitution statutes that presume a minor can consent to commercial sex. In this way,

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[114] Annitto, *supra* note 60, at 25.

[115] *Id.* at 60, at 5, 25 (arguing that the policy of prosecuting prostituted minors conflicts with the policies underlying statutory rape laws).

[116] *See* Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1346–49 (2012); Robin Walker Sterling, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607, 610–12 (2013).

[117] J. Shoshanna Erlich, *You Can Steal Her Virginity But Not Her Doll: The Nineteenth Century Campaign to Raise the Legal Age of Sexual Consent*, 15 CARDOZO J. L. & GENDER 229, 235 (2009).

[118] *See generally* Ellen Marrus & Laura Oren, *Feminist Jurisprudence and Child-Centered Jurisprudence: Historical Origins and Current Developments*, 46 HOUS. L. REV. 671, 691 (2009).

[119] Marrus & Oren, *supra* note 118, at 691.

[120] *Id.*

[121] Jennifer Ann Drobac, *"Developing Capacity": Adolescent "Consent" at Work, at Law, and in the Sciences of the Mind*, 10 U.C. DAVIS J. JUV. L. & POL'Y 1, 8 (2006).

[122] *Id.*

[123] *Id.* at 7 (citing Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 486 (2004)).

such laws reflect a mistaken belief that the exchange of money reflects agency, consent, and the absence of coercion.[124]

IV. WHAT DRIVES CHILD SEX TRAFFICKING: CONSENT OR VULNERABILITIES?

This section explores whether the law's FFC paradigm accurately reflects the reality of child sex trafficking in the United States. Such a fact-based exploration reveals that the FFC framework distorts the realities of child sex trafficking by ignoring the real vulnerabilities of all minors to sexual exploitation by adults or others in positions of power over them. Scholars have argued that an effective response to human trafficking should address the root causes that make certain populations vulnerable to this crime.[125] Human trafficking, like other social problems, is fueled by the exploitation of human vulnerability.[126] Granted, some child sex trafficking cases fit into the traditional FFC framework. However, traffickers also use alternative means that fall outside of the traditional FFC paradigm.

A. *The FFC Paradigm and its Limitations*

In many child sex trafficking cases, minors are compelled to perform commercial sex acts by means that the law recognizes as falling under the traditional FFC paradigm. "Force" is often used to compel minors to sell their bodies for sex.[127] Traffickers use physical

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[124] Annitto, *supra* note 60, at 20 ("Indeed the failure to explicitly acknowledge the coercive nature of youth prostitution—regardless of the exchange of money—represents a conflict in our legal jurisprudence.").

[125] *See* Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 57–58 (2011) ("Although vulnerability is a part of the human condition, certain individuals and communities are at a heightened risk of exploitation. If governments and civil society are to make progress in combating human trafficking, they must confront the root causes of this vulnerability."); Hoffer, *supra* note 90, at 1835–36.

[126] For the emerging scholarship on the need to understand how human vulnerability shapes legal responses to social issues other than human trafficking, see generally Martha A. Fineman, *'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 THE ELDER L.J. 71 (2012); Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 Emory L.J. 251 (2010); Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Jennifer S. Hendricks, *Renegotiating the Social Contract*, 110 MICH. L. REV. 1083, 1083 (2012) (reviewing Maxine Eichner's THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS and applauding Eichner's efforts at "reforming liberalism to account for dependency, vulnerability and families; Ari B. Saltz, *Fragmented Lives: Disability Discrimination and the Role of Environment-Framing*, 68 WASH. & LEE L. REV. 187 (2011).

[127] S. Res. 340, 113th Cong. (2014) ("[S]ex trafficking victims are routinely raped and beaten, and sometimes even branded."); Melissa Farley, *Sex for Sale: Prostitution*

force to compel minors to engage in commercial sex acts.[128] Several research reports suggest that prostitution and commercial sexual exploitation have become increasingly violent phenomena.[129] Traffickers use violence to control all of the victims' movements.[130] Likewise, child sex trafficking cases also include fact patterns that fit the typical "fraud" paradigm for such cases. Child victims answer ads offering legitimate opportunities as models,[131] hotel industry workers,[132] restaurant staff,[133] and dancers.[134] Certain forms of psychological coercion are especially prevalent in cases involving trafficked minors. Isolation, whether physical or emotional, is the "hallmark" of the crime.[135]

Yet, minors also are trafficked for commercial sex in the United States by means that most anti-trafficking laws do not recognize as falling within the traditional legal paradigms for "force," "fraud," or "coercion." As scholars have argued, rape laws that use "consent" as a marker for determining rape fail to capture the complexities of the situation from the victim's perspective.[136] Similarly, "consent" and

Trafficking and Cultural Amnesia: What We Must Know in Order to Keep the Business of Sexual Exploitation Running Smoothly, 18 YALE J.L. & FEMINISM 109, 111 (2006). For cases detailing the physical abuse that minors endure from adult pimps, see *In re: B.W.*, No. 08-1044, June 18, 2010.

[128] S. 340, 113th Cong. (2014) ("[S]ex trafficking victims are routinely raped and beaten, and sometimes even branded."); Melissa Farley, *Sex for Sale: Prostitution Trafficking and Cultural Amnesia: What We Must Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 (2006). For cases detailing the physical abuse that minors endure from adult pimps, see In re B.W., No. 08-1044, 313 S.W.3d 818, at 820–22 (Tex. June 18, 2010).

[129] Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 138–39 (2004).

[130] Marisa Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, 59–60 (2008).

[131] *See generally* RAYMOND & HUGHES, *supra* note 69, at 20.

[132] AMY FARRELL ET AL., NAT'L INST. OF JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 15 (2008), *available at* http:/www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf.

[133] *Id.*

[134] *Id.* at 20, n.67.

[135] *See* Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. Rev. 157, 185 (2007). *Id.* at 197 (indicating as evidence of her limited will, she might "pressure the trafficker for more independence or pay . . . ask for phone privileges . . . request a vacation day . . . or [ ] demand medical care").

[136] *See generally* John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081 (2012); Josephine Ross, *Blaming the Victim: Consent Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1 (2010); Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE (Alan Wertheimer & William Miller eds., forthcoming), *available at*

"coercion" are poor markers for determining whether the law should protect minors who are exploited for commercial sex.

When traffickers recruit children as young as eleven years old, they need not go through the trouble of using conventional forms of FFC.[137] Coercive maneuvers that transcend the definition of "coercion" used in trafficking statutes such as abuse of power, trickery, or seduction, are the bread and butter of many trafficking schemes. As discussed below, traffickers prey upon children's history of prior abuse, whether sexual or emotional, or the universal vulnerabilities inherent in being minors. Sex traffickers also prey on children's gullibility as well as their need for peer approval, emotional love, and support.[138] Traffickers often recruit minors into prostitution by means of romantic seduction.[139] However, courts have long been hesitant to recognize seduction as a form of coercion in state rape cases.[140] Thus, in most cases, seduction by use of false promises is considered mere "puffery" and hence too "trivial" to amount to "rape by fraud."[141]

American legislators must bring sexually exploited minors from the margins and to the center of the discourse on anti-sex trafficking jurisprudence. This call for reform is all the more imperative and timely in light of two new major efforts by the federal government to

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http:/ssrn.com/abstract=1172162.

[137] NOEL BRIDGET BUSCH-ARMENDARIZ ET AL., INSTITUTE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, UNDERSTANDING HUMAN TRAFFICKING: DEVELOPMENT OF TYPOLOGIES OF TRAFFICKERS 15 (Oct. 2009), *available at* http://www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/humantrafficking.pdf.

[138] *See generally* Cheryl Hanna, *Somebody's Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry & The Power of Love*, 9 WM. & MARY J. WOMEN & L. 1 (2002); AMANDA WALKER-RODRIGUEZ & RODNEY HILL, FBI LAW ENFORCEMENT BULLETIN, HUMAN SEX TRAFFICKING (Mar. 2011), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking; *see also* Catherine MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 996 (2004-05) ("Just as throwing money at victims of sexual abuse does not make it a job, taking pictures of it does not make it really chosen or desired. It makes it pictures of paid rape – rape in the real, if regrettably seldom in the legal 'sense.")

[139] THE POLARIS PROJECT, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES, *available at* http://www.polarisproject.org/what-we-do/policy-advocacy/prosecuting-traffickers/895-sex-trafficking-of-minors

[140] Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 90 (2007) (discussing problems with recognizing rape by seduction); *Id.* at 90 n.91 (quoting RICHARD A. POSNER, SEX AND REASON 392 (1992)) ("Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape.").

[141] *Id.* at 90.

develop a more humane approach to the needs of vulnerable populations within its own borders. Recent decisions by the United States Supreme Court have recognized the unique vulnerabilities that minors face against negative societal influences.[142] While the facts of these cases do not deal with sexual exploitation of minors, they nevertheless provide guidance and insight into the need to apply a protectionist approach into cases involving sexual exploitation of minors.

B. Emotional and Basic Needs

An alternative legal paradigm is needed to address child prostitution—one that focuses on a minor's vulnerability to sexual exploitation as opposed to assumptions about agency and consent. Minors are vulnerable to sexual exploitation as a result of their need for familial love and peer approval.[143] Predators prey on minors who are deprived of such love, emotional support, and appropriate guidance from parents, relatives, and friends.[144] In the United States, runaways are recruited through fraudulent promises of love and protection.[145] Neither force, fraud, nor coercion are necessary to recruit minors into prostitution in cases where seduction fills the minors' need for safety, attention, or a sense of family or belonging.[146]

A variety of factors make minors more vulnerable to sexual exploitation in the United States. Minors who run away or otherwise become homeless are vulnerable to sexual exploitation.[147] Some

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[142] *See* Part V.B. *infra*; *See e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[143] *See generally* ADMINISTRATIVE OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, PRESENTATION: HUMAN TRAFFICKING: AN OVERVIEW AND SPECIAL FOCUS ON COMMERCIALLY SEXUALLY EXPLOITED MINORS (CSEC) 37–39 (Dec. 15, 2011), *available at* http://www.courts.ca.gov/documents/Human_Trafficking-An_Overview.pdf.

[144] *See generally id.*

[145] *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 9 (2010) ("Runaways, throwaways, children who are chronically truant, or who suffer physical or sexual abuse in the home—these are the types of children who are targeted by pimps. The pimps purport to offer these children the love and attention that they never had but, rather, instead manipulate them and force them into prostitution."); Hanna, *supra* note 138, at 3.

[146] *See* Hanna, *supra* note 138, at 3.

[147] HEATHER J. CLAWSON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVICES, HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 9 (Aug. 2009), *available at* http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.pdf; TEXAS JUVENILE PROBATION COMMISSION, ALTERNATIVES TO JUVENILE JUSTICE FOR YOUTH INVOLVED IN PROSTITUTION 2–3 (2011), *available at* http://www.tjjd.texas.gov/publications/reports/RPTOTH201103.pdf.

minors run away to escape abuse in their homes.[148] Some of them flee incest or other forms of sexual abuse in their homes, schools, or communities.[149] Others are "thrown away children" who are no longer wanted by their parents.[150] Each year, at least one-third of them are lured into prostitution within two days of leaving home.[151]

These minors will "agree" to perform commercial sex, without being physically forced, in order to survive.[152] Some runaways are manipulated into "survival sex"—trading sexual relations for basic needs, including shelter, food, and water.[153] One state's attorney testified before Congress about the realities of this practice: "In a prostitution case that my office handled recently, one juvenile related that she did not wish to pursue criminal charges against her pimp because, and I quote, 'He gets me a Subway sandwich whenever I want one.'"[154] As the testimony indicates, the need for survival, not consent, often is the driving force behind child prostitution.

It has become increasingly common for teens to experience sexual harassment on their jobs, whereby teens acquiesce to sexual favors for managers and coworkers in order to remain employed.[155] Similarly to a minor being trafficked, the teenage worker's "explicit verbal consent" does not represent true consent.[156] As all of these cases indicate, the victim may be someone who is not restrained in the sense that she cannot escape.[157]

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[148] CLAWSON ET AL., *supra* note 147, at 9; TEXAS JUVENILE PROBATION COMMISSION, *supra* note 147, at 2–3

[149] CLAWSON ET AL., *supra* note 147, at 9.

[150] BUSCH-ARMENDARIZ ET AL., *supra* note 137, at 22; *see also* Suzanna L. Tiapula & Allison Turkel, *Identifying Victims of Human Trafficking*, 42 PROSECUTOR 10, 12 (2008).

[151] BUSCH-ARMENDARIZ ET AL., *supra* note137, at 22.

[152] RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 11, 58 (2001), *available at* http://www.sp2.upenn.edu/restes/CSEC_Files/Exec_Sum_020220.pdf.

[153] *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 11–12 (2010) (statement of Anita Alvarez, State's Attorney, Cook County), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg58003/pdf/CHRG-111shrg58003.pdf ("These juveniles are engaging in 'survival sex'—exchanging sex for food, clothing, or a safe place to sleep.")._On the prevalence of "survival sex," *see* ESTES & WEINER, *supra* note 152152, at 11, 58; Ian Urbina, *Running in the Shadows: For Runaways, Sex Buys Survival*, N.Y. TIMES (Oct. 26, 2009), http://www.nytimes.com/2009/10/27/us/27runaways.html?pagewanted=all&_r=0.

[154] In Our Own Backyard, *supra* note 153, at 11–12.

[155] Drobac, *supra* note 121, at 3 n.7 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986)).

[156] Drobac, *supra* note 121, at 3 n.7 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986)).

[157] Srikantiah, *supra* note 135, at 197.

C. Prior Child Abuse

Many prostituted minors in the United States fall prey to sexual exploitation when an adult exploits their vulnerabilities stemming from their prior experience of sexual assault and other forms of abuse and neglect.[158] Socio-behavioral experience, including an individual's history of sexual assault, plays a large role in predicting vulnerability to trafficking.[159] A primary factor in any case is family dysfunction. A history of family abuse and neglect makes such minors vulnerable to recruitment into the commercial sex industry, even without the use of the types of conventional FFC described in anti-trafficking statutes.[160]

Adults who prostitute these minors exploit the minors' emotional vulnerabilities from prior child abuse.[161] Advocate Vednita Carter, by eyewitness account, put the "harms" that minors suffer in poignant terms:

> A girl who enters prostitution at fourteen will have submitted to the sexual demands of four thousand men before she is old enough to drive a car, eight thousand men before she is old enough to vote and twelve thousand men before she is deemed mature enough to buy a single beer in most states.[162]

A minor who has never experienced a positive, loving relationship from a parent or other family member is more likely to internalize the message that prostitution is normal and expected of her. As child advocate Rachel Lloyd has explained:

> Imagine . . . that you've never seen a cow, never even seen a picture of one or had one described to you, and someone tells you that a horse is a cow. Of course you'll believe them. If you haven't had proper love and care, then a substitute will feel like the real thing, because you've got nothing to compare it to.[163]

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[158] CLAWSON ET AL., *supra* note 147, at 9; ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 143, at 28.

[159] ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 143, at 28.

[160] *Id.* at 37–39.

[161] S. 29, 113th Cong (2013) (acknowledging that many child sex trafficking victims have experienced prior sexual abuse and that traffickers exploit this abuse to lure these minors into prostitution); *see generally* Celia Williamson & Michael Prior, *Domestic Minor Sex Trafficking: A Network of Underground Players in the Midwest*, 2 J. CHILD & ADOLESCENT TRAUMA (2009).

[162] Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism & Feminist Discourse*, 10 HASTINGS WOMEN'S L. J. 37, 46 (1999).

[163] ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 143, at 415.

Adults can also abuse their power by persuading minors that prostitution is a normal way for a child to earn money for his or her family or to prove love or loyalty to a group.[164]

Power disparities obscure consent to sex in these contexts. Arguably, sex achieved through such abuse of power is in fact coercive because taking advantage of a child's prior sexual or other abuse is in itself a form of child abuse.[165] Scholars have expounded upon the multiplicity of physical and psychological harms that ensue from sexual abuse of power, particularly when such sexual abuse of power is used to compel people to work or as a condition of employment.[166] Public officials and employers, for example, yield tremendous influence over their adult subordinates and can use that power to gain subordinates' submission to unwanted sexual acts.[167]

The law has often failed to recognize acquiescence to sexual abuse of power as a form of "coercion."[168] Indeed, the law has often failed to incorporate sexual abuse of power into a legal framework that adequately protects vulnerable persons from coercive economic and employment situations.[169] The fear of losing one's job, source of income, food, shelter, or security renders a minor's engagement in prostituted sex, in order to protect these things, extremely coercive. Coercive sex undermines one's sense of "bodily integrity" and "sexual integrity" and also causes "psychological impairment and distress," "invasion of privacy," and "violation of human dignity."[170]

D. Sexual Abuse of Power

Those who argue that a child has a choice not to engage in prostitution ignore the coercion inherent in the predicament of a prostituted child in relation to adults who abuse their power over the child.[171] Predators pose as "boyfriends" who appear to offer security, attention, love, and affection.[172] Sexually exploited teens are "not

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[164] *See id.*

[165] *See* Kate Brittle, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1348 (2008).

[166] *See* Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL'Y 77, 79–80, 88–90 (2010).

[167] *See id.* at 79.

[168] *See id.* at 117.

[169] *Id.* at 79. ("Despite many years of reform in laws pertaining to rape and sexual assault, various forms of sexual abuse of power continue to leave many victims without redress or legal remedy.").

[170] *Id.* at 89.

[171] Annitto, *supra* note 60, at 20.

[172] *See* Hanna, *supra* note 138, at 3.

motivated by lust or greed or gluttony or wrath or envy or pride or sloth; they are lured by love."[173] In particular, as Professor Hanna explains, teen girls from broken homes may "have never had a strong, loving relationship with their father or another adult male."[174] As a result, they become vulnerable to sexual exploitation once they begin "look[ing] for [love] in all the wrong places."[175] The minor may initially "consent" to have sex with multiple partners to prove her love and loyalty to the man who traffics her.[176]

E. The Internet and Exploitation

In addition to their exploitation of children's' need for parental love, traffickers use the Internet to recruit and exploit vulnerable minors.[177] Traffickers also target "their minor victims through telephone chat-lines, clubs, on the street, through friends, and at malls, as well as using girls to recruit other girls at school and after-school programs."[178] Minors are also seduced, recruited, and sold via online advertisements and Internet websites, including Craigslist[179] and Backstage.[180]

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[173] *Id.*

[174] *Id.* at 7.

[175] *Id.* at 3.

[176] *Id.*

[177] *See* S. 340, 113th Cong. (2014), *available at* http://www.govtrack.us/congress/bills/113/sres340/text. On the impact of the Internet in facilitating child sex trafficking and the appropriate legal response, *see* URBAN INSTITUTE REPORT, *supra* note __, at 10 ("Forty nine percent of pimps reported using internet ads to attract business."); Mary Leary, *Children, Sex Trafficking and Technology: Lessons Learned from an Analysis of Federal Case Law Since the Passage of the Trafficking Victims Protection Act*, 4 (August 21, 2013) ("The migration of sex trafficking to a digital space can make the crime more public but also remove it from places where it has been traditionally recognized and identified"), available at http://ssrn.com/abstract=2314189; Wendi Adelson, *Child Sex Trafficking and the Unavoidable Internet*, 19 S.W. J. INT'L L. 281, 282–84 (2013); Ryan Dalton, Note, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEMP. L. REV. 1097, 1099 (2013); Elana T. Jacobs, *Online Sexual Solicitation of Minors: An Analysis of the Average Predator, His Victims, What is Being Done and Can be Done to Decrease Occurrences of Victimization*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 505, 508–11 (2012); Erin I. Kunze, *Sex Trafficking Via The Internet: How International Agreements Address The Problem And Fail To Go Far Enough*, 10 J. HIGH TECH. L. 241, 242 (2010).

[178] U.S. DEP'T OF EDUC., HUMAN TRAFFICKING OF CHILDREN: A FACT SHEET FOR SCHOOLS, *available at* http://www2.ed.gov/about/offices/list/oese/oshs/factsheet.html.

[179] *See generally* Kunze, *supra* note 177, at 241.

[180] Adelson, *supra* note 177, at 282–84 ("Just how many of the ads on Backpage are safe and how many are facilitating the exploitation of children? One oft cited statistic comes from the National Center for Missing and Exploited Children ("NCMEC") which reported 2,695 potentially suspect ads in the year 2011 alone.").

American pop culture "normalizes" commercial sexual exploitation in the eyes of both indifferent adults and impressionable pre-teens.[181] Middle-class youths allow themselves to be sexually exploited in order to earn money for clothing and jewelry.[182]

Minors recruited by these tactics become uncooperative with police and refuse to see themselves as victims because they become emotionally bound to their traffickers.[183] Not surprisingly, law enforcement officials report that one of their biggest challenges is the "lack of victim cooperation."[184] Stockholm syndrome[185] is especially prevalent in sexually exploited children who often see their traffickers as boyfriends or parental figures.[186]

A vicious cycle ensues in which police officers misidentify uncooperative minors as consenting to prostitution, as opposed to being coerced into silence or compliance.[187] The State Department has acknowledged that the attitudes of law enforcement toward sexually exploited minors reflect this popular perception that minors consent to prostitution.[188] Without proper identification as victims, these minors remain invisible to those community members who are willing to help.[189]

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[181] *See* Abdul Ali, *Parenting in the Hip Hop Age of Lil Wayne, Wife Beaters, Domestic Violence and Misogyny*, WASH. POST (Jan. 6, 2012), http://www.washingtonpost.com/blogs/therootdc/post/parenting-in-the-hip-hop-age-of-lil-wayne-wife-beaters-domestic-violence-and-misogyny/2012/01/04/gIQA4ovDfP_blog.html; Elizabeth Marshall et al., *Ghetto Fabulous: Reading Black Adolescent Femininity in Contemporary Urban Street Fiction*, 53 J. OF ADOLESCENT & ADULT LITERACY 28, 29–35 (2009).

[182] BUSCH-ARMENDARIZ ET AL., *supra* note 137, at 9; TRACEY KYCHELHAHN ET AL., U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS 29 (Jan. 2009), *available at* http://www.bjs.gov/content/pub/pdf/cshti08.pdf.

[183] *See generally* AMY FARRELL ET AL., *supra* note 132.

[184] *Id.* at 8.

[185] WALKER-RODRIGEUZ & HILL, *supra* note 138 (citing NATHALIE DE FABRIQUE, FBI LAW ENFORCEMENT BULLETIN, UNDERSTANDING STOCKHOLM SYNDROME 10–15 (Jul. 2007)) ("These abusive methods of control impact the victims both physically and mentally. Similar to cases involving Stockholm Syndrome, these victims, who have been abused over an extended period of time, begin to feel an attachment to the perpetrator.").

[186] Annitto, *supra* note 60, at 15.

[187] *See* SHARED HOPE INTERNATIONAL, DOMESTIC MINOR SEX TRAFFICKING RAPID ASSESSMENT FACT SHEET ARIZONA 1 (2010), *available at* http://sharedhope.org/wp-content/uploads/2012/09/AZ-Fact-Sheet12.3.pdf.

[188] TIP REPORT 2013, *supra* note 51, at 9; THE WHITE HOUSE, *supra* note 1, at 26.

[189] Annitto, *supra* note 60, at 5.

V. LEGAL SUPPORT FOR A SHIFTING FRAMEWORK

A new awareness of the role of vulnerability is shaping the public discourse on new legal paradigms to combat child sex trafficking. This section explores how several legal precedents favor a shifting focus away from a FFC/ consent paradigm in child sex trafficking cases. A new awareness of the role of vulnerability is shaping new legal paradigms for such cases.

A. Guidance from International Law: U.N. Protocol

The U.N. Protocol is another legal precedent that supports a vulnerabilities paradigm for child sex trafficking cases.[190] The Protocol offers guidance in the form of a clear statement that vulnerability, rather than consent, must drive the legal and policy response to child sex trafficking.[191] The U.N. Protocol provides a broad definition of child sex trafficking that reflects the myriad of means used to engage minors in commercial sex.[192] Professor Mohamed Mattar has argued that the Protocol "expanded the traditional definition of slavery" beyond the concepts of "ownership or buying and selling" to include circumstances "based on undue influence, control and exploitation."[193] In this way, the U.N. Protocol seeks to address "all aspects of trafficking in persons."[194] The U.N. Protocol does not require that prosecutors rebut a presumption of consent in order to prove child sex trafficking.[195] In other words, the

[190] PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, opened for signature Dec. 12, 2000, T.I.A.S. No. 13127 (entered into force Dec. 25, 2003).

[191] For legal scholarship in support of the argument the U.N. Protocol offers a legal rule that focuses on human vulnerability to human traffickers, *see* Hoffer, *supra* note 90, at 1837.

[192] As Professor Mattar has pointed out, the Protocol "extended the definition of trafficking in persons to include not only exploitation of the prostitution of others, but other forms of exploitation, including domestic service, begging, involvement of children in armed conflict, transnational marriages, marriages for child bearing, illegal adoption, removal of human organs and other forms of criminal activities." United Nations Office on Drugs and Crime, United Nations Division for the Advancement of Women, Expert Paper Prepared by Professor Mohamed Mattar, Legal Approaches to Trafficking as a Form of Violence Against Women: Implications for a More Comprehensive Strategy in Legislation on the Elimination of Violence Against Women, 2, 3 (2008).

[193] *Id.*

[194] *Id.*, quoting U.N. Protocol, *supra* note 190.

[195] *Id.* at art. 3, para. (b) ("The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) . . . shall be irrelevant where any of the means set forth in subparagraph (a) have been used."); *see also* Mattar, *supra* note 192, at 3–4.

U.N. Protocol does not require proof of FFC to define child trafficking.[196] Instead, the Protocol recognizes that trafficking in persons also can be accomplished through other means, including "abuse of power or of a position of vulnerability" or the "exploitation of the prostitution of others."[197]

Under the U.N. Protocol, the term "position[s] of vulnerability" includes "the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity."[198] The provision includes those cases in which minors provide some level of complicity to be prostituted by adults, albeit with an inequality of bargain power.[199] Further, paragraph (c) of article 3 provides that the "recruitment, transportation, transfer, harboring or receipt of a child for the purposes of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a)."[200] This last provision is particularly important in cases involving minors because minors are recruited for prostitution through means that transcend the conventional legal definitions of FFC used in trafficking jurisprudence.[201] These means include abuse of power to persuade minors to believe that prostitution is mainstream social behavior, that it is not unhealthy, or that it is financially necessary.[202]

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[196] Hoffer, *supra* note 90, at 1837. Prior to the U.N. Protocol, the U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted in 1949. The latter, however, had limited effectiveness in eradicating trafficking. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives From the Field(s)*, 3 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 317, 329 (2007).

[197] U.N. Protocol, *supra* note 190, art. 3. Article 3 defines "trafficking in persons" as:

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .

Id. at art. 3, para. (a).

[198] *Id.* at art. 3, para. (a); *id.* at art. 9, para. (b)4.

[199] Hoffer, *supra* note 90, at 1836.

[200] U.N. Protocol, *supra* note 190, at art. 3, para. (c). The U.N. Protocol defines a "child" as anyone under eighteen years old. *Id.* at art. 3, para. (d).

[201] Butler, *supra* note 44, at 863–68.

[202] *See* TIP REPORT 2011, *supra* note 6, at 25.

Granted, the U.N. Protocol's effectiveness as a legal weapon in the fight against human trafficking is not without its weaknesses.[203] As scholars have pointed out, in some respects, the Protocol has failed to fully address the factors that make certain populations vulnerable to human trafficking.[204] Nevertheless, its clear statements that vulnerability, not consent, is the yardstick for developing anti-trafficking policy is an important starting point for future discourse on effective approaches to combating child sex trafficking.

B. State Law Limitations on a Minor's Capacity to Consent

In many ways, traditional state laws mirror the U.N. Protocol's concern with the vulnerability of minor's and the law's protectionist approach toward them. State laws regulating a minor's legal consent in other contexts have often leaned towards a protectionist approach in the context of commercial sex. America's ambivalence about the issue of minors and sexual consent is also apparent in its inconsistent legal approaches to adolescent sexuality.[205] First, the age of consent varies from state to state.[206] While the average age is sixteen, several states recognize a legal consent to sex for minors as young as fourteen.[207] In some states, courts are moving to abandon age of consent laws and instead reasoning that the law should reflect a minor's *actual* ability to consent to sex.[208]

Moreover, the law's determination of whether a minor is mature enough to consent to a variety of adult activities varies greatly depending on the context. As Jonathan Todres has explained:

> Children are deemed mature enough to participate in the polity (e.g., vote) at a different age from when they are deemed mature enough to exercise independent economic power (e.g., work or contract), control their own bodies

[203] *See* Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 57–58 (2011).

[204] *Id.* ("International law does not address root causes and systematic issues sufficiently. The issues of poverty, development, and equality collectively merit only a single sentence in the Trafficking Protocol, with no detail on steps to be taken or specific requirements on states parties vis-à-vis these issues.").

[205] Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1107 (2012); Nicole Phillips, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. (2011).

[206] Nicole Phillips, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. (2011).

[207] *Id.* at 274, n.11, n.12

[208] *See generally,* Jennifer Ann Drobac, *Wake Up and Smell the Starbucks Coffee: How* Doe v. Starbucks *Confirms the end of "Age of Consent" in California and Beyond*, 33 B.C. J. L. & SOC. JUST. 1 (2013).

> (e.g., engage in consensual sex), or assume adult social responsibilities (e.g., drink alcohol in public places).[209]

The ways in which the law limits a minor's legal right to consent to engage in adult activities generally should inform the proper legal response to child prostitution.

First, the law should not recognize a minor's consent to prostitution because the law rightfully limits other romantic and sexual relationships in which the minor needs protection from the State, As Jonathan Todres argued, the right to bodily integrity, such as the right to engage in romantic or sexual relationships, is a proxy for a child's maturity.[210] Yet, the law already constrains the types of romantic and sexual relationships in which minors can engage.[211] Similarly, in many states, minors sixteen or older can consent to sex but still cannot terminate a pregnancy without parental consent. Arguably, the law rightfully provides that, with rare exception, a minor under age eighteen does not have the right to marry without parental consent.

Second, the law should not recognize a minor's consent to contract for commercial sex in part because their right to contract is not recognized in most other contexts. Todres points out that the law limits a minor's right to contract until they are eighteen years old[212] "primarily as a protective measure."[213] Indeed, their rights to contract are limited because "minors are perceived as having far less capability to engage in fair exchange over the long term."[214] Third, the law's tradition of constraining a minor's ability to work based on lack of maturity[215] should also be applied to sex work. The law should not legitimate a minor's consent to "work" as a prostitute because minors generally are "prohibited from working under a certain age to protect them from harm."[216] While there are exceptions to the federal labor law provisions against employment of minors under sixteen,[217] those exceptions (e.g. farm work, babysitting) are not analogous to sex work.

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[209] Todres, *supra* note 205, at 1108.

[210] Todres, *supra* note 205, at 1116, 1143.

[211] Todres, *supra* note 205, at 1143.

[212] Todres, *supra* note 205, at 1125.

[213] Todres, *supra* note 205, at 1125.

[214] Todres, *supra* note 205, at 1125, *quoting* Michael Glassman and Donna Karno, *On Establishing a housing Right to Contract for Homeless Youth in America*, 7 SEATTLE J. FOR SOCIAL JUST. 437, 438 (2009).

[215] Todres, *supra* note 205, at 1128–29

[216] *See* Todres, *supra* note 205, at 1128–29.

[217] Todres, *supra* note 205, at 1130.

C. *Applying U.S. Supreme Court Precedents in State Trafficking Cases*

United States Supreme Court precedents pertaining to minors and capacity to understand crime shed light on the debate over consent, capacity, and child prostitution. The United States Supreme Court has recognized the particular physical and emotional vulnerabilities that make minors susceptible to drugs, crime, and other negative social influences.[218] The Court's conclusions provide insight into the capability of minors to consent to prostitution and, therefore, will be briefly explored here. In *Graham v. Florida*, the Court explored the extent to which juveniles have the same culpability as adults who commit crimes. The Court relied on social science research on adolescent brain and social development to hold that life sentences without the possibility of parole for non-violent offenses for juveniles violate the Eighth Amendment.[219] In *Graham*, a sixteen-year-old juvenile violated his parole when he committed armed burglary with assault and battery.[220] The state sentenced him to the maximum penalty of life without parole.[221]

Relying on prior Supreme Court precedents regarding juvenile capacity, the *Graham* Court reversed.[222] It relied in part on the Court's landmark *Roper* decision, which reasoned that age and immaturity make minors uniquely vulnerable to negative societal influences.[223] In *Roper*, the Supreme Court determined that the "'comparative immaturity and irresponsibility of juveniles'" warranted a lower level of culpability for minors who commit crimes.[224] In particular, the Court recognized the "susceptibility of juveniles to immature and irresponsible behavior" as well as their "vulnerability and comparative lack of control over their immediate surroundings."[225] According to the Court, these vulnerabilities make

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[218] Jennifer Ann Drobac, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to "The Age of Consent,"* 20 J.L. & POL'Y 63, 89 (2011) (discussing, in light of Graham, the "need to explore further whether adolescent development and psychosocial maturity should guide the development of civil law . . . regarding the 'age of consent.'"); Mary Berkheiser, *Death is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 9–10 (2011); Deana Pollard Sacks, *Children's Developmental Vulnerability & the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 784–85 (2011).

[219] Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2010).

[220] *Id.* at 2018.

[221] *Id.*

[222] *Id.*

[223] Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[224] Berkheiser, *supra* note 218, at 9 (quoting *Roper*, 543 U.S. at 569).

[225] *Roper*, 543 U.S. at 570; *see Berkheiser*, *supra* note 218, at 8–9.

juveniles especially susceptible to negative influences, such as crime, and minimize their culpability as compared to adults.[226] Most recently, the *Graham* Court affirmed *Roper* and its reasoning as to the vulnerabilities of minors.[227] The Supreme Court reached a similar result in *Thompson v. Oklahoma*.[228] There, the Court held that, as compared to adults, juveniles have a lower mental capacity to understand crime.

Another factor that the Supreme Court has considered is the new adolescent brain research affirming the limited capability of minors to consistently make rational choices and to avoid improper societal influences.[229] The Court agreed with scientific findings of "fundamental differences between juvenile and adult minds."[230] The Court then reasoned that these differences mean that children are malleable, are still developing their moral value system, and their understanding of the impact of their decisions.[231]

The Supreme Court's recognition in *Graham* of the unique vulnerabilities that minors face offers guidance for reform of domestic sex trafficking laws. The Court's recognition that minors are vulnerable to the undue influence of their environments suggests that adults also recognize these vulnerabilities and often exploit them. Furthermore, the *Graham* Court's reasoning that minors are still developing their understanding of moral value systems supports the notion that many do not completely understand a priori the implications of acquiescing to commercial sex acts in order to please the adults that exploit them.

The Court's reasoning in *Graham* is anchored in children's rights jurisprudence. Social scientific data suggests that adolescents still "experience physical, cognitive, sexual and psychosocial development during this long maturation phase."[232] As a result, a minor's "'behavioral immaturity mirrors that anatomical immaturity of their brains.'"[233] In other words, minors experience dramatic physical

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[226] *Roper*, 543 U.S. at 571.

[227] *Graham*, 130 S. Ct. at 2026; *Berkheiser*, *supra* note 218, at 10.

[228] 487 U.S. 815, 833–37 (1988).

[229] *Graham*, 130 S. Ct. at 2026; Terry A. Maroney, *Adolescent Brain Research After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 779 (2011) (casting doubt on the viability of expanding the use of research to draw conclusions about the legal responsibility of minors for their criminal acts).

[230] *Graham*, 130 S. Ct. at 2026.

[231] *See id.*

[232] Drobac, *supra* note 121, at 11–12.

[233] *Id.* at 12 (citing Brief for the American Medical Association & American Psychiatric Association et al. as Amici Curiae Supporting Respondent, Roper v.

development and continue to undergo brain development before they turn eighteen years old.[234]

Graham and *Roper* echo the argument that the criminal law must consider how vulnerable minors can be manipulated by adults into making bad choices. As Professor Barbara Bennett Woodhouse has explained, there is a universal recognition of the vulnerability of children.[235] Likewise, Professor Annette Appell has referenced a view of childhood that came to influence American law: "Children [are] fragile, vulnerable, inexperienced, unworldly, and without value systems. Children are also unreliable decisionmakers who are unable to project into the future, are subject to peer pressure, and possess poor impulse control."[236] Indeed, law "shape[s] the space of childhood."[237]

The Texas Supreme Court applied these precedents to address conflicting legal treatment of a minor's consent to sex. In a landmark decision, *In re B.W.*, the court held that the Texas state legislature did not intend to recognize a thirteen-year-old child as capable of consenting to commercial sex with an adult.[238] In that case, a thirteen-year-old girl admitted to engaging in prostitution.[239] The trial court found that the child had engaged in delinquent conduct, the Class B misdemeanor offense of prostitution, and then placed her on probation for eighteen months.[240] The Court of Appeals affirmed the trial court's decision.[241]

The Texas Supreme Court had to reconcile conflicting provisions of its family and criminal laws. On the one hand, the Texas Penal Code permitted a thirteen year old to be punished as a delinquent for the crime of prostitution.[242] On the other hand, the same statute made it a crime to have sex with a person under seventeen years old.[243] The law provided no defenses for sex with a

Simmons, 543 U.S. 551 (2005) (No. 03-633)).

[234] *Id.*

[235] *See generally* Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817 (2009).

[236] *See* Annette Ruth Appell, *The Pre-Political Child in Child Centered Jurisprudence*, 46 HOUS. L. REV. 703, 709 (2009).

[237] *Id.* at 708.

[238] *In re B.W.*, No. 08-1044, 313 S.W.3d 818, 819 (Tex. June 18, 2010).

[239] *Id.* at 2.

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.* at 821

child under fourteen years old.[244] The Texas Supreme Court rejected the state's legal and policy arguments that the legislature intended to prosecute thirteen year olds for engaging in commercial sex with adults.[245]

The court recognized that the current state prostitution laws provided inadequate protection for commercially exploited minors because they punished minors for their own exploitation.[246] Instead, the court reasoned that recent anti-trafficking legislation enacted by the Texas legislature demonstrated the legislature's intent to recognize prostituted minors as victims, not criminals.[247]

The *B.W.* case reflects a sea change in which several states have enacted safe-harbor provisions that specifically eliminate the FFC requirement from child sex trafficking cases.[248] Safe harbor laws reflect a paradigm shift in the legal approach to child prostitution—one that no longer labels prostituted minors as criminals or delinquents.[249] These safe harbors invalidate prostitution laws that presume that minors can consent to prostitution[250] and therefore treat prostituted minors as victims, as opposed to criminals.[251] Such child centered approaches reflect an understanding of the vulnerabilities that minors face to child sexual exploitation.

Several proposed federal bills support a new approach to child sex trafficking that focuses on the vulnerability of minors to exploitation, as opposed to their capacity to consent to sex. For

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[244] In re B.W., 313 S.W.3d at 821. The court explained, "[t]here are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child's spouse. Tex. Penal Code 22.011(e). . . . There are no such defenses, however, when the child is under fourteen, irrespective of the child's purported willingness." *Id.*

[245] *Id.* at 822.

[246] *Id.*

[247] *Id.* at 826.

[248] *See* Polaris Project, *The Governor of CA: Support AB 90 and SB 861*, CHANGE.ORG (last visited Feb. 1, 2014), http://www.change.org/petitions/the-governor-of-ca-support-ab-90-and-sb-861#?opt_new=t&opt_fb=f. For a favorable view of safe harbor laws, *see generally* Rawal, *supra* note 66, at 525–35; Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEG, & POL'Y BRIEF 67, 71 (2012); Butler, *supra* note 60, at 876–85; Annitto, *supra* note 60, at 21–25, 29–32; Birckhead supra note 19, at 1055. For an oppositional view, *see generally* Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235 (2008) (opposing Safe harbor laws).

[249] *Id.*

[250] *See* Adelson, *supra* note 19, at 108.

[251] RAMI S. BADAWY, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, SHIFTING THE PARADIGM FROM PROSECUTION TO PROTECTION OF CHILD VICTIMS OF PROSTITUTION 1 (2010), *available at* http://www.ndaa.org/pdf/Update_V22N8.pdf.

example, the proposed Domestic Minor Sex Trafficking Deterrence and Victims Support Act[252] recognizes all prostitutes under age eighteen as trafficking victims, regardless of FFC proof.[253] This bill calls upon states to enact their own legislation that would "establish the presumption that a child under the age of eighteen who is charged with a prostitution offense is a minor victim of sex trafficking."[254] Moreover, the Act calls upon Congress to amend the TVPRA of 2008 to expressly prohibit the prosecution of minors for prostitution.[255] These are steps in the right direction.

VI. CONCLUSION

Child sex trafficking also persists in the United States because trafficking laws have failed to address the root causes of the problem. While federal law provides a blanket proscription against child prostitution. Some state anti-trafficking laws fail to follow the TVPRA's definition of child sex trafficking and, instead, presume that a child consents to prostitution unless the presumption is rebutted by proof of force, fraud, or coercion.

The application of the FFC test in child sex trafficking cases causes devastating collateral consequences for sexually exploited minors. Without a uniform definition of child sex trafficking, law enforcement officials and other community stakeholders do not consistently identify sexually exploited minors as victims of human trafficking. When anti-trafficking laws fail to recognize prostituted minors as trafficking victims, the far-reaching impacts of child sexual exploitation are not addressed. Minors may face criminal prosecution as prostitutes for their own sexual exploitation. The state may decline shelter, health services, or other victim protections. Thus, opportunities to prevent further child sexual exploitation may be lost. No court or legislature should legally recognize a minor's decision to have a romantic relationship with a pimp or to engage in a sexual encounter with an adult who purchases sex with the minor.

Fortunately, the legal landscape for addressing child prostitution is changing. There is legal support for a shifting framework that moves the focus away from testing consent and towards universal recognition of the vulnerability that all minors face to sexual exploitation by adults and other predators in positions of power or

[252] Domestic Minor Sex Trafficking Deterrence and Victims Support Act, S. 596, 112th Cong. (2011), *available at* https://www.govtrack.us/congress/bills/112/s596.

[253] *Id.* at § 3(3)(A).

[254] *Id.* at § 3(3)(B)(i).

[255] *Id.* at § 6.

influence. Judges, legislators, and advocates should take into account these vulnerabilities when creating a child-centered response to child prostitution. A consistent legal framework that recognizes the vulnerabilities that minors face as potential victims of sex trafficking is the best approach to ensure that America recognizes child prostitution in its own backyard for what the world knows it is—one of the worst, gruesome, and devastating forms of human trafficking.