

WEAPONIZING MARRIAGE: A CRITICAL VIEW OF MARRIAGE THROUGH A HUMAN TRAFFICKING LENS

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INTRODUCTION

“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹

Marriage is so profoundly woven into our concept of society that offering a definition seems superfluous. Marriage transcends cultures and is virtually universal. Although a universal practice, there remains diverse thought surrounding the purpose and practice of marriage. Some view marriage as an outward display of an inward commitment, while others view it as an integral part of their religious or faith practice. Some view marriage as an economic proposition that facilitates financial benefits, such as discount car insurance, while others view it as a Hollywood trope. The diversity in thought related to marriage is further highlighted by the response of the States in their marriage-related legislation. For example, Delaware provides for annulments if the marriage was entered into on a dare.² Montana does not require either party to be present at the time of the marriage, allowing, instead, for marriage by proxy.³ Texas allows for informal marriage that only requires two individuals to agree between themselves to be married, live together as spouses, and represent to others that they are married.⁴

Regardless of one’s personal thoughts or feelings regarding marriage, it cannot be denied that marriage is a tenet of American society. It holds such significance and connotes such dignity to personhood that many individuals have dedicated great effort in paving the way for all persons to be afforded the right to marry.⁵ Justice Kennedy articulated the complex dynamic of marriage in the

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1. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

2. DEL. CODE ANN. tit. 13, § 1506(a)(6) (2023).

3. MONT. CODE ANN. § 40-1-301 (2023).

4. TEX. FAM. CODE ANN. § 2.401(a)(2) (West 2023).

5. *See generally* *United States v. Windsor*, 570 U.S. 744 (2013) (explaining that Edith Windsor and Thea Spyer married in Canada. After returning to the States, Spyer passed. When Windsor attempted to claim the estate exemption for surviving spouses, she was barred by the Defense of Marriage Act.); *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (explaining that California voters

landmark Supreme Court decision that established marriage as a fundamental right regardless of sexual orientation, writing:

[T]he annals of human history reveal the transcendent importance of marriage. The lifelong union... has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.⁶

In 1907 the Supreme Court identified two essentials to a valid marriage, “capacity and consent.”⁷ Black’s Law Dictionary defines marriage as “[t]he legal union of a couple as spouses.”⁸ It lists the elements for a valid marriage as “(1) parties legally capable of contracting to marry, (2) mutual consent of agreement, and (3) an actual contracting in the form prescribed by law.”⁹

So, what happens when capacity and consent are subverted? And are we willing to acknowledge that consent does not automatically operate in tandem with marriage? Can the subversion be so great that marriage is weaponized as a tool for human trafficking?

Human trafficking is not only pervasive throughout the United States, it is a crisis that infects communities globally.¹⁰ The Trafficking Victims Protection Act (“TVPA”) of 2000 defines trafficking in persons as:

(A) sex trafficking in which a commercial sex act is induced by *force, fraud, or coercion*, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of *force, fraud, or coercion* for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹¹

attempted to amend the California Constitution and limit the definition of marriage to only those unions between a man and a woman. A same-sex couple, wishing to marry, challenged the Proposition under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“To say that the issue... was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”); *Baker v. Nelson*, 291 Minn. 310 (1971) (holding that Richard John Baker and James Michael McConnell were denied a marriage license solely because they were a same sex couple.).

6. *Obergefell v. Hodges*, 576 U.S. 644, 656-57 (2015).

7. *Travers v. Reinhardt*, 205 U.S. 423, 438 (1907).

8. *Marriage*, BLACK’S LAW DICTIONARY (11th ed. 2019).

9. *Id.*

10. *About Human Trafficking*, U.S. DEP’T OF STATE, <https://www.state.gov/humantrafficking-about-human-trafficking/> (last visited Sept. 6, 2023).

11. VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, 114 Stat. 1464, § 103 (8)(A)-(B) (emphasis added).

Human trafficking refers to “a crime whereby traffickers exploit and profit at the expense of adults or children by compelling them to perform labor or engage in commercial sex.”¹² The Department of Homeland Security estimates that “[e]very year, millions of men, women, and children are trafficked worldwide – including right here in the United States.”¹³ The abhorrent nature of trafficking is exacerbated by the techniques utilized by traffickers to recruit their victims. Traffickers use violence, manipulation, false promises, and romantic relationships to lure their victims into trafficking schemes.¹⁴

While it is patently accurate that “[a]nyone can be a victim of trafficking,”¹⁵ there are distinctive patterns that put certain individuals at greater risk. Traffickers often prey on individuals who are psychologically or emotionally vulnerable, individuals who are facing economic hardship, or individuals who lack robust social circles.¹⁶ Often traffickers target individuals who have experienced other forms of abuse or maltreatment, runaways, or persons displaced during natural disasters.¹⁷ In a culture that recognizes the social, emotional, and economic advantages of marriage it’s not difficult to see how marriage could be wielded and weaponized against victims by a trafficker. Even if an individual initially consents to engage with a person who, unbeknownst to them, is a human trafficker, human trafficking can still manifest later in the relationship and, despite original consent, remains a crime.¹⁸ “[A]n adult victim’s initial willingness... is not relevant where a perpetrator subsequently uses force, fraud, or coercion to exploit the victim[.]”¹⁹

Marriage should not be a rubber stamp that negates an individual’s ability to give and withdraw consent. Marriage should not eliminate an individual’s autonomy. The ability to consent should follow an individual into every relationship and commitment in which they engage. Force, fraud, and coercion can exist within a marriage. Human trafficking can exist within a marriage. It is imperative that we acknowledge the capacity of marriage to empower traffickers and that we not allow an institution so “fundamental to our very existence and survival”²⁰ to become a harbor for trafficking.

Human trafficking impacts individuals that identify along the gender spectrum. Despite that fact, statistics demonstrate that human trafficking

12. *Trafficking in Persons Report*, U.S. DEP’T OF STATE 31 (July 2022), <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf>.

13. *What is Human Trafficking?*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/blue-compass/campaign/what-human-trafficking> (last updated Sept. 22, 2022).

14. *Id.*

15. Office on Trafficking in Persons, *Fact Sheet: Human Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERV. <https://www.acf.hhs.gov/otip/fact-sheet/resource/fshumantrafficking> (last visited Sept. 6, 2023) [hereinafter *Fact Sheet: Human Trafficking*].

16. *What is Human Trafficking?*, *supra* note 13.

17. *Fact Sheet: Human Trafficking*, *supra* note 15.

18. *Trafficking in Persons Report*, *supra* note 12, at 34.

19. *Id.*

20. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

disproportionately affects women and girls.²¹ The language within this piece may feature the experiences of women and girls, however, boys, men, and non-binary individuals are not exempt from the horrors of trafficking. It is imperative that we acknowledge the full array of experiences. The imbalance promulgated in published statistics may be a genuine portrayal of reality, but it is worth considering that lingering stigmas may prevent boys, men, and non-binary individuals from reporting their trafficking experiences.²²

Additionally, there is a natural tendency to believe that only the “innocent” become victims of trafficking. However, that perspective may result in a disservice to real-world victims. Kate D’Adamo shared some exceptional insight to that end:

[R]eal victims are complex and powerful people whose lives started long before their trafficking experiences and will continue long after. Their stories are always far more complicated than simply “innocent” or “not.” It is in these nuances that so much about trafficking and trafficking experiences can be learned, like how... a history of arrests meant that no one could see beyond a victim’s criminal record and reconcile the person in front of them with preconceived ideas of a victim.²³

While reasonable minds can differ on the complexities of marriage, the only reasonable approach to trafficking is extinction. We must continually shed light to expose structures within our society that allow exploitation and trafficking to fester. Through illumination we may be able to halt victimization and extinguish this insidious crime.

BACKGROUND

On November 20, 2018, Tulsa police officer, J. Oxford (“Oxford”), who was assigned to the Department’s Vice Unit,²⁴ responded to an advertisement offering a “date” with an unidentified woman.²⁵ When Oxford arrived to the agreed location, he noticed a man observing him as he approached the woman’s room.²⁶ After

21. Amy Novotney, *7 in 10 Human Trafficking Victims are Women and Girls. What Are the Psychological Effects?*, AM. PSYCH. ASS’N (Apr. 24, 2023), <https://www.apa.org/topics/women-girls/trafficking-women-girls>.

22. See Office to Monitor and Combat Trafficking in Persons, *Assisting Male Survivors of Human Trafficking*, U.S. DEP’T OF STATE (June 2017), <https://www.state.gov/wp-content/uploads/2019/02/Assisting-Male-Survivors-of-Human-Trafficking.pdf>; Michael T. Tien, *Human Trafficking: The Missing Male Victim*, 18 PUB. INT. L. REP. 207, 209-10 (2013), <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1016&context=pilr>; *Unique Obstacles Put Transgender People at Risk of Trafficking*, POLARIS (Mar. 10, 2017), <https://polarisproject.org/blog/2017/03/unique-obstacles-put-transgender-people-at-risk-of-trafficking/>.

23. Kate D’Adamo, *Preconceived Notions of “Innocence” are a Disservice to Trafficking Victims*, VERA INST. OF JUST. (Sept. 2, 2015), <https://www.vera.org/news/beyond-innocence/preconceived-notions-of-innocence-are-a-disservice-to-trafficking-victims-1>.

24. Trial Brief of the United States of America at 4, *United States v. Palms*, No. 19-CR-103-CVE, 2019 WL 3856590 (N.D. Okla. Aug. 16, 2019) [hereinafter Trial Brief].

25. *United States v. Palms*, No. 19-CR-0103-CVE, 2019 WL 3856590, at *3 (N.D. Okla. Aug. 16, 2019), *aff’d*, 21 F.4th 689 (10th Cir. 2021).

26. *Id.*

the woman agreed to perform a commercial sex act, Oxford identified himself as a police officer.²⁷ Oxford then directed other officers to detain the man who had observed him enter the woman's room.²⁸ The man was identified as R. Palms ("Palms") and the woman was identified by the pseudonym M.W.²⁹ When officers examined M.W.'s phone, they found messages between M.W. and Palms regarding the arranged "date" with Oxford.³⁰ The messages revealed that Palms had directed M.W. on pricing and coached her on screening, scheduling, and advertising her "dates."³¹ M.W. shared with Oxford that she met Palms while working as a bartender and they began a romantic relationship.³² After some time, Palms informed M.W. that she would be working for him by soliciting commercial sex acts.³³ If M.W. did not conduct at least five "dates" each night, Palms would physically assault her.³⁴

Six days after the incident involving Oxford, Palms forced M.W. to marry him in an attempt to claim spousal privilege to prevent M.W. from testifying against him.³⁵ The court determined that M.W. could only testify that she had a history with Palms and that he forced her to marry him.³⁶ Eventually, a federal grand jury indicted Palms on sex trafficking, attempted obstruction of sex trafficking enforcement, and retaliation against a victim.³⁷ A jury trial was held but the jury could not reach a verdict, forcing the district court to declare a mistrial.³⁸ A second trial was set and the Government obtained a superseding indictment that added two additional charges: transporting an individual for prostitution and online promotion and facilitation of prostitution.³⁹ The jury found Palms guilty of sex trafficking, attempted obstruction of sex trafficking enforcement, and transporting an individual for prostitution.⁴⁰

A mild, censored version of this case has been presented to you. The censorship is in place not to belittle or downplay the horrific acts that M.W. endured or the heinous crimes Palms perpetrated. Instead, censorship is provided to allow your thinking brain to stay engaged and critically process the finer points of this case.

First, the origin of M.W.'s trafficking victimization was not a violent interaction involving physical threats, verbal attacks, or outward aggression. Instead, it began with a romantic relationship.⁴¹ M.W. was a mother and twenty-

27. Trial Brief, *supra* note 24, at 4.

28. *Palms*, 2019 WL 3856590, at *3.

29. *Id.*

30. Trial Brief, *supra* note 24, at 5.

31. *Id.*

32. *Id.*

33. *Palms*, 2019 WL 3856590, at *3.

34. Trial Brief, *supra* note 24, at 5.

35. *Palms*, 2019 WL 3856590, at *3.

36. *Id.* at *20.

37. *United States v. Palms*, 21 F.4th 689, 696 (10th Cir. 2021).

38. *Id.*

39. *Id.*

40. *Id.*

41. Trial Brief, *supra* note 24, at 5.

seven years old.⁴² She was not a young, naive adolescent. She was a grown woman engaging in a consensual relationship. However, that relationship quickly tarnished. Palms invited M.W. to accompany him on a road trip to Louisiana and when they were “in the middle of nowhere” Palms told M.W. that she would be making money for him.⁴³ From that moment until the incident involving Oxford, Palms controlled M.W.’s money, car, and phone⁴⁴—every lifeline available to M.W. that could empower her to leave. Palms exercised complete control. M.W. had to ask Palms for the money she earned to support her two children and when she could no longer pay her bills or rent, she was evicted.⁴⁵ M.W. had engaged in a romantic relationship that transformed into a nightmare. In the blink of an eye her money, car, phone, and housing were no longer her own. She lost bodily autonomy and the ability to control the care of her children. This brings us to the other, finer point of this case.

Only six days after Palms’ arrest, he forced M.W. to marry him. This is a significant and alarming part of the case that could easily be overshadowed by its competing horrors. Palms had full confidence that he could force M.W. into marrying him because he controlled every aspect of her life. Further, the basis for the marriage was the prevention of M.W.’s testimony against Palms under the shield of spousal privilege. There are two lenses through which a person could view that tactic—both are disturbing. The first lens is that a legal professional could have informed Palms that spousal privilege was a procedural technique that could be wielded in his favor. Rule 1.2(d) of the American Bar Association’s Model Rules of Professional Conduct states, “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent[.]”⁴⁶ While there are those who choose to disregard ethical practices, this lens appears obscured. The second lens is that Palms, as a seasoned trafficker, had previous knowledge of the procedural loophole of spousal privilege and chose to wield it in his favor. One could surmise that he was somewhat successful in his plot. Although it is speculation, could the initial mistrial and further traumatization of M.W. have been avoided if she had not been restricted by the shield of spousal privilege?

Palms appealed his convictions, and the Tenth Circuit affirmed the convictions.⁴⁷ Although it may be tempting to view Palms’s convictions as another mark in the column of justice, it calls for further inspection. M.W.’s case exposes, in a subtle form, the room left open for abuse of legal process by human traffickers. M.W. is not the first person to experience marriage as a weapon. Applying a critical view to current procedural loopholes and reinforcing the idea that trafficking can happen within a marriage, may eradicate the opportunity for such a significant institution to become weaponized.

42. *Palms*, 21 F.4th at 693.

43. *Id.*

44. *Id.*

45. *Id.*

46. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR. ASS’N 2023).

47. *Palms*, 21 F.4th at 692.

Human trafficking is the third largest global, criminal enterprise and continues to expand.⁴⁸ While many governments and organizations work tirelessly to combat this alarming practice, domestic judicial systems may inadvertently maintain loopholes for traffickers to further exploit their victims. Marriage can become a tool to be wielded by traffickers. However, there are solutions to prevent the weaponization of an institution that carries exceptional cultural, religious, and economic significance.

We must take a critical look at current legal procedures to evaluate if there are unintended mechanisms and loopholes related to marriage that traffickers can utilize to further exploit and victimize. The modification of spousal privilege and abolition of child marriage could eliminate two significant harbors for traffickers. Additionally, education could enlighten mindsets to foster recognition of human trafficking's connection to marriage. The more informed we are as a society and the more aware our legislators become, the more success we will find in providing all human trafficking victims and survivors with access to the social services and justice they profoundly deserve.

Although it may be more comfortable to take the stance that marriage is private ordering and therefore should remain untainted by invasive review, justice should not be blinded by traditions that are a conduit to injustice. Left unchecked, marriage could germinate into an unfettered method of human trafficking. Reread M.W.'s story. Her trafficker did not need to be advised on how to protect himself at the expense of further exploitation of his victim. He acted, without hesitation, to weaponize a revered practice. We can only prevent the degradation of marriage that human trafficking poses if we are willing to look at it critically. There are too many individuals depending on it.

Presented here, will be an application of marriage to the triad of "force, fraud, and coercion" to demonstrate the general premise that trafficking can and does happen in the facilitation and practice of marriage. Child marriage will be evaluated as a potential pipeline for juvenile trafficking. Finally, there will be a brief conversation about the potential for labor trafficking to manifest within marriage.

I. MARRIAGE AS AN ABUSE OF LEGAL PROCESS FOR HUMAN TRAFFICKERS

Within the United States, marriage involves legal processes and procedures. While most people focus on the words of an officiant invoking their vested power to pronounce individuals as married, there are vital steps that precede walking down an aisle or engaging in other rituals. Before two individuals can be legally married, they must apply for a marriage license. In the state of Ohio, obtaining this license requires that the two individuals who intend to marry report to the Probate Court in their county of residence, where they must disclose personal information

48. Mark Kavenagh, *The Trafficking of Children for Sexual Purposes: One of the Worst Manifestations of This Crime*, ECPAT (Aug. 6, 2018), <https://ecpat.org/trafficking-the-third-largest-crime-industry-in-the-world/>.

under oath.⁴⁹ At this point, the State becomes a party to the legal contract of marriage and it will be required to enforce certain obligations of spouses to each other, any future children, and the State itself.⁵⁰ If the State is a party to these contracts, it would seem reasonable for the State to ensure that its legal processes and procedures do not diminish, encumber, or deprive any other party to the contract of their rights and freedoms within the contract. Therefore, it is reasonable that any procedural loophole to weaponize a contract in which the State is party should be highly scrutinized and modified or abolished if necessary.

A. *Spousal Privilege*

Spousal Privilege, or marital privilege, is a component of the Federal Rules of Evidence and is recognized in some formulation by the States.⁵¹ Spousal privilege originated as a common law rule claiming that spouses “were incompetent as witnesses for or against each other.”⁵² This view was centered on the legal fiction that spouses “were one person” and therefore if a defendant could not be compelled as a witness, neither could their spouse.⁵³ Further, spouses were one person – the husband – because, at the inception of spousal privilege, women “had no recognized separate legal existence[.]”⁵⁴ Eventually, the Supreme Court acknowledged that women have separate legal identities and should be afforded “the dignity associated with recognition as a whole human being.”⁵⁵ The modern justifications for spousal privilege center around the sanctity of marriage and its perceived role in fostering peace within families.⁵⁶ On its journey through American jurisprudence, spousal privilege bifurcated into two distinct sub-privileges: spousal communications privilege and spousal testimonial privilege.⁵⁷

The spousal testimonial privilege prevents a witness spouse from being compelled to adversely testify in a criminal trial of their defendant spouse.⁵⁸ The Supreme Court concluded that based on the history and foundations of the privilege, the witness spouse alone would have the privilege to refuse to adversely testify against their spouse.⁵⁹ In theory, the spousal testimonial privilege would provide a trafficking victim with the flexibility and independence to choose whether or not to testify against their trafficker spouse. It’s not difficult to imagine that an individual who has been trafficked, even given the chance to testify against

49. OSBA Comms. & Section, *Law Facts: Ohio’s Marriage Laws*, OHIO STATE BAR ASS’N (Oct. 12, 2018), <https://www.ohiobar.org/public-resources/commonly-asked-law-questions-results/law-facts/law-facts-ohios-marriage-laws/>.

50. *Id.*

51. See FED. R. EVID. 501. See also OHIO REV. CODE ANN. § 2317.02 (West 2023).

52. *Hawkins v. United States*, 358 U.S. 74, 75 (1958).

53. *Id.*

54. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

55. *Id.* at 52.

56. *Id.* at 44.

57. *Id.* at 45. See also *Spousal Privilege*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/spousal_privilege (last updated Apr. 2021).

58. *United States v. Brock*, 724 F.3d 817, 820 (7th Cir. 2013).

59. *Trammel*, 445 U.S. at 53.

their trafficker, would be reluctant. With the complete onus of testifying being placed on a victim, they may become a target of retaliation. The dissolution of the privilege in cases of human trafficking could allow legal counsel to utilize trauma-informed methods and develop new strategies to provide robust evidence that does not expose a victim to retraumatization or retaliation.

The spousal communications privilege protects spouses against disclosures of confidential statements made between spouses.⁶⁰ The “communications privilege covers ‘information privately disclosed between [spouses] in the confidence of the marital relationship[.]’”⁶¹ If we look back at the case of M.W., communications were pivotal in demonstrating that Palms had been trafficking M.W.⁶² This is not isolated to M.W.’s case. Communications play a significant role in trafficking. In the twenty-first century, digital communications (i.e., text messages, private messages, Snapchat messages) can facilitate grooming, recruitment, and the perpetration of trafficking.⁶³ The spousal communications privilege is a more malleable doctrine and varies among the several States.

In 2019, the Supreme Court of New Mexico prospectively abolished the spousal communications privilege.⁶⁴ It concluded “that the spousal communications privilege ha[d] outlived its useful life[.]”⁶⁵ The court reasoned that “[e]videntiary privileges ‘are not lightly created nor expansively construed’ because ‘they are in derogation of the search for truth’” and therefore felt compelled to evaluate if the privilege promoted a “sufficiently important interest[] [that] outweigh[ed] the need for probative evidence.”⁶⁶ The most prominent and traditional justification the court found regarding the privilege was that it “promote[d] harmony between husband and wife” which, in turn, promoted “the public good[.]”⁶⁷ The court explored criticisms of the privilege pointing to two weaknesses: “that (1) married people know the privilege exists, and (2) they rely on it when deciding how much information to share.”⁶⁸ The court stated, “it is likely that most people are entirely unaware of the privilege.”⁶⁹ Furthermore, the court determined that spouses communicate freely with each other, not motivated by a legal evidentiary privilege but because of “the trust they place in the loyalty and discretion of each other[.]”⁷⁰ The justification that marital privacy is a goal of

60. *Brock*, 724 F.3d at 820.

61. *Id.* (quoting *Trammel*, 445 U.S. at 51).

62. *United States v. Palms*, No. 19-CR-0102-CVE, 2019 WL 3856590, at *3 (N.D. Okla. Aug. 16, 2019), *aff’d*, 21 F.4th 689 (10th Cir. 2021).

63. See *Human Trafficking and Social Media*, POLARIS, <https://polarisproject.org/human-trafficking-and-social-media/> (last visited Sept. 6, 2023).

64. *State v. Gutierrez*, 482 P.3d 700, 703 (N.M. 2019), *overruled by State v. Gutierrez*, No. S-1-SC-36394, 2021-NMSC-008, on reh’g (Nov. 5, 2020).

65. *Id.*

66. *Id.* at 705.

67. *Id.* at 706 (first quoting 1* Kenneth S. Broun, *MCCORMICK ON EVIDENCE* 523 (7th ed. 2013); and then quoting R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM. L. 339, 358 (2006)).

68. *Id.* at 708.

69. *Id.*

70. *Id.* (quoting Broun, *supra* note 67, at 523).

the Rules of Evidence is undercut by its underinclusive nature.⁷¹ If the privilege is meant to protect interactions in which one spouse conveys a message to the other, the privilege completely misses “some of the most personal and intimate interactions between spouses.”⁷²

In 2020, the court retracted their ruling that abolished the spousal communications privilege and determined that any final modification or abolition of the privilege should be subjected to “comprehensive study and robust public discussion.”⁷³ New Mexico Supreme Court Justice Judith Nakamura expressed sadness in her dissent related to the Court’s decision to retract their initial opinion.⁷⁴ She stated that the evidentiary rule had a legacy steeped in “the silencing of women and the hindrance of truth seeking.”⁷⁵ The goal of this piece is to add to the comprehensive and robust discussion.

In an effort to avoid manipulation of the spousal communications privilege, some state legislatures have adopted exceptions.⁷⁶ A majority of states allow both the witness spouse and the defendant spouse to testify to the contents of their confidential communications, while several states bestow the privilege on the defendant spouse alone, and yet several other states have maintained that neither the witness spouse nor the defendant spouse are eligible to testify regarding their communications.⁷⁷ In the majority of states, the privilege will not apply in cases where the crime in question is committed by one spouse against the other.⁷⁸ Additionally, a majority of jurisdictions do not apply the privilege when the defendant spouse is accused of crimes against children of either one of the spouses.⁷⁹ While it may feel tempting to think that these exceptions alone would be sufficient to prevent a trafficker from using legal process related to marriage as a shield, there are several factors and scenarios that should be considered.

First, what if a spouse doesn’t recognize that they’re being trafficked or doesn’t know that the crime is being perpetrated against them, and, therefore, doesn’t initially fall within an exception?⁸⁰ It’s not difficult to envision a scenario in which this could happen because an individual has become so indoctrinated that they are unable to see themselves as the victim. Second, within trafficking,

71. *Id.* at 709.

72. *Id.* (quoting Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN’S L. J. 1, 25 (1999)).

73. *State v. Gutierrez*, No. S-1-SC-36394, 2021-NMSC-008, on reh’g, at *2-3 (Nov. 5, 2020), rev’g *State v. Gutierrez*, 482 P.3d 700 (N.M. 2019) (J. Nakamura dissenting).

74. *Id.* at *4.

75. *Id.* at *4-5.

76. *State v. Bailey*, 276 A.3d 124, 127 (N.J. 2022) (adopting a crime-fraud exception).

77. Alexandra Aparicio, *Her Alone: Feminist Perspectives on the Future of Spousal Privileges*, 87 U. CHI. L. REV. ONLINE *1, at *3 (July 6, 2020).

78. Emily Crawford Sheffield, *Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century*, 74 VAND. L. REV. EN BANC 187, 196-97 (2021).

79. *Id.* at 196.

80. *See Love and Trafficking: Grooming, Exploitation, and Control: Chelsea*, POLARIS, <https://polarisproject.org/love-and-trafficking/> (last visited Sept. 6, 2023) [hereinafter *Chelsea*].

recruitment plays a significant role.⁸¹ If Spouse A is indicted on trafficking charges and Spouse B is neither a victim nor implicated, there is still potential that Spouse B could be involved in grooming and recruiting.⁸²

Finally, and perhaps most importantly, what if there is trafficking of *any* child involved? The majority of states—but not all—maintain an exception to the privilege when a crime is committed against a child of either spouse.⁸³ What if the child is illegally adopted and, therefore, not legally the child of either spouse, but the child is trafficked while under their care?⁸⁴ Should this technicality hinder a court’s search for truth? And how broadly are we willing to interpret the idea of a child being under someone’s care? Human trafficking is singularly serious enough to warrant an exception that trafficking of *any* child should eliminate the privilege.

One cannot contract for illegal activity. Marriage is a state approved contract between spouses. Therefore, marriage should not be allowed to provide a harbor for restricting communications and testimony in relation to illegal activity.

The private nature of communications between spouses is important. However, spousal communication is not dependent on an evidentiary privilege. Further, with the advent of technology, “private communication” could reasonably be considered a misnomer. Communications that a spouse willingly transmits over externally managed platforms should not be considered “private communications” and should be available for the litigation of cases involving human trafficking, especially those involving juveniles. “[I]t is important that courts recognize that excluding information may not always further the intended goal of a privilege and may, in fact, hinder the prosecution of legal proceedings intended to protect fragile members of society.”⁸⁵

B. *Marriage’s Role Within the Definitional “Force, Fraud, or Coercion”*

According to the TVPA, human trafficking centers around force, fraud, and/or coercion.⁸⁶ Marriage can be and often is the driver behind the force, fraud, and/or coercion. In 2020, 39% of trafficking victims were recruited through an intimate partner or a marriage proposition.⁸⁷ Further, marriage procures the resource to perpetrate the crime of human trafficking—it provides unbridled access to another human. In anticipation of the ignorant statement wielded against victims of various crimes, “why didn’t they just leave?”, Dr. Sharon Cooper, a sex trafficking expert shared the following at trial:

[V]ictims often stay with their traffickers... because they believe they have no-where to go; that there is no one else out there for them, and no other options for them; they

81. *Recruiters/Traffickers*, THE NO PROJECT, <https://www.thenoproject.org/slavery/traffickers/> (last visited Sept. 6, 2023).

82. *See* *United States v. Carson*, 870 F.3d 584, 590-91 (7th Cir. 2017).

83. *Sheffield*, *supra* note 78, at 196.

84. *See Love and Trafficking: Grooming, Exploitation, and Control: Cammy*, POLARIS, <https://polarisproject.org/love-and-trafficking/> (last visited Sept. 6, 2023).

85. *Commonwealth v. Hunter*, 60 A.3d 156, 159 (Pa. Super. Ct. 2013).

86. 22 U.S.C. § 7102(11)(A)-(B) (2023).

87. *See Chelsea*, *supra* note 80.

feel ashamed and guilty and stigmatized, thinking that they will not be accepted elsewhere. They are also afraid that if they leave, the trafficker will find them and harm them even more egregiously.⁸⁸

Marriage imbues complexity into the analysis. Considering the unique pressures imposed by cultural or religious overtones and the combining of finances. The feelings that Dr. Cooper references may be prone to exacerbation when marriage is added to the equation.

Additionally, although our society has seemingly become more tolerant of divorce, there is certainly a stigma surrounding divorce, especially within religious communities. So, what happens if an individual coerces a person to marry them with the sole intention to exploit them through commercial sex acts or labor? What happens when someone voluntarily enters into a marriage, but is subsequently threatened with divorce to coerce them into exploitation? Marriage is susceptible to human trafficking from its inception, and it can also be perpetrated in the midst of a marriage.

1. *Forced Marriage*

Forced marriage and human trafficking are definitionally distinguishable forms of exploitation that can be interconnected or concurrent.⁸⁹ “Forced marriage [is] a marriage with [one] or more elements of force, fraud, or coercion, and where [one] or both parties do not or cannot consent to the marriage.”⁹⁰ The international definition of human trafficking requires the:

[R]ecruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of *force* or other forms 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*.⁹¹

There is a clear and evident overlap between these definitions. While there is significant nuance involved in discussing both terms, forced marriage does not incorporate a conversation about benefits or exploitation. However, forced marriage inherently possesses elements of both. Through forced marriage one party is receiving the benefit of a marriage they’ve consented to and, because there is lack of consent from the other party, there exists an element of exploitation. This is especially true if the consenting party believes they’re entitled to physical

88. *United States v. Carson*, 870 F.3d 584, 591 (7th Cir. 2017).

89. Terri Waldron, *The Intersection of Forced Marriage and Human Trafficking*, FREEDOM NETWORK USA, <https://freedomnetworkusa.org/2021/12/21/the-intersection-of-forced-marriage-and-human-trafficking/> (last visited Sept. 6, 2023).

90. U.S. Citizenship and Immigration Services, *Forced Marriage*, U.S. DEP’T OF HOMELAND SEC., <https://www.uscis.gov/humanitarian/forced-marriage> (last updated Aug. 16, 2022).

91. G.A. Res. 55/25, Art. 3 (Nov. 15, 2000) (emphasis added).

gratification and, like many legislators, that marital rape does not exist.⁹² To determine whether trafficking has occurred the actions, means, and purpose model is utilized.⁹³ There must be an action in furtherance of the trafficking scheme by means of force, fraud or coercion, for the purpose of sexual or labor exploitation.⁹⁴ In the context of forced marriage, this model may indicate that forced marriage falls within the spectrum of human trafficking. An individual can take *action* to provide or obtain a victim by *means* of force, fraud, or coercion for the *purpose* of forced marriage which may result in sexual and labor exploitation.

2. *Fraud*

Within the sphere of human trafficking, fraud often manifests as false promises.⁹⁵ As Jessie bravely shared, her trafficker incentivized her saying, “once I’m in a good place we can make our relationship official, we can get engaged when we hit \$10,000, I can put a ring on it.”⁹⁶ It is undeniable that humans desire social connection. Independent of an innate desire to participate in community, a bombardment of social pressures, primarily directed towards women, instruct that marriage is the ideal.⁹⁷ There are industries, moguls, and media empires built around the idea of getting married. Combine the external pressures indicating that marriage is the pinnacle with additional vulnerabilities and one can clearly see how the false promise of marriage could coerce an individual into a human trafficking scheme.

3. *Coercion*

Coercion can take on many forms within the context of human trafficking. It can include threats of physical harm, psychological manipulation, shame, and/or fear-inducing threats.⁹⁸ In early 2022, a Washington Court of Appeals heard the appeal of a man who had been convicted of human trafficking.⁹⁹ The court affirmed his convictions based on evidence that demonstrated his victim engaged in sex work as a result of his manipulation.¹⁰⁰ On review, the court was diligent in

92. See Irin Carmon, *Meet the Marital Rape Deniers*, MSNBC (July 28, 2015, 11:50 AM), <https://www.msnbc.com/msnbc/meet-the-marital-rape-deniers-msna649071>.

93. Kelly Ann Whelan, *Out of the Cold: Forced Marriage Trafficking Victims Need to Be Included in U.S. Definition 3* (Feb. 2020), https://refugees.org/wp-content/uploads/2021/01/Whelan_KellyAnn_Forced_Marriage_USCRI_Feb_2020.pdf.

94. *Fact Sheet: Human Trafficking*, *supra* note 15.

95. *Id.*

96. *Love and Trafficking: Grooming, Exploitation, and Control: Jessie*, POLARIS, <https://polarisproject.org/love-and-trafficking/> (last visited Sept. 6, 2023).

97. See Arti Patel, *Getting Married Isn't a Requirement, So Why do People Feel Pressure to Do It?*, GLOBAL NEWS (Nov. 9, 2018, 7:00 AM), <https://globalnews.ca/news/4643136/marriage-pressure/>.

98. *Fact Sheet: Human Trafficking*, *supra* note 15.

99. *State v. Braun*, 502 P.3d 884, 887 (Wash. Ct. App. 2022).

100. *Id.*

providing an expansive narrative of the survivor's story.¹⁰¹ The court expressed that it did so because of the example it presented.¹⁰² Jane's story demonstrated "how enduring manipulation can implausibly result in the control of another's choices, even to the extent of causing the other to perform repulsive and dangerous acts."¹⁰³

Jane began communicating via the internet with a man named Lars Braun ("Braun").¹⁰⁴ At the time, Jane was twenty-years-old and married and Braun was in his fifties and also married.¹⁰⁵ Jane confided her marital issues to Braun who encouraged Jane to engage in an extramarital affair.¹⁰⁶ Jane engaged Braun in her extramarital affair and they both sought divorces from their respective spouses.¹⁰⁷ After some instances of jealousy and anger, "Braun revealed to Jane she was his girlfriend."¹⁰⁸ It's important to pause momentarily and note the language used in the court's opinion. It does not state that Braun and Jane collaboratively decided to engage in a consensual relationship, it states that Braun singularly and unilaterally instructed Jane that she was his girlfriend.¹⁰⁹ Jane traveled to visit Braun who purchased alcohol for her since she was too young to purchase alcohol for herself.¹¹⁰ On one occasion, a housemate of Braun's informed Jane that Braun had given him permission to have sex with her.¹¹¹ When she declined, she reached out to Braun requesting an explanation.¹¹² Braun blamed Jane for prompting his housemate's advances based on "her suggestible behavior."¹¹³ He blamed her for not striking him if she objected to his advances, and he told her not to report his housemate to law enforcement.¹¹⁴ Eventually, Jane moved in with Braun and he continued to furnish her with "mass quantities of alcohol" and she became dependent on him for food and housing.¹¹⁵ Braun eventually suggested Jane post Craigslist ads for sex.¹¹⁶ When Jane initially rebuffed his suggestion, he threatened to cheat on Jane.¹¹⁷ Further, Braun "*promised to love and cherish till death do them part* if Jane fulfilled his directions to sell her body."¹¹⁸ Braun provided instruction related to pricing, duration, and facilitation.¹¹⁹ Braun continued to "voice[] his

101. *Id.* (explaining the survivor proceeded under the pseudonym Jane).

102. *Id.*

103. *Id.*

104. *Id.* at 888.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *State v. Braun*, 502 P.3d 884, 888 (Wash. Ct. App. 2022).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 889.

116. *Id.*

117. *Id.*

118. *Id.* (emphasis added).

119. *State v. Braun*, 502 P.3d 884, 889 (Wash. Ct. App. 2022).

everlasting love for Jane” and promised her that if she continued, “he would marry her, have children with her, and start a family with her” knowing that “Jane desperately wanted children.”¹²⁰ The promises went unfulfilled for nearly five years.¹²¹ The details of what Jane endured are disturbing and unimaginable for most.

The court found that force, fraud, and coercion were all identifiable among the facts of Braun’s case.¹²² The court made some important determinations that have impactful correlations. The court quoted the Seventh Circuit stating that victims of trafficking “may make some decisions along the way that are truly voluntary. Those decisions do not take away from the fact that they have been held hostage, coerced, forced, or threatened[.]”¹²³ The court acknowledged that coercion and force may, on some occasions, be subtle, however, there is nothing subtle about eliminating an individual’s means of escape.¹²⁴ Furthermore, the court determined that the opportunity to escape and the act of a successful escape did not preclude findings of trafficking.¹²⁵

This led the court to an important point on consent. Braun attempted to argue that Jane consented to certain acts but Jane testified that Braun’s actions went beyond her consent.¹²⁶ Braun tried to argue the breach of consent was “a mere betrayal in their relationship” and not the force requisite for a human trafficking conviction.¹²⁷ The court cited an Eighth Circuit opinion in which a man made overtures of stable relationships and love in order to recruit and traffic several different women.¹²⁸ One of the women testified that throughout her experience, she still loved her trafficker and hoped that he would keep his promise of a stable relationship.¹²⁹ Another woman testified that she did not realize her trafficker was recruiting her; she believed he was proposing a legitimate relationship.¹³⁰

These cases provide the platform for crucial reflection. The promise of a romantic relationship or marriage, standing alone, should be enough to qualify as coercion or fraud within the definition of human trafficking. It is abundantly clear that this is a technique shrouded in sincerity and intended to warp the social emotional elements of the human psyche. Furthermore, it reinforces the premise that an individual can voluntarily enter a marriage and still have their consent breached. As stated previously, the label of “marriage” does not eliminate an individual’s retention or ability to consent.

120. *Id.* at 890-91.

121. *See id.* at 893 (noting that Jane began communicating with Braun in 2013 and their communication ceased in January 2018).

122. *Id.* at 898-902.

123. *Id.* at 900.

124. *Id.*

125. *Id.* at 901.

126. *Id.* at 900.

127. *Id.*

128. *United States v. Bell*, 761 F.3d 900, 903 (8th Cir. 2014).

129. *Id.* at 904.

130. *Id.*

As a final point, in 2003, Washington was the first state to outlaw human trafficking.¹³¹ It did so in response to the murders of Filipina mail-order brides within the state.¹³² Although it would be tempting to tout our modern, progressive view of the evils of human trafficking, there is still a great deal of work to be done. Trafficking in persons, although an ancient practice, is a relatively new crime and our jurisprudence requires continued revision.¹³³ “[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”¹³⁴

II. HUMAN TRAFFICKING MANIFESTING DIRECTLY THROUGH MARRIAGE

In 2017, a man arranged for his twelve-year-old niece to be “religiously ‘married’” to an eighteen-year-old male.¹³⁵ The girl was forced to marry when she was thirteen and the man was nineteen.¹³⁶ The young girl was a member of a religious community called Lev Tahor, an extremist Jewish sect.¹³⁷ Within the sect, young girls were directed to tell outsiders that they were not married.¹³⁸ These young girls were also directed to pretend to be older and to deliver any babies inside their homes instead of hospitals to conceal their young ages from the public.¹³⁹ In 2018, after the mother of the young girl had removed her from the reach of Lev Tahor, the girl’s uncle and other members of the sect kidnapped the minor to return her to her “husband” in order to procreate.¹⁴⁰

Although the girl was recovered, three months later, different members of the sect attempted to kidnap the girl again.¹⁴¹ Multiple defendants, including the girl’s uncle and quasi-husband, were charged on a multiple count indictment.¹⁴² The defendants represented themselves *pro se* and attempted to make different paper and electronic filings invoking spousal privilege to prevent the testimony of the girl.¹⁴³ The defendants pressed that the forced marriage between the thirteen-year-

131. *Braun*, 502 P.3d at 897.

132. *Id.*

133. *See generally Key Legislation*, U.S. DEP’T JUST., <https://www.justice.gov/humantrafficking/key-legislation> (last updated May 12, 2023) (“Prior to 2000, the Department of Justice (DOJ) filed human trafficking cases under several federal statutes related to involuntary servitude and slavery, but the criminal laws were narrow and patchwork. In the last two decades, Congress has passed a number of comprehensive bills designed to bring the full power and attention of the federal government to the fight against human trafficking.”).

134. *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).

135. Superseding Indictment at 4, *United States v. Helbrans*, 570 F. Supp. 3d 83 (S.D.N.Y. 2021) (No. 358).

136. *Id.*

137. *Id.* at 2.

138. *Id.* at 4.

139. *Id.*

140. *Id.* at 2.

141. *Id.* at 7.

142. *Id.* at 1-2.

143. *United States v. Helbrans*, 570 F. Supp. 3d 83, 85 (S.D.N.Y. 2021).

old girl and an adult male was legitimate while also invoking the Constitutional guarantees of privacy in marriage.¹⁴⁴

To put this girl's story into perspective, consider any junior high student. Instead of frantically questioning why they need to memorize the Pythagorean Theorem and use deodorant, imagine they've been kidnapped and forced to marry an adult for the purpose of procreation. Imagine their abduction was facilitated by a family member who felt justified by their religious convictions. It may be concerning to consider that the young person has been deprived of opportunity and choice. Maybe it's equally concerning that the young person couldn't possibly contextualize marriage. Among these competing concerns is a lack of capacity to consent, the expectation of acts necessary for procreation, and the presence of force, fraud, or coercion for the purpose of exploiting a person—a child. These concerns are a formula for human trafficking.

A. *Child Marriage as a Pipeline for Juvenile Trafficking*

It is estimated that children represent 27% of all human trafficking victims and the majority of child victims are girls.¹⁴⁵ While boys and men are just as likely to become victims of trafficking, boys are typically recruited for forced labor and their cases are less identified and reported.¹⁴⁶ Girls are more often subjected to trafficking for sexual exploitation and forced marriage.¹⁴⁷

Child marriage is “any formal marriage or informal union between a child under the age of [eighteen] and an adult or another child.”¹⁴⁸ Child marriage has been declared a human rights violation by UNICEF,¹⁴⁹ the United Nations,¹⁵⁰ the World Health Organization,¹⁵¹ and numerous international and domestic organizations. A common misconception is that child marriage is a foreign practice. However, from 2000 to 2018 approximately 300,000 boys and girls were married in the United States and 86% of those marriages were premised on a girl being married to an older man.¹⁵² Child marriage has only been outlawed by a few States.¹⁵³ While some States have attempted to develop statutory schemes to

144. *Id.* at 87.

145. *Child Trafficking: Myth v. Fact*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/c/harity-stories/child-trafficking-myths-vs-facts> (last visited Sept. 6, 2023).

146. *Id.*

147. *Id.*

148. *Child Marriage*, UNICEF, <https://www.unicef.org/protection/child-marriage> (last updated July 2022).

149. Page Cassidy & Tychimba Turner, *The Fight Continues to End Child Marriage in the U.S.*, UNICEF USA (Aug. 25, 2021), <https://www.unicefusa.org/stories/fight-continues-end-child-marriage-us/38893>.

150. *Child Marriage*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/child-marriage> (last visited Sept. 6, 2023).

151. *Child Marriages-39 000 Every Day: More than 140 Million Girls Will Marry Between 2011 and 2020*, WORLD HEALTH ORG. (Mar. 7, 2013), <https://www.who.int/news/item/07-03-2013-child-marriages-39-000-every-day-more-than-140-million-girls-will-marry-between-2011-and-2020>.

152. Cassidy & Turner, *supra* note 149.

153. *About Child Marriage in the U.S.*, UNCHAINED AT LAST, <https://www.unchainedatlast.org/laws-to-end-child-marriage/> (last visited Sept. 6, 2023).

address the concerns surrounding child marriage, several states have no minimum age for marriage.¹⁵⁴ In States where child marriage is allowed, there are purported “safeguards” in place, primarily parental consent and/or judicial approval.¹⁵⁵ To believe that judges are infallible and also have access to sufficient information to make a well-informed approval seems illusory. In essence, a parent can become the proprietor of their child in relation to marriage. Herein lies the issue—what if the parent providing the consent is the same parent that is trafficking the child? We would like to believe that all parents are consistently working towards the betterment of their children, but that is far from guaranteed.

1. *Familial Trafficking*

Confronted with the topic of child trafficking, most people would likely conflate child trafficking with kidnapping. They picture a deplorable stranger accosting a child when, in reality, perpetration of child trafficking most frequently happens closer to home. Most often, a human trafficking victim knows their trafficker.¹⁵⁶ It is estimated that 41% of child trafficking experiences are related to familial trafficking—where the parent or guardian is the child’s trafficker or sells the child to a third-party trafficker.¹⁵⁷ Familial trafficking is difficult to identify because it is insulated within a familial matrix and victimizes young children who often do not understand they are victims.¹⁵⁸ A familial trafficker utilizes their proximity to a child to warp the child’s developmental stages, often resulting in a child’s inability to comprehend and verbalize safety concerns.¹⁵⁹ Children rely on their caregivers to learn who to trust and how to distinguish between safe and unsafe practices.¹⁶⁰ “Caregivers have the greatest influence on a child’s sense of self-worth and value.”¹⁶¹ All of these factors, compounded by a child’s inherent loyalty and dependence on their family, present significant difficulties in identifying and prosecuting familial trafficking.¹⁶² Additionally, in situations of familial trafficking, “the exploitation is often normalized and accepted within the family culture[.]”¹⁶³

Familial traffickers wield an unparalleled amount of power by nature of their relationship to the trafficking victim.¹⁶⁴ For individuals fortunate enough to grow up outside the shadow of familial trafficking, it may be difficult to comprehend

154. *Id.*

155. Cassidy & Turner, *supra* note 149.

156. *Child Trafficking: Myth v. Fact*, *supra* note 145.

157. Office to Monitor and Combat Trafficking in Persons, *Navigating the Unique Complexities in Familial Trafficking*, U.S. DEP’T OF STATE (June 2021), https://www.state.gov/wp-content/uploads/2021/06/Navigating-the-Unique-Complexities-in-Familial-Trafficking_LOW.pdf.

158. *Id.*

159. *Navigating the Unique Complexities in Familial Trafficking*, *supra* note 157.

160. *Effects*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects> (last visited Sept. 6, 2023).

161. *Id.*

162. *Navigating the Unique Complexities in Familial Trafficking*, *supra* note 157.

163. *Id.*

164. *Id.*

how a family member could traffic anyone, let alone their own family member. Extreme poverty can play a significant role in the familial trafficking dynamic.¹⁶⁵ But, adhering to family culture or financial strains may not be the only pressures motivating a familial trafficker. What if, instead, a family member is trafficking a child to attain salvation? Or what if a child is forced into trafficking based on their fear of eternal damnation?

2. Religion

In 2022, Netflix released a docuseries titled, “Keep Sweet: Pray and Obey.”¹⁶⁶ The series, “examine[d] the rise of Warren Jeffs in the Fundamentalist Church of Jesus Christ of Latter-Day Saints[.]”¹⁶⁷ In 2002, Warren Jeffs became the “Prophet” of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”) and was considered, by its followers, “to be God’s mouthpiece on [E]arth.”¹⁶⁸ Followers “believed that God [spoke] directly to Warren Jeffs” and that through Jeffs “God direct[ed] which male members [were] worthy of entry into heaven[.]”¹⁶⁹ Women were only invited into heaven by “satisfied husbands[.]”¹⁷⁰ Jeffs was the sole officiant of marriages and was singularly responsible for assigning wives to husbands.¹⁷¹ While a central focus of the docuseries is the persistent polygamy within the FLDS community, the more disturbing premise was the rampant child exploitation through marriage.

Elissa Wall was raised within the FLDS community and was singularly exposed to Jeffs’ teachings.¹⁷² Elissa was never provided any modicum of education about anatomy, reproduction, or consent but was instead taught that she would learn these matters exclusively from her husband.¹⁷³ Since Jeffs was “God on [E]arth,” Elissa was instructed to obey him “completely and willingly.”¹⁷⁴ The result of disobedience would be the “forfeiture of spiritual salvation, loss of family and friends, denial of marriage, and removal from the FLDS community.”¹⁷⁵ When Elissa was fourteen she was informed by her stepfather that the “Prophet” had arranged her marriage.¹⁷⁶ Fearing separation from her mother, siblings, and home,

165. Ajwang Warria, *Forced Child Marriages as a Form of Child Trafficking*, 79 CHILD AND YOUTH SERVS. REV. 274, 274-79 (2017).

166. *Keep Sweet: Pray and Obey* (2022), <https://www.netflix.com/title/81292539> (last visited Sept. 6, 2023).

167. *Id.*

168. Wade Goodwyn et al., *Warren Jeffs and the FLDS*, NPR (May 3, 2005, 12:00 AM), <https://www.npr.org/2005/05/03/4629320/warren-jeffs-and-the-flds>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *State v. Jeffs*, 243 P.3d 1250, 1252 (Utah 2010).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

Elissa reluctantly acquiesced.¹⁷⁷ Elissa was transported to Nevada to marry her nineteen-year-old, first cousin.¹⁷⁸

The “marriage ceremony” was performed by Jeffs¹⁷⁹ and differed greatly from the celebratory occasions society most often associates with weddings. Elissa cried during the ceremony, not from all-consuming joy but, instead, out of fear.¹⁸⁰ When presented with the standard question about whether she would take her nineteen-year-old, first cousin as her husband, she did not respond.¹⁸¹ Elissa’s mother was prompted to join Elissa at the alter to coerce her into a response.¹⁸² After the question had been posed three separate times, Elissa finally responded, “Okay, I do.”¹⁸³ Jeffs then charged Elissa and her “husband” to “go forth and multiply[.]”¹⁸⁴ Elissa, still ignorant about reproduction and consent, was subjected to rape and assault by her “husband.”¹⁸⁵ When she sought help from Jeffs she was instructed to “repent” and to be “obedient [and] submissive.”¹⁸⁶

The docuseries provides a first-hand account from Elissa herself who authored, “Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs[.]”¹⁸⁷ In the docuseries, Elissa shares the incredible acts of courage that eventually led to her flight from the FLDS community. Unfortunately, this was not a singular incident. While executing a search warrant of the “Yearning for Zion” FLDS Ranch, caseworkers interviewed girls between seven and seventeen.¹⁸⁸ “[S]everal of the girls reported being married to, and mothers of children with, adult men who lived at the ranch.”¹⁸⁹ And lest one thinks this gut-wrenching practice is reserved to only specific religious groups, it can be found within sects of virtually every major religion.¹⁹⁰

There are several players that are complicit in the atrocities these young girls endured. First, the leaders within these religious communities are complicit in

177. *Id.* at 1253.

178. *Id.* at 1252-53.

179. *Id.* at 1253.

180. *Id.*

181. *Id.*

182. *State v. Jeffs*, 243 P.3d 1250, 1253 (Utah 2010).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. See ELISSA WALL & LISA PULITZER, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* (Harper Collins Publishers 2012).

188. *Lehi Barlow Jeffs v. State*, No. 03-10-00272-cr, 2012 WL 601846, at *7 (Tex. Ct. App. 2012).

189. *Id.*

190. See generally *United States v. Malka*, 602 F. Supp. 3d 510 (S.D.N.Y. 2022) (explaining that a member of a Jewish sect arranged to have minors married); *United States v. Cabactulan*, No. MJ 20-00354-DUTY, 2020 WL 758955 (C.D. Cal. Feb. 14, 2020) (explaining that members of the Kingdom of Jesus Christ church orchestrated sham marriages to perpetrate labor trafficking); *Ross v. Jenkins*, 325 F. Supp. 3d 1141 (D. Kan. 2018) (explaining that a leader of the United Nation of Islam facilitated bids for marriage and there was no minimum age for marriage among members).

purposefully depriving young people, especially girls, of education related to consent. The leaders also facilitated these marriages, coercing not only the child subjected to the marriage but often the parents of the child involved.

Here, coercion transcended physical and social needs and exploited spiritual needs. Salvation was on the line. As evidenced by Elissa's story, ceremonial marriage was not the only thing expected. Recall, Jeffs charged the fourteen-year-old Elissa and her quasi-husband to "multiply and replenish the earth with good priesthood children."¹⁹¹ When Elissa sought help from her spiritual leader she was instructed, "[i]t is time for you to be a wife and do your duty."¹⁹²

Coercion of a commercial sex act is explicit. The benefit received by the leaders is more implicit. The benefit to these leaders is power. By facilitating these child marriages, they appease the male members of their communities, reinforcing their god complex.¹⁹³ Also, forcing procreation provides a larger base to indoctrinate and control.

Elissa's "parentally-placed individuals"¹⁹⁴ are also complicit. Recall, Elissa's stepfather conspired with Jeffs to facilitate her "marriage." Additionally, her mother physically joined her at the altar to coerce her daughter into marrying her nineteen-year-old cousin. The benefits Elissa's parentally-placed individuals received were purported salvation and fellowship with their communities. These communities are often small, insulated, and severely codependent.¹⁹⁵ Physical, mental, and spiritual well-being are dependent on strict adherence to the instruction and direction of the religious leaders.¹⁹⁶

The argument may be made that child marriages are often not conducted as "legal marriages" but are facilitated as "spiritual" or "religious marriages" and therefore the State plays no role. With this, one might vehemently disagree. Recall, child marriage is "any formal marriage or informal union[.]"¹⁹⁷ To oppose child marriage is to oppose it in all its iterations. While the First Amendment's Free Exercise Clause protects a person's beliefs, it does not protect every religious ritual that a given group may practice. "Although the right to believe freely is 'absolute'—the government may not dictate what citizens think—the right to act is qualified by a duty to comply with the law."¹⁹⁸ In 1878, the Supreme Court was astutely aware of the dichotomy:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed

191. *State v. Jeffs*, 243 P.3d 1250, 1253 (Utah 2010).

192. *Id.*

193. *See Goodwyn et al.*, *supra* note 168.

194. The labels "parents," "caregivers," or "guardians" are all unsuitable for the adults in Elissa's life.

195. *See Cults*, GOOD THERAPY, <https://www.goodtherapy.org/blog/psychpedia/cult-definition> (last updated June 6, 2016).

196. *See Id.*

197. *Child Marriage*, *supra* note 148.

198. *Brock v. City of New York*, No. 21-cv-11094, 2022 WL 479256, at *4 (S.D.N.Y. Jan. 28, 2022) (quoting *Dixon v. De Blasio*, 566 F. Supp. 3d 171, 183 (E.D.N.Y. 2021)). *See Emp. Div., Dep't of Hum. Res. v. Smith*, 485 U.S. 660, 670 n. 13 (1988).

that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?¹⁹⁹

Or if an adult wanted to marry a child because they believed they were religiously entitled to their subjugation, would the civil government sit idly by in the name of religious freedom?

It is time to interfere. This interference should manifest as the complete disappearance of child marriage. Parents and guardians should not be able to claim their approval as grounds for stealing the innocence of a child and eliminating their child's choice to engage in the practice of marriage as an adult.

3. *Contract Corollary: The Infancy Doctrine*

Well entrenched within contract law is the infancy doctrine. Generally, the infancy doctrine establishes that “contracts entered into by minors are voidable.”²⁰⁰ The doctrine has several bases. The doctrine acknowledges that minors lack the requisite competence, judgment, and experience, and require protection against their own immaturity.²⁰¹ Another basis of the doctrine is to “discourage adults from contracting with an infant.”²⁰² Society has clearly contemplated that minors lack capacity to engage in contracting. Marriage is a contract, so why then are we ignorant of a child's incapacity to engage in that specific type of contracting that arguably manifests in exceptional responsibility? “[C]hildren lack autonomy, independence and/or the maturity required to consent to marriage.”²⁰³

The infancy doctrine has an exception—necessity. The doctrine maintains that a contract with a minor will be enforced and valid if the minor was seeking “necessaries” such as food, medicine, or shelter necessary for preservation of life.²⁰⁴ The argument could be made that marriage may be a necessity for a child to become emancipated. If the only recourse available to a child to leave a potentially abusive, neglectful, or trafficking situation is marriage, we have failed children and our communities. Subscribing to the idea that marriage is a sound solution to allow children to escape these situations is equivalent to believing the only solution for efficient transportation is the exclusive use of rockets. It's extreme, hazardous, and potentially fatal. Independent of trafficking implications,

199. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

200. *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 525 (Haw. 2006).

201. *Michaelis v. Schori*, 20 Cal. App. 4th 133, 136 (Cal. Ct. App. 1993).

202. *Id.*

203. *Warria*, *supra* note 165, at 275.

204. *Muller v. CES Credit Union*, 161 Ohio App. 3d 771, n.4 (Ohio Ct. App. 2005).

girls who are married before eighteen are more likely to experience domestic violence²⁰⁵ and less likely to attain an education.²⁰⁶

Child marriage should be abolished in all fifty states. The risks outweigh the benefits especially when considering its vulnerability to trafficking. Parental consent and judicial approval for the customary and/or religious practice of marriage do not function as the infallible safeguards we would hope and can be infiltrated by human trafficking.

B. *Labor Trafficking in Marriage*

It is undeniable that marriage requires work—both emotional and physical. Ideally, the burden is shouldered by two individuals working within a consenting framework of shared responsibilities. What happens when one party is forced to conduct work without their consent? What if one party to the marriage never receives the benefits of their income? What if one party to the marriage is forced to have children at the demand of the other?

Labor Trafficking is defined by the TVPA as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”²⁰⁷ Labor trafficking manifests in a variety of ways.

Bonded labor involves a victim whose labor is “demanded as a means of repayment for a loan or service in which its terms and conditions have not been defined or in which the value of [the victims’] services as reasonably assessed is not applied toward the liquidation of the debt.”²⁰⁸ The victim’s labor is therefore “greater than the original sum of money ‘borrowed.’”²⁰⁹ Ran’s story provides an example:

When he was only [sixteen], Ran, now in his eighties, took a \$20 loan from a landowner. To repay his debt, he ploughed the landowner’s field for years until his government freed him. For years, the fruit of his labour belonged to someone else. He couldn’t leave, he couldn’t rest, he couldn’t stop. He was in bonded labour.²¹⁰

205. *Fact Sheet: Assessing National Action on Protection from Child Marriage*, WORLD POL’Y ANALYSIS CTR. (Mar. 2015), https://www.worldpolicycenter.org/sites/default/files/WORLD_Fact_Sheet_Legal_Protection_Against_Child_Marriage_2015.pdf.

206. Vivian A. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1846 (2012).

207. Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464, § 103(8)(B).

208. Office on Trafficking in Persons, *Fact Sheet: Labor Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERVS. 1, <https://www.acf.hhs.gov/archive/otip/fact-sheet/fact-sheet-labor-trafficking-english> (last visited Sept. 6, 2023) [hereinafter *Fact Sheet: Labor Trafficking*].

209. *Id.*

210. International Labour Organization et al., *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 11 (Sept. 2022), https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipecc/documents/publication/wcms_854733.pdf [hereinafter *Global Estimates of Modern Slavery*].

Forced labor involves a victim being “forced to work against their own will, under the threat of violence or some other form of punishment, their freedom is [restricted, and a] degree of ownership is exerted.”²¹¹ Jasmine’s story provides an example:

When she was just [twelve], Jasmine was married off to a man who offered to wed her in lieu of the debt her father owed him. Jasmine’s husband was an alcoholic and forced her into commercial sexual exploitation to pay for his addiction. In addition to forced marriage and sexual exploitation, she endured physical violence and abuse at the hands of her husband.²¹²

Victims of labor trafficking are often kept in isolation with restrictions imposed to prevent them from obtaining assistance.²¹³ Traffickers often blackmail labor trafficking victims to obtain their compliance.²¹⁴ Marriage is shrouded in such distinctive privacy that it provides a degree of societally-imposed isolation making it difficult to identify when labor trafficking is occurring within a marriage.

CONCLUSION

Human trafficking is pervasive, and it will require exceptional effort from a coalition of organizations, institutions, and legislatures to eliminate its rancid presence in our local and global communities. We can each play a pivotal role in the extinction of human trafficking by remaining vigilant in refining our perception of trafficking and where it proliferates. It cannot be resigned to a foreign practice only affecting a specific type of person.

We must continue to eradicate opportunities for trafficking and remain educated in how it is perpetrated. Spousal privilege may generate loopholes for traffickers to further exploit, terrorize, and denigrate victims. Forced marriage, the fraudulent promise of marriage, or coerced marriage can suffice as the basis for human trafficking. Child marriage may foster a pipeline for familial trafficking. Sex and/or labor trafficking can manifest within a marriage, even if that marriage was entered into voluntarily.

Marriage is too “fundamental to our very existence”²¹⁵ for it to be weaponized by human traffickers. We must not allow legal procedures and the practice of marriage to exploit the vulnerable. We cannot continue to allow the privacy shroud of marriage to intimidate us from critical review and examination. We must evaluate every corner of life and root out any opportunity for human trafficking to fester. William Wilberforce, a prominent British abolitionist,²¹⁶ provided a

211. *Fact Sheet: Labor Trafficking*, *supra* note 208.

212. *Global Estimates of Modern Slavery*, *supra* note 210, at 11.

213. *Fact Sheet: Labor Trafficking*, *supra* note 208.

214. *Id.*

215. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

216. *William Wilberforce*, BBC, https://www.bbc.co.uk/history/historic_figures/wilberforce_william.shtml (last visited Sept. 6, 2023).

poignant and solemn reminder to that end. “You may choose to look the other way but you can never again say you did not know.”²¹⁷

217. Takim Williams, *#InContext: William Wilberforce*, HUM. TRAFFICKING INST. (Jan. 11, 2017), <https://traffickinginstitute.org/incontext-william-wilberforce/>.

