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NOTE

Syntax or Experience: What Should Determine If Sex Trafficking Qualifies as a Crime of Violence?

United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016)

*Britteny Pfleger**

I. INTRODUCTION

The residents of Lebanon, Missouri, a small town in the southern part of the state, certainly did not believe their kind, generous neighbors were in fact sadistic slave owners.¹ Yet such brutality existed, lurking beneath one such family's gentle and caring façade.² In what was later described as the most horrific case of sex trafficking ever prosecuted in the state, a resident couple housed a mentally deficient runaway teenage girl with a troubled past and forced her to sign a never-ending sex-slave contract.³ "Master Ed" branded his victim with a bar code tattoo, marking her as his property, and forced her to have sex with him and several "customers."⁴ Over the next six years, Master Ed subjected the girl to waterboarding, electrocution, and beatings.⁵ He repeatedly threatened his victim with a gun, exhibiting his ability to kill her if she did not comply.⁶ The trafficking was not discovered until 2009, when the

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1. See Todd C. Frankel, *A Missouri Town's Doubts About a Sex Torture Case*, ST. LOUIS POST-DISPATCH (Nov. 5, 2010), http://www.stltoday.com/news/local/crime-and-courts/a-missouri-town-s-doubts-about-a-sex-torture-case/article_03074291-7988-59e7-9fd1-4d81b5088e56.html.

2. See *id.*

3. *Id.*

4. Indictment at 9, *United States v. Bagley*, No. 10-00244-01-CR-W-DW (W.D. Mo. Mar. 30, 2011).

5. *Id.* at 7, 12.

6. *Id.* at 13.

victim went into cardiac arrest after one of Master Ed's torture sessions, resulting in her hospitalization and emergency treatment.⁷

While the circumstances in the Lebanon case were especially horrific, the practice of sex trafficking is not unique. The National Human Trafficking Resource Center ("NHTRC") reported 4136 cases of sex trafficking in the United States in 2015,⁸ including 155 cases in Missouri between 2013 and 2015.⁹ To combat these alarming statistics, Congress enacted the Trafficking Victims Protection Act ("TVPA") in 2000 to "ensure just and effective punishment of traffickers."¹⁰ The TVPA criminalizes the trafficking of people in the commercial sex industry by force, fraud, or coercion.¹¹ A conviction under this statute subjects a defendant to a minimum of fifteen years in federal prison.¹²

Separately, Congress authorized federal prosecutors to charge defendants who possess a gun while committing a "crime of violence" under 18 U.S.C. § 924(c).¹³ A conviction under this statute is punishable by at least five years, served in addition to the underlying crime of violence.¹⁴ To convict a defendant under § 924(c), prosecutors must show (1) the defendant possessed or used a gun in the commission of his or her crime and (2) the crime committed is characterized as a "crime of violence."¹⁵ Prior to 2015, federal courts agreed the sex trafficking of minors was a "crime of violence."¹⁶ However, in August 2015, the U.S. Court of Appeals for the Fourth

7. *Id.* at 19.

8. *Data Breakdown: United States Report 1/1/2015 – 12/31/2015*, NAT'L HUMAN TRAFFICKING RESOURCE CTR., <http://traffickingresourcecenter.org/sites/default/files/NHTRC%202015%20United%20States%20Report%20-%20USA%20-%202001.01.15%20-%202012.31.pdf> (last visited Jan. 15, 2017). The NHTRC is a national anti-trafficking hotline and resource center. *Mission*, NAT'L HUMAN TRAFFICKING RESOURCE CTR., <https://traffickingresourcecenter.org/mission> (last visited Jan. 15, 2017).

9. *Missouri*, NAT'L HUMAN TRAFFICKING RESOURCE CTR., <https://traffickingresourcecenter.org/state/missouri> (last visited Nov. 8, 2016). The Missouri hotline uncovered fifty-eight cases of sex trafficking and one case of sex and labor trafficking in 2015. *Id.* In 2014, thirty-nine cases of sex trafficking and one case of sex and labor trafficking were reported. *Id.* In 2013, the NHTRC found fifty-three cases of sex trafficking and three cases of sex and labor trafficking. *Id.* It is important to note these statistics are not cumulative, and each may involve multiple victims. *Id.*

10. 22 U.S.C. § 7101(a) (2012).

11. 18 U.S.C.A. § 1591(a) (West 2016).

12. *Id.* § 1591(b)(1).

13. *Id.* § 924(c)(1)(A).

14. *Id.* § 924(c)(1)(A)(i).

15. *Id.* § 924(c)(1)(A).

16. *See infra* Part III.B.2.

Circuit went against this trend, declaring sex trafficking of an adult victim not to be a crime of violence.¹⁷

This Note analyzes the Fourth Circuit's opinion in *United States v. Fuertes*, ultimately concluding that, contrary to the decision in *Fuertes*, sex trafficking should be considered a crime of violence under 18 U.S.C. § 924(c). Part II of this Note details the acts of German Ventura, a defendant charged with sex trafficking and possession of a gun during a crime of violence. Part III explores the purpose of § 924(c) and courts' interpretations of "crime of violence"; it then considers federal circuit courts' bases for finding sex trafficking under the TVPA to be a violent crime under a variety of statutes. Part IV summarizes the Fourth Circuit's decision to depart from established precedent. Part V scrutinizes the court's theory that sex trafficking cannot be a violent crime, ultimately resolving that, while sex trafficking should be considered a crime of violence, Congress must change the statute to expressly reflect the violent nature of sex trafficking.

II. FACTS AND HOLDING

By early 2008, German Ventura owned and operated several brothels throughout Annapolis, Maryland, quickly becoming a top competitor in the commercial sex industry.¹⁸ Ventura arranged for prostitutes to work in his brothels on a weekly basis.¹⁹ The women communicated with Ventura by phone, traveled to Washington, D.C., by bus, and were transported by Ventura or his employees to a brothel.²⁰ Ventura charged customers, commonly called johns, thirty dollars for fifteen minutes of sex and paid the women half the gross receipts, minus expenses for food, hygiene products, and other trade expenses.²¹

Ventura had a particularly violent relationship with Rebeca Duenas Franco ("Duenas"), who Ventura pimped out to several johns over the course of several years.²² Duenas, an undocumented worker with only a third grade education,²³ was under the control of another pimp when Ventura met her.²⁴ Ventura extricated Duenas from the pimp's employment and provided her with a place to stay.²⁵ Their relationship became sexual in nature, and Duenas subsequently gave birth to Ventura's son.²⁶

17. *United States v. Fuertes*, 805 F.3d 485, 500 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016).

18. *See id.* at 491.

19. *Id.* at 490.

20. *Id.* at 491.

21. *Id.*

22. *Id.*

23. Brief of Appellee United States of America at 8, *United States v. Fuertes*, 805 F.3d 485 (4th Cir. 2015) (Nos. 13-4755(L), 13-4931).

24. *Fuertes*, 805 F.3d at 491.

25. *Id.*

26. *Id.*

Ventura soon reintroduced Duenas to prostitution by giving her a box of condoms and telling Duenas to “go to work.”²⁷ When Duenas resisted, Ventura beat her until she complied.²⁸ While other women received payment for their services, Duenas did not.²⁹ Ventura continued to threaten and harm Duenas, including beating her with a belt and cutting her foot when she refused to perform sexual acts.³⁰ Through fear and control, Ventura held Duenas against her will.³¹

Duenas’s fear of Ventura grew as she witnessed other violent acts he committed against others.³² Duenas observed Ventura threaten those he perceived as competitors by displaying weapons and making harassing phone calls.³³ She saw Ventura beat a woman who he believed had sent people to rob one of his brothels.³⁴ On another occasion, Duenas watched as Ventura assaulted a male employee for threatening to go to the police.³⁵ Perhaps most terrifying, Duenas witnessed Ventura celebrating the murder of a competing pimp, who he had previously threatened to kill.³⁶ Ventura disclosed to Duenas that one of the prostitutes working for the murdered pimp had also been killed during the crime.³⁷

On November 15, 2010, following the serious assault of a competing pimp, police arrested Ventura.³⁸ Subsequently, a federal grand jury indicted Ventura on charges of conspiracy; transportation of individuals for prostitution; and sex trafficking by force, fraud, or coercion.³⁹ In addition, the grand

27. *Id.*

28. *Id.*

29. *Id.* at 492.

30. *Id.* at 491.

31. *Id.*

32. Brief of Appellee United States of America, *supra* note 23, at 16 (“RDF’s knowledge of the violence directed at others, whether claimed, actual or threatened, was undisputedly relevant evidence because this conduct contributed to a climate of fear intentionally created by the defendants to compel RDF to continue to engage in commercial sex acts.”).

33. *Fuertes*, 805 F.3d at 492.

34. *Id.*

35. *Id.*

36. *Id.*

37. Brief of Appellee United States of America, *supra* note 23, at 24–26.

38. *Fuertes*, 805 F.3d at 492.

39. *Id.* at 493. The seven-count indictment included charges of (1) “conspiracy to transport an individual in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. § 371”; (2) “transportation of individuals in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. § 2421”; and (3) “sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. § 1591(a).” *Id.* In addition, Ventura was individually charged with (1) “coercing or enticing an individual to travel in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. § 2422(a)”; (2) “transportation of individuals in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. § 2421”; and (3) “possession and use of a firearm in relation to a crime of violence . . . in violation of 18 U.S.C. § 924(c).”

jury charged Ventura with possession and use of a firearm in relation to a crime of violence based on the sex trafficking charge.⁴⁰

Proceeding to trial, a jury found Ventura guilty on all counts.⁴¹ Denying Ventura's post-trial motions for judgment of acquittal or new trial, the district court sentenced Ventura to 420 months' imprisonment: 360 months for the several prostitution and sex trafficking counts and 60 months for the possession of a gun while committing the crime of sex trafficking.⁴² On appeal, the U.S. Court of Appeals for the Fourth Circuit upheld the jury's convictions on all counts save one.⁴³ In overturning Ventura's conviction for possession and use of a firearm to commit a crime of violence under 18 U.S.C. § 924(c), the court found sex trafficking by force, fraud, or coercion "is not a categorical crime of violence."⁴⁴

III. LEGAL BACKGROUND

In 1968, Congress enacted 18 U.S.C. § 924(c) with the intention of preventing criminals from carrying and using firearms during the commission of federal felonies.⁴⁵ To convict a defendant under § 924(c), the court must first find the underlying crime to be a "crime of violence" as defined by statute.⁴⁶ Courts frequently look to similar provisions containing "crime of violence" or "violent crime" language in making this determination.⁴⁷ While circuit courts have not evaluated sex trafficking under § 924(c), courts have evaluated this issue under similar "crime of violence" clauses and concluded sex trafficking qualifies as a violent crime.⁴⁸

A. Defining Crimes of Violence Under 18 U.S.C. § 924(c) and Similar Statutes

Section 924(c) currently provides a mandatory minimum of five years' imprisonment for "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such

Id. This Note analyzes only the possession and use of a firearm in relation to a crime of violence under 18 U.S.C. 924(c).

40. *Id.*

41. *Id.*

42. *Id.* at 493, 501.

43. *Id.* at 490.

44. *Id.*

45. *See* United States v. Eagle, 539 F.2d 1166, 1171 (8th Cir. 1976).

46. 18 U.S.C. 924(c)(1)(A) (2012).

47. *See infra* Part III.A.

48. *See infra* Part III.A.

crime, possesses a firearm.”⁴⁹ A conviction under this statute must be served consecutively to the underlying crime.⁵⁰

Congress created two distinct definitions under which a felony may qualify as a “crime of violence” under § 924(c).⁵¹ First, under the “force clause,” a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” is a crime of violence.⁵² Second, the “residual clause” expresses that a felony will be considered a crime of violence if, “by its nature, [the felony] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”⁵³ When determining whether a crime fits within either “crime of violence” definition, courts commonly look at (1) the defendant’s conviction of a particular crime and (2) the “statutory definition of the offense.”⁵⁴ In most cases, the court cannot consider particular facts of a defendant’s case when making the crime of violence determination.⁵⁵

Application of this legal principle to § 924(c)’s force clause is straightforward: a crime that requires the use, attempt, or threat of force for conviction qualifies as a crime of violence.⁵⁶ Conversely, when a statute defines a felony using elements that “allow[] for both violent and nonviolent means of commission, the offense is not a . . . crime of violence.”⁵⁷

The Supreme Court has not defined what constitutes a violent crime under the residual clause of § 924(c).⁵⁸ Circuit courts have looked to similar language in other statutes to evaluate specific crimes, including the criminal code’s general definition found in 18 U.S.C. § 16(b), the U.S. Sentencing

49. § 924(c)(1)(A).

50. *Id.* § 924(c)(1)(D)(ii).

51. *Id.* § 924(c)(3).

52. *Id.* § 924(c)(3)(A).

53. *Id.* § 924(c)(3)(B).

54. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (“Sentencing courts may ‘look only to the statutory definitions’ – *i.e.*, the elements – of a defendant’s prior offenses, and *not* ‘to the particular facts underlying those convictions.’” (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990))). The *Descamps* Court held that if a felony statute is indivisible – it does not contain alternative elements – courts must apply a categorical approach in making a crime of violence determination. *Id.* at 2281. On the rare occasion a felony statute contains alternative substantive offenses that qualify as a violation, courts will apply a modified categorical approach. *Id.* at 2283.

55. *Id.* at 2283.

56. See *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016).

57. *Id.*

58. See Charles Doyle, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*, CONG. RES. SERV. 3 (Sept. 16, 2015), <https://www.fas.org/sgp/crs/misc/R41412.pdf> (“The Supreme Court has addressed several other aspects of § 924(c), but it has yet to decide what constitutes a crime of violence for purposes of this section.”).

Guidelines (“U.S.S.G.” or “Sentencing Guidelines”) §4B1.2, and the Armed Career Criminal Act’s (“ACCA”) definition in 18 U.S.C. § 924(e)(2)(B).⁵⁹ However, appellate decisions analyzing felonies as crimes of violence under these assorted residual clauses have varied widely.⁶⁰

The language in 18 U.S.C. § 16(b) parallels that of § 924(c).⁶¹ In *Leocal v. Ashcroft*, the Supreme Court asserted that if the felony encompasses a “reckless disregard . . . to the risk that the use of physical force against another might be required in committing a crime,” it is a crime of violence under § 16(b).⁶² In other words, if a person risks having to “use” physical force against another person in the course of committing the felony, then it is a crime of violence.⁶³

The Court illustrated its point by analyzing the “classic example” of burglary.⁶⁴ It reasoned that burglary is a crime of violence because it “involves a substantial risk that the burglar will use force against a victim in completing the crime,” not because the offense can be committed in a generally reckless manner.⁶⁵ By contrast, a conviction for driving under the influence of alcohol cannot be considered a violent crime because the harm is merely accidental or negligent, rather than reckless.⁶⁶ Yet even after the Court’s decision in *Leocal*, the circuit courts still vary in their crime of violence determinations.⁶⁷

Another prominent residual clause can be found in the Sentencing Guidelines. Under §4B1.1, judges can raise a defendant’s sentencing range if: (1) the instant offense is a crime of violence, and (2) the defendant has at least two prior felony convictions for either committing a violent crime or

59. *Id.* at 4–5.

60. *Id.* Compare *United States v. Hull*, 456 F.3d 133, 140 (3d Cir. 2006) (possession of an unregistered pipe bomb was not a crime of violence under 18 U.S.C. § 16), with *United States v. Jennings*, 195 F.3d 795, 798 (5th Cir. 1999) (possession of a pipe bomb was a crime of violence under 18 U.S.C. § 16).

61. Compare 18 U.S.C. § 16(b) (2012) (defining crime of violence as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”), with § 924(c)(1)(3) (“‘[C]rime of violence’ means an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”).

62. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

63. *Id.* at 11 (“In no ‘ordinary or natural’ sense can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury.”).

64. *Id.* at 10.

65. *Id.*

66. *Id.* at 11.

67. See generally Hon. Bertha A. Zuniga, *Aggravated Felony Case Summary*, DOJ (Nov. 15, 2010), http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Aggravated_Felony_Outline.pdf.

possessing a controlled substance.⁶⁸ The Sentencing Guidelines similarly provide two definitions for “crimes of violence.”⁶⁹ While the first definition matches that of other “force” clauses, the second definition states a felony that “[is a] burglary of a dwelling, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another” is a “violent felony.”⁷⁰ Interestingly, the commentary to the Sentencing Guidelines lists, but does not limit itself to, additional crimes it considers violent, including: murder, manslaughter, kidnapping, forcible sex offenses, robbery, and extortionate extension of credit.⁷¹ While this provides some guidance as to which crimes apply, circuit courts still vary as to unenumerated felonies.

The ambiguity in applying the “crime of violence” provision carries over to the ACCA. The ACCA almost perfectly mirrors the alternative definitions of “crime of violence” provided in the Sentencing Guidelines.⁷² Notably, the Supreme Court declared the ACCA’s residual clause to be unconstitutionally vague in 2015 and chastised its own ambiguous interpretations of the clause over the past decade.⁷³ The Court in *Johnson v. United States* felt “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony” and criticized its application as “judge-imagined abstraction.”⁷⁴ While the Court claimed this decision would not affect the constitutionality of other residual clauses in nationwide criminal codes, several circuits have applied the *Johnson* holding to other residual clauses.⁷⁵ Because of uncertainty among circuit courts regarding the validity of residual clauses, the status of these clauses is now unclear.

68. U.S. SENTENCING GUIDELINES MANUAL §4B1.1 (U.S. SENTENCING COMM’N 2015). The Guidelines also indicate the defendant must be eighteen years old at the time of conviction. *Id.*

69. *Id.* §4B1.2.

70. *Id.*

71. *Id.* §4B1.2 cmt. n.1.

72. Compare §4B1.2, with 18 U.S.C. § 924(e)(2)(B) (2012).

73. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (“Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.”). The Court analyzed its previous holdings in *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); and *Sykes v. United States*, 564 U.S. 1 (2011). *Id.* at 2558–60 (“[T]his Court’s repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.”).

74. *Id.* at 2558.

75. See *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (“Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. §16(b) is not meaningfully distinguishable from the ACCA’s residual clause and . . . must be deemed unconstitutionally vague in light of *Johnson*.”); *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016) (“[W]e are convinced that *Johnson* is equally applicable to the [] residual definition of crime of violence. . . . [T]his nebulous provision, we conclude, denies due process of law.”); *United States*

B. Sex Trafficking Statutes and Case Law

Congress passed the TVPA in 2012 “to combat trafficking in persons[,] . . . to ensure just and effective punishment of traffickers, and to protect the victims.”⁷⁶ This legislation addressed, for the first time, trafficking in persons as a specific offense, criminalizing participation in sex trafficking by force, fraud, or coercion.⁷⁷ The question of whether a violation of the TVPA qualifies as a crime of violence is relatively recent.⁷⁸ The courts have addressed this question as to minors, and all concluded criminal sexual activity with a minor is categorically a violent crime.⁷⁹ Prior to *Fuertes*, no court had decided whether criminal sex trafficking of an adult by force, fraud, or coercion qualified as a crime of violence.⁸⁰

v. *Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015) (“Applying *Johnson’s* reasoning here, we conclude that § 16(b) is unconstitutionally vague.”); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015) (“[T]hese uncertainties render [§ 16(b)] unconstitutionally vague.”) (footnote omitted), *cert granted*, 137 S. Ct. 31 (2016) (mem.). *But see* *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016) (“*Johnson* does not require reversal of Taylor’s conviction, because several factors distinguish the ACCA residual clause from § 924(c)(3)(B).”); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (“These distinctions mean that the concerns raised by the Court in *Johnson* with respect to Armed Career Criminal Act’s residual clause do not cause the same problems in the context of 18 U.S.C. § 16(b). . . . Thus, we hold that 18 U.S.C. § 16(b) is not unconstitutionally vague on its face.”). In addition, the Eighth Circuit has asked the attorneys in *United States v. Taylor* to brief whether the Court’s holding in *Johnson* makes U.S.S.G. § 4B1.2 unconstitutionally vague. *United States v. Taylor*, 803 F.3d 931, 932 (8th Cir. 2015) (per curiam).

76. 22 U.S.C. § 7101(a) (2012).

77. Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1250 (2011) (“The TVPA of 2000 recognized for the first time trafficking in persons as a specific offense.”). The statute also recognized forced labor, trafficking with respect to peonage, slavery, involuntary servitude, unlawful conduct with respect to documents, and attempting to commit any of these acts as crimes under the TVPA. *Id.*

78. *Id.* at 1249.

79. *See, e.g., United States v. Williams*, 529 F.3d 1, 8 (1st Cir. 2008) (“[I]t is surpassingly difficult to see how burglary could be treated as a violent crime yet child trafficking exempted.”); *United States v. Patterson*, 576 F.3d 431, 442 (7th Cir. 2009) (“[T]he government is correct that violation of the statute creates a significant risk of violence against the victim by the perpetrator”); *United States v. Keelan*, 786 F.3d 865, 872 (11th Cir. 2015) (“Since the conduct encompassed by the elements of § 2422(b) involves a sex crime against a minor, the ordinary or generic violation of § 2422(b) involves a substantial risk the defendant may use physical force in the course of committing the offense.”).

80. *See* Brief of Appellee United States of America, *supra* note 23, at 38–40 (comparing the reasons circuits have found sex trafficking of minors to be a crime of violence with the physical risk of injury to adult victims).

1. The Prosecution of Sex Traffickers: Developing Statutory Law

The TVPA recognizes human trafficking as “a contemporary manifestation of slavery.”⁸¹ In 2000, Congress estimated 50,000 women and children were trafficked into the United States.⁸² In the congressional findings, legislators noted that traffickers target impoverished women and girls who lack access to education and economic opportunities.⁸³ Trafficked women and girls “are often forced through physical violence to engage in sex acts,” including rape and other forms of sexual abuse, torture, starvation, and imprisonment.⁸⁴ Traffickers threaten their victims, claiming they will physically harm the victims or others should the victims attempt to escape.⁸⁵ Accordingly, Congress declared, “Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.”⁸⁶

The TVPA defines sex trafficking as the use of force, fraud, or coercion,⁸⁷ or any combination thereof, to cause a person to engage in a commercial sex act.⁸⁸ As prescribed by statute, a “commercial sex act” is “any sex act, on account of which anything of value is given to or received by any person.”⁸⁹ Prohibited sex acts, such as the recruitment, enticement, providing or benefiting from commercial sex trafficking, are punishable by no less than fifteen years in prison.⁹⁰

Prior to the TVPA, the only statute to prosecute sex traffickers fell under the Mann Act.⁹¹ The Mann Act, originally passed in 1910, currently makes it a felony to knowingly transport a person with the intent that person engage “in any sexual activity for which any person can be charged with a criminal offense.”⁹² Specifically, the Mann Act criminalizes the persuasion, induce-

81. § 7101(a).

82. *Id.* § 7101(b)(1).

83. *Id.* § 7101(b)(4).

84. *Id.* § 7101(b)(6).

85. *Id.* § 7101(b)(7).

86. *Id.* § 7101(b)(9).

87. Coercion is defined as (1) “threats of serious harm to or physical restraint against any person”; (2) “any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person”; or (3) “the abuse or threatened abuse of law or the legal process.” 18 U.S.C.A. § 1591(e)(2) (West 2016).

88. As indicated by statute, “force fraud and coercion are not separate elements of the offense of sex trafficking” but are “alternate means to accomplish a single element.” See Mattar, *supra* note 77, at 1265 (quoting *United States v. Paris*, No. 03:06-cr-64 (CFD), 2007 U.S. Dist. LEXIS 78418, at *36 (D. Conn. 2007)).

89. § 1591(e)(3).

90. *Id.* § 1591(b)(1).

91. See Mattar, *supra* note 77, at 1250.

92. 18 U.S.C.A. § 2421(a); *id.* § 2422(a); see also Mattar, *supra* note 77, at 1250–52.

ment, enticement, and coercion of said individuals, allowing the government to prosecute sex traffickers.⁹³ Interestingly, the Mann Act does not require proof of force, fraud, or coercion, effectively lowering the burden of proof on the government.⁹⁴

2. Sex Trafficking as a Crime of Violence in Circuit Courts

The U.S. Court of Appeals for the First Circuit was the first court to address whether the sex trafficking of minors through interstate commerce constituted a violent crime for the purpose of categorizing the defendant as a career offender.⁹⁵ Over a two-year period, the defendant in *United States v. Williams* caused a thirteen-year-old girl to travel from Massachusetts to neighboring states to perform sex acts for money.⁹⁶ The defendant argued his conviction under 18 U.S.C. § 2423(a), transportation of a minor with intent to engage in sexual activity, could not be considered a crime of violence because the defendant was not charged with personal sexual contact with the girl.⁹⁷ The First Circuit disagreed, claiming, “[I]t is common ground that most ‘indecent sexual contact crimes perpetrated by adults against children categorically present a serious potential risk of physical injury.’”⁹⁸ The court reasoned that most illicit sexual activity between an adult and a minor occurs in close quarters and is perpetuated by an adult upon a “smaller, weaker, and less experienced” minor.⁹⁹ The court concluded, “The fact that the appellant was not personally intimate with the minor . . . does nothing to diminish the risk that force might be used in carrying out the crime” because the defendant’s conduct “necessarily placed the minor in harm’s way.”¹⁰⁰

Perhaps most similar to *Fuertes*, the U.S. Court of Appeals for the Sixth Circuit decided in *United States v. Willoughby* that a conviction of sex trafficking of a minor under 18 U.S.C. § 1591 qualified as a “crime of violence”

93. § 2422(a) (“Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, . . . to engage in prostitution, or any sexual activity for which any person can be charged with a criminal offense . . . shall be fined under this title or imprisoned not more than 20 years, or both.”).

94. See Mattar, *supra* note 77, at 1251.

95. *United States v. Williams*, 529 F.3d 1, 2 (1st Cir. 2008).

96. *Id.* at 3.

97. *Id.*

98. *Id.* at 5 (quoting *United States v. Cadieux*, 500 F.3d 37, 45 (1st Cir. 2007)).

99. *Id.* (quoting *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998)).

100. *Id.* The U.S. Court of Appeals for the Seventh Circuit addressed the same question a year later in *United States v. Patterson*. 576 F.3d 431, 434 (7th Cir. 2009). Following the court in *Williams*, the court found a crime committed under § 2423(a) created “a significant risk of violence against the victim by the perpetrator as well as third parties.” *Id.* at 442. Though the crime does require an element of violence, the court found the crime presented a sufficiently substantial risk to qualify under the ACCA’s residual clause. *Id.*

for a career criminal sentencing.¹⁰¹ In that case, the defendant took in a sixteen-year-old runaway girl and proceeded to have sex with her and sell her to other johns.¹⁰² Terrified of and completely dependent on the defendant, the girl felt she had no choice but to comply.¹⁰³

The court held, “[T]he act of causing a minor to engage in prostitution – even when the defendant’s act does itself not involve force – obviously does present a ‘serious potential risk of physical injury’ to the victim.”¹⁰⁴ The court acknowledged the risk of physical injury from the act itself, including violence from johns and the pimp.¹⁰⁵ The constant risk of physical violence loomed regardless of whether the pimp actually used force to cause the victim to engage in sex because “there is always a serious risk he will use force afterward, if she disobeys his rules, fails to obtain a client, or for any number of reasons.”¹⁰⁶

The U.S. Court of Appeals for the Eleventh Circuit followed similar reasoning when finding the transportation of a minor in violation of the Mann Act to be a crime of violence for purposes of the Mandatory Victims Restitution Act (“MVRA”).¹⁰⁷ In *United States v. Keelan*, the defendant developed a sexual relationship with one of his high school students over the course of two years.¹⁰⁸ When the defendant moved to Virginia to take a new teaching job, he continued his relationship with the former student until the child gave the defendant up to the police.¹⁰⁹ A jury convicted the defendant of knowingly persuading, inducing, or enticing a minor to engage in sexual activity.¹¹⁰

In seeking to apply the MVRA, the federal prosecutor had to prove the defendant committed a crime of violence that resulted in bodily injury, looking to § 16(b) to determine whether the offense was a crime of violence.¹¹¹ The court, evaluating the ordinary violation of the statute, proclaimed a substantial risk of physical force always exists in order to ensure a child’s compliance.¹¹² The court surmised that the defendant therefore committed a crime of violence under § 16(b)’s residual clause and ordered the defendant to pay restitution.¹¹³

101. 742 F.3d 229, 242 (6th Cir. 2014).

102. *Id.* at 232.

103. *Id.*

104. *Id.* at 242 (quoting U.S. SENTENCING GUIDELINES MANUAL §4B1.2(a)(2) (U.S. SENTENCING COMM’N 2015)).

105. *Id.*

106. *Id.*

107. *United States v. Keelan*, 786 F.3d 865, 872–73 (11th Cir. 2015).

108. *Id.* at 868.

109. *Id.*

110. *Id.* at 870.

111. *Id.* at 871–72.

112. *Id.* at 872.

113. *Id.*

With courts unanimously declaring sex trafficking of minors to be a crime of violence under a variety of statutes, it seems logical to similarly qualify the sex trafficking of adults. However, the Fourth Circuit disagreed.

IV. INSTANT DECISION

In *United States v. Fuertes*, the Fourth Circuit unanimously concluded sex trafficking by force, fraud, or coercion could not be a crime of violence for purposes of 18 U.S.C. § 924(c).¹¹⁴ In doing so, the court found the sex trafficking statute did not conform to the force clause or the residual clause.¹¹⁵ The court reversed Ventura's conviction for possessing a gun during a crime of violence, reducing Ventura's sentence by five years.¹¹⁶

The *Fuentes* court first evaluated whether sex trafficking by force, fraud, or coercion qualified categorically as a crime of violence under § 924(c)'s force clause.¹¹⁷ Citing *Descamps v. United States*, the court asserted a crime could not be a crime of violence if the statute's elements allow for both violent and nonviolent commissions of the crime.¹¹⁸ The court reasoned because 18 U.S.C. § 1591(a) specifically allows for sex trafficking to be committed by fraud alone, it can be committed non-violently.¹¹⁹ Therefore, the court concluded sex trafficking by force, fraud, or coercion does not qualify as a categorical crime of violence under the force clause.¹²⁰

Next, the court addressed whether the crime of sex trafficking by force, fraud, or coercion qualified as a crime of violence under § 924(c)'s residual clause.¹²¹ The government argued that even when the defendant commits the crime of sex trafficking by fraud alone, victims still face a substantial risk of injury from customers.¹²² The court rejected this analysis.¹²³ Relying on the statute's language, the court reasoned the proper inquiry was not whether there was a risk *any* person tangentially related to the offense would use force.¹²⁴ Rather, the court must inquire whether *the defendant* presented such a substantial risk.¹²⁵

114. *United States v. Fuertes*, 805 F.3d 485, 501 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016).

115. *See id.* at 499–500.

116. *Id.* at 501 (“Ventura cannot be guilty of violating § 924(c), and yet he received an additional sixty months’ imprisonment for this offense.”).

117. *Id.* at 498–99.

118. *Id.* at 498.

119. *Id.* at 499.

120. *Id.*

121. *Id.*

122. *Id.* at 500.

123. *Id.*

124. *Id.* at 499.

125. *Id.*

The court illustrated its point by examining burglary as a crime of violence.¹²⁶ Employing *Leocal v. Ashcroft*, the court surmised burglary would be covered as a crime of violence because there was a significant risk *the burglar* would use force in completing the crime.¹²⁷ Comparing this conclusion to the opposite outcome reached in *Willoughby*, the court explained the Sentencing Guidelines, also used in *Leocal*, involved broader language than 18 U.S.C. § 16(b).¹²⁸ Specifically, U.S.S.G. §4B1.2 “involves conduct that presents a serious potential risk of physical injury to another,” while 18 U.S.C. § 16(b) limits the risk to only “during the course of committing the offense.”¹²⁹ Finding the district court plainly erred in instructing the jury that sex trafficking by force, fraud, or coercion is a violent crime, the Fourth Circuit vacated Ventura’s § 924(c) conviction.¹³⁰

V. COMMENT

The Fourth Circuit’s decision in *Fuertes* exemplifies the common misperceptions prosecutors face when prosecuting sex traffickers.¹³¹ First, this Part will address these misperceptions by looking at how traffickers use a mix of physical violence, coercion, deception, and vulnerability to pressure their victims into commercial sex.¹³² Next, this Part will consider the “substantial risk of violence” analysis in *Fuertes* under a corrected sex trafficking lens, concluding sex trafficking is a violent crime under the residual clause. This Part then explores the future of sex trafficking as a violent crime given the residual clause’s uncertain future in statutory law, ultimately resolving that Congress must qualify a conviction of sex trafficking by force, fraud, or coercion as forcible rape in the criminal statute.¹³³

126. *Id.* at 500.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 501.

131. See Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence: A Primer for Judges*, 52 JUDGES’ J. 16 (2013). See also TASK FORCE ON TRAFFICKING OF WOMEN & GIRLS, REPORT OF THE TASK FORCE ON TRAFFICKING OF WOMEN AND GIRLS 26 (2014), <https://www.apa.org/pi/women/programs/trafficking/report.pdf> [hereinafter REPORT].

132. See Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States: International and Domestic Trends*, DOJ 57–65 (Apr. 17, 2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf>.

133. While sex traffickers victimize both men and women, this Part focuses on female sex trafficking reports and statistics for simplicity and easy reading. Any pronouns will therefore refer to “her” throughout this Part.

A. *What Is Sex Trafficking? Violence, Manipulation, and Dependence*

Sex trafficking is infamously recognized as the most common form of modern-day slavery.¹³⁴ It is the third largest and fastest-growing criminal enterprise in the world,¹³⁵ victimizing an estimated four and a half million people globally.¹³⁶ Traffickers operating in the United States frequently operate in solo or small-group operations, capable of running multi-state trafficking businesses and grossing into the millions of dollars.¹³⁷

Violence is an intrinsic part of human sex trafficking.¹³⁸ Traffickers use physical force to initiate women into the world of commercial sex.¹³⁹ They then use violence to punish, threaten, intimidate, dominate, control, and isolate the victim.¹⁴⁰ Traffickers will also use violence as a mechanism to obtain their own sexual gratification.¹⁴¹

A 2001 study funded by the U.S. Department of Justice interviewed domestic and international victims of sex trafficking and found “violence, rape, robbery, kidnapping, and killings are normal occurrences for women in prostitution.”¹⁴² The same study reported that 86% of the American women interviewed and 53% of the international women interviewed experienced physical abuse at the hands of their traffickers.¹⁴³ These women experienced violence such as “having [their] head and face split open, being punched until [their] teeth were knocked out, pounded unconscious, hit with hangers, choked, and pushed out of moving cars.”¹⁴⁴ Traffickers often used weapons, including guns, knives, sticks, and ropes.¹⁴⁵ Importantly, these numbers are consistently underreported and underestimated.¹⁴⁶

Traffickers often rape their victims in order to ensure their compliance.¹⁴⁷ Studies show between one-third and two-thirds of trafficked women

134. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI (Mar. 2011), <https://leb.fbi.gov/2011/march/human-sex-trafficking> (last visited Feb. 3, 2017).

135. *Id.*

136. *Sex Trafficking*, POLARIS PROJECT, <https://polarisproject.org/sex-trafficking> (last visited Jan. 15, 2017).

137. See Raymond & Hughes, *supra* note 132, at 20.

138. *Id.* at 9.

139. *Id.* at 55.

140. *Id.* at 60–61.

141. *Id.* at 61.

142. *Id.* at 66.

143. *Id.* at 65.

144. *Id.* at 58–59.

145. *Id.* at 59.

146. *Id.* at 74. The researchers list several reasons why these numbers are in reality higher than statistics reflect, including: (1) “[n]ormalizing the violence in their lives,” (2) “[r]eluctance to describe or speak about the violence for fear of retaliation from the abuser,” and (3) “[s]hame in talking about what they were subjected to.” *Id.*

147. See Leidholdt, *supra* note 131, at 16.

reported being raped by traffickers and their clients.¹⁴⁸ One such study, funded by the Department of Justice, revealed that 80% of the domestically trafficked interviewees, and almost 40% of the international interviewees, reported sexual assault at the hands of their traffickers.¹⁴⁹ The FBI also recognized that traffickers sometimes use gang rape as a means of gaining control over their victims.¹⁵⁰ Similar to reports of physical violence, sexual violence is underreported in these studies.¹⁵¹

Researchers from another study followed almost 2000 sexually exploited women for thirty years.¹⁵² The study revealed that homicide was the leading cause of premature death.¹⁵³ The rate of homicide for these women was seven times higher than male taxicab drivers and fifty-one times higher than the homicide rate for female liquor store workers (the two occupations with the highest homicide rates in the country at the time of the study).¹⁵⁴ The study noted, “[N]o population of women studied previously has had a crude mortality rate, standardized mortality ratio, or percentage of deaths due to murder even approximating those observed in our cohort.”¹⁵⁵

Traffickers also frequently threaten violence against the victim or her family in order to gain compliance. In one study, 90% of American women and 47% of international women reported verbal threats made by traffickers.¹⁵⁶ In addition, both American and international women received threats to their families.¹⁵⁷ Victims see these threats as viable because traffickers often belong to the same community as the victim and her loved ones.¹⁵⁸ This type of coercion places victims in constant fear of danger.

Psychological coercion is a form of mental violence.¹⁵⁹ Traffickers readily admit to using this type of coercion as a method to maintain control of their victims.¹⁶⁰ A trafficker’s most effective method of recruitment is estab-

148. See REPORT, *supra* note 131, at 37 (citing Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33 (2003)).

149. See Raymond & Hughes, *supra* note 132, at 9.

150. Walker-Rodriguez & Hill, *supra* note 134.

151. See Raymond & Hughes, *supra* note 132, at 74.

152. REPORT, *supra* note 131, at 37 (citing John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 783 (2004)).

153. *Id.*

154. *Id.*

155. *Id.* (quoting Potterat et al., *supra* note 152, at 783).

156. Raymond & Hughes, *supra* note 132, at 9.

157. *Id.* at 62.

158. Leidholdt, *supra* note 131, at 16.

159. REPORT, *supra* note 131, at 35.

160. Meredith Dank et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, URBAN INST. 2 (Mar. 2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413047-Estimating->

lishing a relationship of trust with potential victims – he falsely promises marriage, family, and love.¹⁶¹ After the victim becomes dependent on the perpetrator, he then manipulates her into the commercial sex trade, using methods such as locking her in a room, forcing her to witness violence perpetrated on others, depriving her of movement, and emotionally abusing, shaming, or neglecting her as a means to intimidate and punish.¹⁶² Victims report their traffickers control the money the victims earn; victims become dependent on the traffickers' support for food, clothes, and shelter.¹⁶³ These methods become tantamount to torture for the women involved.¹⁶⁴

The common lack of understanding of how psychological coercion augments physical violence presents significant obstacles for prosecutors.¹⁶⁵ Misperceptions by judges and juries that the victim was complicit in her victimization, or at the very least failed to leave her trafficker, persuade factfinders that the defendant did not commit a crime.¹⁶⁶ Rather than recognizing victims of sex trafficking, courts will chastise victims for their sexual exploitations, often sending them back into the clutches of their traffickers.¹⁶⁷ It is this same lack of understanding that led the Fourth Circuit to its uninformed decision in *Fuertes*.

B. Sex Trafficking as a Violent Crime Under the Residual Clause

The *Fuertes* court concluded sex trafficking did not present a substantial risk of physical violence under 18 U.S.C. § 924(c).¹⁶⁸ The court refused to apply other circuit courts' analyses of sex trafficking statutes to the instant case.¹⁶⁹ While the court emphasized that the decision relied on the defendant's conduct in the ordinary case of sex trafficking, it failed to investigate such statistics.¹⁷⁰ An analysis of both other circuits' decisions and crime statistics reveals that the Fourth Circuit's reasoning is unconvincing.

the-Size-and-Structure-of-the-Underground-Commercial-Sex-Economy-in-Eight-Major-US-Cities.PDF.

161. Walker-Rodriguez & Hill, *supra* note 134.

162. REPORT, *supra* note 131, at 36.

163. Raymond & Hughes, *supra* note 132, at 51, 58.

164. REPORT, *supra* note 131, at 36.

165. *Id.* at 26.

166. *Id.* at 36.

167. *See* Leidholdt, *supra* note 131, at 16.

168. *United States v. Fuertes*, 805 F.3d 485, 499–501 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016).

169. *See id.* at 500.

170. *See id.*

1. The Substantial Risk of Violence at the Hands of Johns: The Circuit Courts' Imputation of the Easily Foreseen Risk to the Trafficker

The First Circuit in *Williams* found an imbalance of power between the adult and child because a child is smaller, weaker, and less experienced; these characteristics inherently lead to the use of force.¹⁷¹ The same power imbalance can also be found in a majority of adult sex trafficking cases. Traffickers, by nature, target vulnerable persons.¹⁷² Women and girls with few economic opportunities, struggling to meet basic needs, make easy prey for traffickers.¹⁷³ Perpetrators look for specific indicators when finding victims, such as poverty, young age, limited education, lack of work opportunities, lack of family support, history of sexual abuse, and health and mental challenges.¹⁷⁴

One study found 73% of trafficked international women had very little to no English language skills.¹⁷⁵ The same study found the majority of both domestic and international female victims entered the sex industry before the age of twenty-five, many of them as children.¹⁷⁶ It is clear the power imbalance is not just found in sex trafficking of minors but also in sex trafficking generally.¹⁷⁷ As such, the *Fuertes* court should have recognized the inherent risk of physical violence that accompanies such asymmetric power.

The First Circuit's finding of an imbalance of power in child sex trafficking cases led to its conclusion that sex trafficking of a minor is a crime of violence, in part because the trafficker "necessarily placed the minor in harm's way and led ineluctably to a sex act . . . between the minor and an older man unconcerned with her welfare."¹⁷⁸ The Sixth Circuit in *Willoughby* mirrored this conclusion, finding a § 1591 conviction is a crime of violence because of the risk of physical injury from johns.¹⁷⁹

The government argued the same reasoning applied in *Williams* and *Willoughby* should also apply to the sex trafficking of adults, but the Fourth

171. *United States v. Williams*, 529 F.3d 1, 5 (1st Cir. 2008) (quoting *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998)).

172. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SECRETARY FOR PLAN. & EVALUATION, HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 10 (Aug. 30, 2009), aspe.hhs.gov/report/human-trafficking-and-within-united-states-review-literature [hereinafter HUMAN TRAFFICKING INTO AND WITHIN].

173. *Id.* at 7.

174. *Id.*

175. Raymond & Hughes, *supra* note 132, at 7.

176. *Id.*

177. HUMAN TRAFFICKING INTO AND WITHIN, *supra* note 172, at 7–11.

178. *United States v. Williams*, 529 F.3d 1, 5 (1st Cir. 2008).

179. *United States v. Willoughby*, 742 F.3d 229, 242 (6th Cir. 2014).

Circuit rejected this position.¹⁸⁰ The Fourth Circuit claimed the U.S.S.G. §4B1.2 residual clause at issue in *Willoughby* was more expansive than the residual clause of 18 U.S.C. § 924(c)(3)(B); while §4B1.2 simply requires “conduct that presents a serious potential risk of physical injury to another,” the court reasoned § 924(c) asks “whether there is a substantial risk that the defendant will use physical force against the victim in completing the crime.”¹⁸¹

Interestingly, the Eleventh Circuit in *Keelan* found differently; it rejected the defendant’s argument that § 16(b), the same language used in § 924(c), was narrower than §4B1.2.¹⁸² Prior to *Keelan*, the court had deduced that there was no “substantial difference that requires a different decision between the definition of a crime of violence under 18 U.S.C. § 16 . . . and the definition of a crime of violence for career offender purposes under [U.S.S.G. §4B1.2].”¹⁸³ In keeping with this conclusion, the court found sex trafficking of a minor to be a violent crime under both §4B1.2 and § 16(b).¹⁸⁴ Seen from this interpretation, the *Willoughby* court’s conclusion that a claim for sex trafficking by force, fraud, or coercion is a crime of violence under §4B1.2 should also apply to crime of violence clauses in § 16(b) and § 924(c).¹⁸⁵

The Fourth Circuit attempted to dissuade legal readers from accepting this argument by considering *Keelan* in a footnote.¹⁸⁶ The court claimed *Keelan* applies only to child sex crimes and is therefore inapplicable to the instant case.¹⁸⁷ Yet the statute used to convict the defendant in *Keelan* does not contain any element of physical force.¹⁸⁸ Instead, the statute requires the government to prove the defendant knowingly “persuade[d], induce[d], entice[d], or coerce[d]” a minor to engage in sexual activity.¹⁸⁹ Undeterred, the *Keelan* court held substantial risk of physical force will always exist when a child complies with an adult’s sexual demands.¹⁹⁰ Conversely, despite the statute’s

180. *United States v. Fuertes*, 805 F.3d 485, 500 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016); Brief of Appellee United States of America, *supra* note 23, at 39.

181. *Id.* at 499–500.

182. *United States v. Keelan*, 786 F.3d 865, 870–72 (11th Cir. 2015).

183. *United States v. Rutherford*, 175 F.3d 899, 905 (11th Cir. 1999). *See also United States v. Searcy*, 418 F.3d 1193, 1197 (11th Cir. 2005) (“[A] crime of violence determination for the purposes of 18 U.S.C. § 16 is indistinguishable from a determination made pursuant to U.S.S.G. § 4B1.1.”).

184. *Keelan*, 786 F.3d at 870, 872.

185. This conclusion is supported by recent circuit courts’ statements. *See supra* Part III.A (residual clauses in § 16(b) and U.S.S.G. §4K1.2 are unconstitutionally vague after the Supreme Court’s decision in *United States v. Johnson*).

186. *Fuertes*, 805 F.3d at 500 n.6.

187. *Id.*

188. *See id.*; *see also* 18 U.S.C. § 2422(b) (2012).

189. § 2422(b).

190. *United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. 2015).

express listing of force and threats of force as possible elements, the Fourth Circuit declined to accept *Keelan*'s reasoning.¹⁹¹

The Fourth Circuit viewed the adult-minor distinction as dispositive, yet, as mentioned earlier, adult victims are similarly subjected to the imbalanced power dynamic that is seen in child sex trafficking.¹⁹² Moreover, force is a specific element of the statute for adult sex trafficking.¹⁹³ The court's view that adult sex trafficking cannot be a violent crime because the defendant merely places the victim in harmful situations and does not harm the victims directly is contrary to both prior holdings on sex trafficking and the interpretations of various residual clauses.¹⁹⁴

2. Substantial Risk of Violence by the Trafficker Himself

The Fourth Circuit emphasized the relevant question in *Fuertes* was whether there was a substantial risk the defendant would use physical force against the victim in a sex trafficking crime.¹⁹⁵ The court relied on the example in *Leocal v. Ashcroft*, which reasoned, "burglary, by its nature, involves a substantial risk that *the burglar* will use force against a victim in completing the crime."¹⁹⁶ While the Fourth Circuit considered the risk of physical violence at the hands of a trafficker's clientele, it failed to analyze the potential for physical harm at the hands of the trafficker himself.

Analyzing the established violent crime of burglary under the "substantial risk of physical force" standard is illuminating. Traditionally, burglary is considered to be a property crime against another, defined as "a breaking and entering of a dwelling house of another at night with the intent to commit a felony therein."¹⁹⁷ Yet burglary has long been considered a crime of violence by the federal court system.¹⁹⁸ It has been proffered, "Perhaps it is the fact that other crimes might occur after a burglar enters a building, and that those crimes might be violent, that has resulted in the categorization of burglary as a violent offense when the law requires that criminal record be used for sentencing enhancement."¹⁹⁹

Yet a 2015 analysis of burglaries occurring between 1998 and 2007 revealed that fewer than 8% resulted in physical violence or threats of physical

191. *Fuertes*, 805 F.3d at 500 n.6.

192. *Id.* at 496.

193. 18 U.S.C.A. § 1591(a) (West 2016).

194. *Fuertes*, 805 F.3d at 500.

195. *Id.* at 499–500.

196. *Id.* at 500 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)).

197. Richard F. Culp, Phillip M. Kopp & Candace McCoy, *Is Burglary a Crime of Violence? An Analysis of National Data 1998–2007*, NAT'L CRIM. JUST. REFERENCE SERV. 2 (Feb. 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf> (quoting *Burglary*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

198. *Id.* at 3.

199. *Id.* at viii–ix.

violence.²⁰⁰ The highest estimate of actual violence occurring during burglaries, as indicated by physical injuries to a victim, was only 2.7%.²⁰¹ Strikingly, courts have found that even if a victim did not know a burglar entered the building until after the property was discovered missing, the burglary is still a violent crime due to the risk of violence.²⁰² It is reasonable to conclude from these statistics that a “substantial risk of violence” for residual clause purposes is a relatively low threshold.²⁰³

When comparing the potential for physical harm between burglary and sex trafficking by force, fraud, or coercion, empirical data show a tremendous difference between the rates of violence.²⁰⁴ Studies typically find between 80 and 90% of sex trafficking victims experience violence at the hands of their traffickers.²⁰⁵ One study concluded up to 90% of women received verbal threats of violence from their traffickers.²⁰⁶ Compared to these numbers, the risk of physical violence in a burglary is quite paltry. Despite these statistics, the Fourth Circuit found the risk of violence by a burglar to be sufficient for a crime of violence determination and failed to even consider the risk of violence by a sex trafficker to his victim.²⁰⁷ Instead, the court dismissed the argument in a footnote.²⁰⁸

Unlike the Fourth Circuit, the Sixth Circuit adjudged sex trafficking by force, fraud, or coercion to fulfill the residual clause definition for a crime of violence.²⁰⁹ The *Willoughby* court specifically pointed to the risk of violence from the pimp “regardless of whether the pimp use[d] force to cause his victim to engage in a sex act.”²¹⁰ The Sixth Circuit acknowledged what the empirical data prove: “[T]here is always a serious risk that [the pimp] will use force afterward, if she disobeys his rules, fails to obtain a client, or for any number of reasons.”²¹¹ This is in keeping with other circuits, which have found sex trafficking of a minor involves risks of physical harm to be suffi-

200. *Id.* at x. This number represents burglaries in urban areas. *Id.* at ii. For rural areas, the likelihood for violence and threats of violence is less than 1%. *Id.*

201. *Id.* at ii.

202. *Id.* at viii.

203. *Id.* at ii. Researchers agree, surmising it is “clear that the majority of burglaries do not involve physical violence and scarcely even present the possibility of physical violence.” *Id.*

204. *Id.* Raymond & Hughes, *supra* note 132, at 9.

205. Raymond & Hughes, *supra* note 132, at 9.

206. *Id.*

207. *See* United States v. Fuentes, 805 F.3d 485, 500 n.6 (4th Cir. 2015) (“[W]e are not persuaded that the ordinary case of sex trafficking by force, fraud, or coercion involves a substantial risk that the defendant will use physical force as a means to commit the offense.”), *cert. denied sub nom.* Ventura v. United States, 136 S. Ct. 1220 (2016).

208. *See id.*

209. United States v. Willoughby, 742 F.3d 229, 242 (6th Cir. 2014).

210. *Id.*

211. *Id.*

cient for purposes of a crime of violence.²¹² The Fourth Circuit's opinion is inconsistent with reliable data and contrary to the thoughtful interpretations of other courts.

Due to the Fourth Circuit's ruling in *Fuertes*, prosecutors are not likely to bring 18 U.S.C. § 924(c) claims, instead using the Sentencing Guidelines to further the goal of reducing guns in the commission of violent crimes.²¹³ One possible option in the *Fuertes* case would be to ask for a sentencing enhancement under U.S.S.G. §2K2.1, which raises a defendant's sentencing range if a defendant used, possessed, or transported a firearm.²¹⁴ While most sentencing enhancements under this guideline require a conviction under § 924(c), a prosecutor can bring a sentencing enhancement under §2K2.1(a)(5), as it simply requires the instant offense to involve a firearm.²¹⁵

This strategy has its limitations. Section 2K2.1(a)(5) restricts the application of the Sentencing Guidelines only to specific guns outlined in 26 U.S.C. § 5845(a).²¹⁶ The types of guns found in this section include sawed-off shotguns and modified rifles, machine guns, and explosives.²¹⁷ It also includes "any weapon or device capable of being concealed on the person from which a shot can be discharged."²¹⁸ The Bureau of Alcohol, Tobacco, and Firearms lists devices such as pen guns, cigarette lighter guns, knife guns, can guns, and umbrella guns.²¹⁹ This definition also includes pistols and revolvers having smooth bore barrels.²²⁰ In other words, § 5845 only applies to illegal guns and excludes many types of guns people are allowed to purchase for use at home or hunting.²²¹ The possibility for the prosecutor to obtain a sentencing enhancement through §2K2.1 therefore fails to capture all criminals, including sex traffickers, who use legally obtained guns. The best way

212. See, e.g., *United States v. Williams*, 529 F.3d 1, 8 (1st Cir. 2008) ("[I]t is surprisingly difficult to see how burglary could be treated as a violent crime yet child trafficking exempted."); *United States v. Patterson*, 576 F.3d 431, 442 (7th Cir. 2009) ("[T]he government is correct that violation of the statute creates a significant risk of violence against the victim by the perpetrator . . ."); *United States v. Keelan*, 786 F.3d 865, 872 (11th Cir. 2015) ("Since the conduct encompassed by the elements of § 2422(b) involves a sex crime against a minor, the ordinary or generic violation of § 2422(b) involves a substantial risk the defendant may use physical force in the course of committing the offense.").

213. Telephone Interview with Teresa Moore, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Missouri (Feb. 8, 2016).

214. U.S. SENTENCING GUIDELINES MANUAL §2K2.1 (U.S. SENTENCING COMM'N 2014).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*; 26 U.S.C. § 5845(e) (2012).

219. *What Are "Firearms" Under the NFA?*, BUREAU ALCOHOL, TOBACCO, & FIREARMS § 2.1.5, at 7, <https://www.atf.gov/file/58196/download> (last visited Jan. 15, 2017).

220. *Id.*

221. § 5845.

to effectively punish a defendant for the possession or use of a gun in a sex trafficking crime is to proceed under the residual clause of § 924(c).

It is difficult to fathom how the court could consider burglary, with statistically low rates of violence, to be a violent crime, while disqualifying sex trafficking as a violent crime, when so many trafficked victims face violence at the hands of their traffickers. Similarly, the court's conclusion – that traffickers are not responsible for the harm committed against their victims when they use their superior power to place vulnerable women at risk – is nonsensical. This decision is illustrative of the general factfinders' lack of education on this issue. The best approach for prosecutors is not to find alternative methods to effectively punish sex traffickers, but rather to educate factfinders on the power dynamics and methods of control used by traffickers, including the common use of force and threat of force as a means of domination.

Because sex trafficking victims face substantial odds of violence, sex trafficking by force, fraud, or coercion should be considered a crime of violence under the several residual clauses. However, what happens if the several residual clauses are found to be unconstitutionally vague and stricken from statutes?

C. Thinking Ahead: Can Congress Ensure Sex Trafficking Is Considered a Violent Crime?

Even if the Fourth Circuit had found committing sex trafficking by force, fraud, or coercion to be a crime of violence under the residual clause, the circuit courts' holdings since *United States v. Johnson* would call into question the instant decision's constitutionality. While § 924(c)'s residual clause has yet to be found in violation of due process, circuit courts have declared its sister clause, § 16(b), to be unconstitutionally vague.²²² The government may be precluded from using § 924(c)'s residual clause in the future, requiring the prosecutor to satisfy § 924(c)'s force clause.

Unfortunately, sex trafficking cannot qualify as a crime of violence under 924(c)'s force clause. The elements of the sex trafficking statute require the crime to be committed by force, fraud, *or* coercion. Thus, in theory, the crime could be committed by fraudulent means alone, making the statute applicable to both non-violent and violent instances. The broad interpretations of this statute, while helpful when convicting sex traffickers, make it difficult to fit sex trafficking within the force clause.²²³ As currently constructed, the statute leaves prosecutors unable to charge sex trafficking defendants under § 924(c), evading the effective justice espoused by the TVPA.

However, an informed analysis of sex trafficking as a violent crime requires a closer look into the congressional findings under the TVPA. Under this statute, Congress declared, "Trafficking includes all elements of the

222. See *supra* note 75 (listing the various circuit courts' decisions on the constitutionality of residual clauses).

223. See Telephone Interview with Teresa Moore, *supra* note 213.

crime of *forcible rape* when it involves the involuntary participation of another person in sex acts by means of *fraud, force, or coercion*.²²⁴ Forcible rape automatically includes the necessary requirement to qualify as a crime of violence: force or threat of force.²²⁵ Because a finding of force, fraud, or coercion qualifies as forcible rape, a conviction of sex trafficking should be considered a crime of violence, regardless of which elements were proven in the actual conviction. While the government presented such an argument, the court did not address it in the published opinion.²²⁶ In oral argument, the court was reluctant to allow the TVPA's "legislative history" to inform its interpretation of crime of violence.²²⁷

The idea that congressional findings are simply "legislative history" minimizes the legitimate purpose they serve.²²⁸ The government argued as much, asserting that the findings in the TVPA were "enacted text that satisfied the bicameralism and presentment requirements of [the U.S. Constitution], and thus have the force of law."²²⁹ The U.S. Supreme Court agreed with this interpretation, claiming congressional findings to be "part of the statute."²³⁰ Congress creates its findings to "inform" the court's interpretation, and the court's decision must be "in harmony" with such findings.²³¹ Any other interpretation would clearly violate the TVPA's stated purpose to "ensure just and effective punishment of [sex] traffickers."²³²

Nevertheless, circuit courts may continue to diminish the importance of Congress's TVPA findings. Congress must clarify its intention to hold sex trafficking as a violent crime. The best possible solution is to insert language into the criminal sex trafficking statute that equates sex trafficking by force, fraud, or coercion to forcible rape. This addition to the statute seems to align with the original intent of the legislature; the application of the same terms in the criminal and congressional statute make clear the legislature meant to equate a conviction of sex trafficking under § 1591 with forcible rape.²³³ By

224. 22 U.S.C. § 7101(b)(9) (2012) (emphasis added).

225. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 580 (7th ed. 2015) ("The traditional rule is that a successful prosecution for forcible rape requires proof that the female did not consent to the intercourse *and* that the sexual intercourse was secured by force.").

226. Supplemental Brief Filed August 3, 2015, at 1, *United States v. Fuertes*, 805 F.3d 485 (Nos. 13-4755(L), 13-4816), 2015 WL 4638635. See generally, *United States v. Fuertes*, 805 F.3d 485 (4th Cir. 2015), *cert. denied sub nom. Ventura v. United States*, 136 S. Ct. 1220 (2016).

227. Supplemental Brief Filed August 3, 2015, *supra* note 226 at 1.

228. *Id.* at 2.

229. *Id.* at 1.

230. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989).

231. Supplemental Brief Filed August 3, 2015, *supra* note 227, at 2 (citing *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994)).

232. 22 U.S.C. § 7101(a) (2012).

233. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("The 'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act

expressly placing the language in the statute, courts would more likely find that sex trafficking qualifies as a categorical crime of violence under the force clause.

VI. CONCLUSION

In the U.S. District Court for the Western District of Missouri, “Master Ed” of Lebanon, Missouri, pled guilty to his eleven-count indictment, including a charge for possession of a firearm in furtherance of a crime of violence.²³⁴ The federal judge sentenced Edward Bagley to twenty years’ imprisonment.²³⁵ However, the recent Fourth Circuit decision in *United States v. Fuertes* is a strong deterrent for federal prosecutors around the country, likely preventing them from additionally charging sex traffickers under 18 U.S.C. § 924(c). Instead of a twenty-year sentence, traffickers like Bagley would receive a fifteen-year sentence. This is not the outcome Congress intended when it wrote the TVPA and is contrary to its stated purpose of combatting trafficking and protecting victims.²³⁶

The Fourth Circuit’s decision reflects the lack of education general fact-finders receive about the violence and manipulation wielded by traffickers. Studies show both traffickers and their clients expose their victims to a substantial risk of violence.²³⁷ While the Fourth Circuit’s judgment that, contrary to data, sex trafficking does not present a substantial risk of violence is inappropriate, it may carry insignificant weight in the future due to the questionable constitutionality of the residual clause. As such, the best solution is for Congress to directly insert in the criminal statute what it already explicitly states in the TVPA’s findings: sex trafficking includes all elements of forcible rape. Only then will traffickers be ensured just and effective punishment.

are intended to have the same meaning.” (quoting *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994))). See also *United States v. Shell*, 789 F.3d 335, 357–58 (4th Cir. 2015) (“[F]orcible sex offenses’ is a distinct term with a consistent meaning across §§ 2L1.2 and 4B1.2.”).

234. *Lebanon Man Guilty, Faces 20 Years in Prison for Coercing a Minor to Become a Sex Slave*, DOJ (Jan. 15, 2013), <https://www.justice.gov/usao-wdmo/pr/human-trafficking-rescue-project-0>.

235. *Lebanon Man Sentenced to 20 Years for Coercing a Minor to Become a Sex Slave*, FBI (Sept. 11, 2013), <https://archives.fbi.gov/archives/kansascity/press-releases/2013/lebanon-man-sentenced-to-20-years-for-coercing-a-minor-to-become-a-sex-slave>.

236. § 7101(a).

237. Raymond & Hughes, *supra* note 132, at 9.

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