

HUMAN TRAFFICKING VICTIM IDENTIFICATION: SHOULD CONSENT MATTER?

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INTRODUCTION

It is widely accepted that human trafficking is a global phenomenon that poses a significant problem within the United States.¹ Despite its wealth and sophisticated law enforcement paradigms, the United States is the third largest destination country for human trafficking victims.² In fact, human trafficking in the United States is increasing.³ Scholars have advanced a myriad of reasons to explain this problem. For example, some have pronounced the conscious neglect of men and boys in the investigation, reporting, and publicity of human trafficking a serious impediment to progress in combating trafficking.⁴ The ease

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1. See KEVIN BALES ET AL., *HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES* 1, 5 (Free the Slaves & Human Rights Ctr. ed. 2004), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=forcedlabor> (discussing the problem of forced labor in the United States); HEATHER J. CLAWSON ET AL., *ESTIMATING HUMAN TRAFFICKING INTO THE UNITED STATES: DEVELOPMENT OF A METHODOLOGY* 2 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/215475.pdf> (noting that the United States is also a destination for human trafficking); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 406-08 (2006) (discussing the global epidemic of human trafficking); see also Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 CARDOZO J.L. & GENDER 909, 910 (2006) (questioning the effectiveness of law enforcement efforts); see generally Judith Dixon, *The Impact of Trafficking in Persons*, in AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 81, 81 (United Nations Office on Drugs & Crime ed., 2008), available at http://www.ungift.org/docs/ungift/pdf/knowledge/background_paper.pdf (analyzing the global impact of human trafficking).

2. Buckwalter et al., *supra* note 1, at 407; see also Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 4 UTAH L. REV. 1143, 1148 (2010) [hereinafter Jones, *Invisible Man*].

3. Jones, *Invisible Man*, *supra* note 2, at 1148; Sarah Leevan, Note, *Comparative Treatment of Human Trafficking in the United States & Israel: Financial Tools to Encourage Victim Rehabilitation and Prevent Trafficking*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 773, 800 (2008); Marisa Nack, Note, *The Next Step: The Future of New York State's Human Trafficking Law*, 18 J.L. & POL'Y 817, 824-25 (2010).

4. See Megumi Makisaka, *Human Trafficking: A Brief Overview*, SOCIAL DEVELOPMENT NOTES: CONFLICT, CRIME AND VIOLENCE, No. 122, Dec. 2009, at 1,6 ("Along with women and girls, both adult men and boys are also the victims of trafficking . . . but the trafficking cases of men are extremely underreported."); see generally Jones, *Invisible Man*, *supra* note 2 (discussing the

with which corporations avoid prosecution under the Trafficking Victims Protection Act of 2000 (TVPA) has been cited as a leading obstacle to thwarting trafficking.⁵ The U.S. government's disproportionate focus on prosecuting poor and powerless individuals has also ignited concern.⁶ In addition, the dismal enforcement results reveal that the neglect of ethnic minority victims has contributed to the proliferation of trafficking schemes.⁷ Finally, even the disproportionate focus on sex trafficking and the manner in which feminist ideology negatively influences anti-trafficking measures has been explored to a significant degree.⁸

Despite sufficient and well-examined scholarly literature regarding human trafficking, perhaps the most perplexing obstacle to prevention of human trafficking lies in the inability of governments and nongovernmental organizations to properly identify victims of human trafficking and quantify their numbers.⁹ Indeed, the wide body of scholarship relative to human trafficking

role of men and boys in human trafficking).

5. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3033-35 (2006); see also Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 *HARV. LATINO L. REV.* 59, 82-89 (2006) (arguing for harsher penalties against corporations that violate immigration laws); see generally Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 28 U.S.C., 42 U.S.C.).

6. See Chacón, *supra* note 5, at 3035-36.

7. See Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 *B.U. INT'L L.J.* 207, 249-50 (2007); Anna Gekht, *Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings*, 37 *DENV. J. INT'L L. & POL'Y* 29, 38 (2008).

8. See Shelley Cavalieri, *The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 31 *N. ILL. U. L. REV.* 501, 510-13 (2011) (asserting that the "[d]isproportionate prosecution of sex trafficking . . . is symptomatic of the excessive focus on sex trafficking that permits the public and those charged with addressing human trafficking to overlook instances of trafficking into other labor sectors"); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1702-03 (2010) (discussing the means by which certain strands of feminist ideology situates all women as "victims of crime"); Jones, *Invisible Man*, *supra* note 2, at 1151 (stating that "female sex trafficking is erroneously regarded as the principal undertaking of human traffickers"); Cynthia L. Wolken, *Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework*, 6 *U. MD. L.J. RACE RELIGION GENDER & CLASS* 407, 421-24 (2006).

9. See DEP'T OF JUSTICE ET AL., *ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS* 5 (2004), available at http://www.justice.gov/archive/ag/annualreports/tr2004/us_assessment_2004.pdf (recognizing "an inability to determine the precise number of people who are victimized by traffickers each year"); ALISON SISKIN & LIANA SUN WYLER, *CONG. RESEARCH SERV.*, RL 34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS* 22 n.54 (2010) ("[T]here does not seem to be a clear definition of what it means to be a U.S. citizen trafficked within the United States. For example, some would argue that all prostitutes who have

reveals stark inconsistencies in representations of the number of human trafficking victims, which various sources claim “range from the hundreds of thousands to millions per year.”¹⁰ One source estimates that each year “[twenty-seven] million people worldwide are enslaved,” and up to four million are trafficked across international borders.¹¹ Another source claims that each year as many as two million women and children are trafficked across international borders,¹² with other sources pointing to potentially millions of men and boys who are also victims of human trafficking.¹³ Other reports state “that at any given time, about 12.3 million people are trapped in situations” of some form of forced labor.¹⁴ Another commentator notes that “the U.S. government estimate[s] that between 600,000 and 800,000 men, women, and children are trafficked across international borders each year.”¹⁵ Some estimates place the number of victims trafficked into the United States each year at between 14,500 and 17,500; others estimate the number to be closer to 100,000 or even higher.¹⁶ Finally, some admit that the number of human trafficking victims in the United States is simply “unknown.”¹⁷

The lack of consensus regarding the number of human trafficking victims is largely attributed to the lack of agreement regarding who is, in fact, a victim of human trafficking.¹⁸ The conundrum arises from an inability to isolate the jurisprudential, conceptual, and practical distinctions between victims of human trafficking (those forced to perform certain acts) and smuggled migrants (those who consent to being transported across international borders as means to engage in certain acts). Granted, the conceptual distinction between the human trafficking victim and the smuggled migrant appears well established in juridical constructions, as the divergent objectives of each crime determine the culpability

pimps are victims of trafficking.”). Some commentators have argued that the “largest number of trafficking victims in the United States are U.S. citizen children, and . . . the number of these victims [is] . . . between 100,000 and 300,000.” *See id.*

10. David E. Guinn, *Ambiguous Knowledge: Seeking Clarity in the Effort to Define and Assess Trafficking and the Sexual Exploitation of Children 2-3*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997677 (prepared for and presented at the International Seminar on the Prevention and Sanction of Trafficking in Persons in Mexico, June 21-22, 2007).

11. Bravo, *supra* note 7, at 209.

12. UNITED NATIONS DEV. FUND FOR WOMEN, *VIOLENCE AGAINST WOMEN: FACTS AND FIGURES 5* (2007), available at http://www.unifem.org/attachments/gender_issues/violence_against_women/facts_figures_violence_against_women_2007.pdf.

13. Jones, *Invisible Man*, *supra* note 2, at 1156.

14. Chacón, *supra* note 5, at 2982 (referring to “bonded labor, forced child labor, sexual servitude, and involuntary servitude”) (citation omitted).

15. *Id.* (citation omitted).

16. *Id.*; see also Jones, *Invisible Man*, *supra* note 2, at 1148.

17. SISKIN & WYLER, *supra* note 9, at 22 n.54 (stating “[t]he number of U.S. citizen trafficking victims in the United States is unknown”).

18. See Makisaka, *supra* note 4, at 4.

and blameworthiness associated with offenders.¹⁹ Despite different objectives, though, the empirical line of demarcation between the crimes is not readily identifiable because the difference turns on consent.²⁰

Contemporary literature has not investigated whether theories of consent situate moral culpability and blame well enough to adequately inform the distinction between human trafficking and migrant smuggling. Instinctively, one might reason that the effectiveness and legality of consent that distinguishes human trafficking victims from smuggled migrants rests on the presence or absence of obstructive agents, such as coercion, in their transactions. Indeed, human trafficking legislation, to some degree, reflects this position,²¹ the underlying rationale being that a person becomes a victim once force, fraud, or coercion vitiates the individual's consent or interrupts his or her autonomy.²² Absent the presence of such interference with the individual's autonomy, the person is deemed a consenting participant and thus is branded a criminal.²³ This Article critiques that view.

By isolating the normative point at which the shift from consenting participant to human trafficking victim occurs, this Article challenges existing approaches to identifying human trafficking victims. It demonstrates that consent may, in some cases, expire before the onset of fraud, force, or coercion, particularly in the face of unpalatable alternatives. Nevertheless, this Article will illustrate that consent may be viable despite the absence of palatable alternatives. In so doing, this Article questions whether individuals can be neatly bifurcated into two distinct categories—migrant smuggling and human trafficking—and instead points to at least five classifications that arguably fit under the ambit of migrant smuggling, human trafficking, or both, depending on one's theory of consent. Finally, this Article examines existing autonomies between migrant smuggling and human trafficking and questions whether the role of consent in each case is truly antithetical.

In short, this Article attempts to take a first step in fashioning a decision-making paradigm for resolving the consent question. This paradigm incorporates the moral imperative to respect human dignity and permit individuals to determine their own direction, without compromising the undeniable empiricism of commercial exploitation and victimization. Part I distinguishes between human trafficking and migrant smuggling and evaluates the jurisprudential basis for five classifications of individuals within the human trafficking–smuggled migrant spectrum. In so doing, it highlights how the desire to migrate acts as a catalyst and sociological contributor to drive demand for human trafficking and migrant smuggling, and ultimately encourages individuals to consent to high-risk

19. *See id.* at 3 (discussing differences between migrant smuggling and human trafficking).

20. *Id.* For purposes of this Article, the term *consent* relates to adults of sound mind and excludes children and the mentally impaired.

21. *See* Traffic Victims Protection Act, 22 U.S.C. § 7102(8) (2006) (defining “severe forms of trafficking” to include “force, fraud, or coercion”).

22. *See infra* Part I.A.

23. *See* Chacón, *supra* note 5, at 3021-22.

exchanges. Giving particular attention to historical accounts, Part I also evaluates the manner in which voluntariness and coercive agents inform ideas about victimization and criminality and ultimately influence anti-trafficking law enforcement efforts. Part II explores the conceptual basis for deciding the voluntary nature and dispositive treatment of consent in the victim identification process and introduces the two dominant, but competing, jurisprudential approaches to defining and respecting consent. This Article concludes by positing that although the two dominant approaches to defining and respecting consent both center largely on ideas about human dignity and moral culpability, only one approach operates as a legitimate safeguard for respecting each when evaluating consent.

I. DISTINGUISHING BETWEEN MIGRANT SMUGGLING AND HUMAN TRAFFICKING FOR PURPOSES OF IDENTIFYING VICTIMS

As alluded to, misunderstandings regarding the distinction between human trafficking and migrant smuggling, or other immigration-related offenses, tend to impede law enforcement processes.²⁴ In some circumstances, law enforcement officials misidentify smuggled migrants as trafficked victims, and in other instances misidentify trafficked victims as smuggled migrants.²⁵ The distinction between the two crimes is frequently misunderstood or completely ignored.²⁶ Although similar conditions give rise to both crimes, logic suggests that careful recognition of the significant differences between human trafficking and migrant smuggling could often make the difference between freedom and continued

24. See Mike Dottridge, *Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Levels*, in AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 103, 110 (United Nations Office on Drugs & Crime ed., 2008), available at http://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf (discussing and criticizing legislative and other anti-trafficking efforts). For example, five years ago Washington became the first state to make human trafficking a crime, but the law has yet to result in a single conviction. Ruth Teichroeb, *State's Human Trafficking Law Fails to Snag a Conviction*, SEATTLE POST-INTELLIGENCER, July 21, 2008, <http://www.seattlepi.com/local/article/State-s-human-trafficking-law-fails-to-snag-a-1279944.php> (noting that “[t]he biggest impediment seems to be that police and prosecutors don’t recognize trafficking victims when they encounter them. . .”).

25. Law enforcement officials equate human trafficking with prostitution—“sex work involving women from other countries.” GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 1, 15 (2007) [hereinafter COLLATERAL DAMAGE], available at http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf (reporting and analyzing the results of studies done in eight countries worldwide on the impact of anti-trafficking legislation on human rights). Police pick up “victims” who have not been trafficked and are just migrant sex workers who want to go back to earning money and do not need protection from their employers. *Id.* at 15.

26. Chacón, *supra* note 5, at 2985-86.

enslavement for trafficked victims.²⁷ But, as demonstrated later in this Article, the distinction between migrant smuggling and human trafficking is typically conditioned upon one's ability to consent in the relational transaction. As discussed later, identifying the role of consent in the victim identification process, though effective in most instances, potentially causes grave harm or leaves a wide multitude of harms suffered by certain categories of victims completely unabated.²⁸

A. Standard Human Trafficking

In contrast to smuggled migrants, human trafficking victims do not willingly violate the law.²⁹ The trafficked victim has no reasonable alternative to obeying the commands of the human trafficker. Unlike smuggled migrants, who are generally treated as business allies by their smugglers,³⁰ trafficking victims are subjected to threats, forced isolation, and other forms of coercion, fraud, deception, or abuse in order to guarantee obedience.³¹ The human trafficker's foremost purpose is to profit from continued exploitation of the trafficked person.³² Therefore, the trafficking enterprise invests vigorously in the continued exploitation and manipulation of the victim so as to maximize its economic gain.³³

In many cases of human trafficking, the trafficker induces the victim through deception and fraud, rather than coercion or force. For instance, Gladys Vasquez Valenzuela, Mirna Jeanneth Vasquez Valenzuela, Gabriel Mendez, Maria de los Angeles Vicente, and Maribel Rodriguez Vasquez (the "Vasquez ring") were convicted of various counts of human trafficking.³⁴ The Vasquez ring lured

27. See HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 4 (2006) [hereinafter FACT SHEET], available at <http://www.state.gov/documents/organization/90541.pdf> (listing differences between human smuggling and human trafficking); Kevin Shawn Hsu, Note, *Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude*, 14 GEO. J. ON POVERTY L. & POL'Y 489, 507 (2007) (exploring the difference between human smuggling and human trafficking).

28. See *infra* Part II.A–D.

29. Hsu, *supra* note 27, at 507.

30. FACT SHEET, *supra* note 27, at 2.

31. See *id.* at 4; Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 371 (2006). The force requirement does not apply in the case of a minor involved in commercial sex acts. FACT SHEET, *supra* note 27, at 4.

32. FACT SHEET, *supra* note 27, at 2.

33. See Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT'L L.J. 131, 133 (2008).

34. Jones, *Invisible Man*, *supra* note 2, at 1178-79 (citing Press Release, U.S. Dep't of Justice, Five Defendants Convicted of International Sex Trafficking for Forcing Central American

Central American women across the U.S.-Mexico border with promises of legitimate employment within the United States.³⁵ After the women reached their desired destination, the Vasquez ring forced the women into prostitution and maintained control over them through torture and beatings, including threats of rape and murder of their family members.³⁶ The Vasquez ring was ultimately convicted of conspiracy, sex trafficking, and importation of aliens for purposes of prostitution and sentenced to at least thirty years imprisonment.³⁷

In other cases, deception may not have a role in luring the victim; rather, coercion and force may be employed to secure the victim's cooperation. One example involves Varsha Sabhnani, who was charged with forced labor and involuntary servitude after one of the two Indonesian women whom Sabhnani and her husband had kept as slaves for years escaped and sought help.³⁸ The couple, owners of a multimillion-dollar perfume business, kept two women in their home and forced them into domestic servitude.³⁹ When Sabhnani found the work unsatisfactory, she would beat the women with broomsticks, slash them with knives, and force them to eat vomit.⁴⁰

Some human trafficking cases involve mentally impaired or handicapped individuals. To illustrate, Waquita Wallace "tortur[ed] a mentally disabled teenager and rent[ed] her out for sex."⁴¹ Wallace took the eighteen-year-old hostage and forced her to "pay off her cousin's \$3,300 debt to Wallace" through prostitution.⁴² Wallace not only forced the teenage girl into prostitution, she "also beat, burned, tortured, and humiliated" the mentally disabled teenager.⁴³ Wallace pled guilty to one count of sex trafficking.⁴⁴

Very young adults and children may become human trafficking victims as

Girls and Women into Prostitution (Feb. 12, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crt-117.html>; see also Press Release, U.S. Dep't of Justice, Five Sentenced for Forcing Guatemalan Girls and Women to Work as Prostitutes in Los Angeles (Aug. 18, 2009), available at <http://www.fbi.gov/losangeles/press-release/2009/la081809.htm>.

35. Jones, *Invisible Man*, supra note 2, at 1179.

36. *Id.*

37. *Id.*; see also *id.* at 1178 (discussing Olga Mondragon, who was sentenced to seven years of imprisonment and, along with her seven co-defendants, ordered to forfeit over \$1 million to the 120 injured women whom she forced into indentured servitude).

38. *Slaves of Long Island*, N.Y. TIMES, May 20, 2007, <http://www.nytimes.com/2007/05/20/opinion/nyregionopinions/LI-Slaves.html>.

39. *Id.*

40. Dan Herbeck, *Retired Agent Says Slavery Cases Bothered Him More than Others*, BUFFALONEWS.COM (Nov. 30, 2009), <http://www.buffalonews.com/city/article23758.ece>.

41. Jeremy Kohler, *Woman Admits to Sex Trafficking Waquita "Goddess" Wallace Rented Disabled Teen Out for Sex, Faces 15 Years to Life in Prison*, ST. LOUIS POST-DISPATCH, Apr. 14, 2009, at A3.

42. *Id.*

43. *Id.*

44. *Id.*

well.⁴⁵ To cite but a few examples, Shanaya Hicks was found guilty for her participation in a prostitution ring.⁴⁶ She admitted forcing two juveniles and two adults into prostitution through fraud and coercion.⁴⁷ Hicks recruited the females and subsequently held them against their will and subjected them to repeated rapes and beatings.⁴⁸

Likewise, Jessica King admitted to recruiting, enticing, and employing juveniles to become prostitutes, from August 2007 to October 2007.⁴⁹ King took photographs of the juveniles in lingerie and would post them on the classified advertising website Craigslist to “solicit dates.”⁵⁰ The advertising arrangement allowed the responder to purchase sex with underage females.⁵¹ On January 20, 2009, Jessica King and two other defendants pled guilty to one count of conspiracy to engage in sex trafficking of children and one count of coercion and enticement of a juvenile into prostitution.⁵²

In other instances children are lured by fraud. For example, in 1999, Maude Paulin took a fourteen-year-old Haitian girl into her home after Paulin’s mother smuggled the girl into the United States under the false pretense that she was a niece of the family.⁵³ For six years, Paulin forced the young girl to work in domestic servitude, cleaning, cooking, and washing clothes.⁵⁴ She worked up to fifteen hours a day and at night was forced to bathe out of a bucket and sleep on the floor.⁵⁵ Paulin, age fifty-two and a former middle school teacher, repeatedly beat the young girl with shoes and brooms.⁵⁶ It was reported that on several occasions Paulin’s husband had to step in to stop the beatings.⁵⁷

Similarly, Sandra Bearden, “a homemaker and native of Mexico, was found

45. See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 8-9* (2011), available at <http://www.state.gov/documents/organization/164452.pdf> (describing gravity of child victims of labor trafficking).

46. Edmund H. Mahony, *10 Accused of Running Sex Ring; 56-Count U.S. Indictment Alleges Men Held Woman Captive*, HARTFORD COURANT, Mar. 24, 2006, at B1, available at http://articles.courant.com/2006-03-24/news/063240119_1_prostitution-ring-accused-ring-leaders.

47. Press Release, U.S. Attorney’s Office Dist. of Conn., *Woman Sentenced to 46 Months in Prison for Role in Prostitution Ring that Victimized Women and Minors* (Apr. 1, 2008), available at <http://www.justice.gov/usao/ct/Press2008/20080401-1.html>.

48. *Id.*

49. Press Release, U.S. Attorney’s Office, S. Dist. of Cal., *Three Plead Guilty to Sex Trafficking of Children* (Jan. 20, 2009), available at <http://www.justice.gov/usao/cas/press/cas90120-Arnold.pdf>.

50. *Id.*

51. *Id.*

52. *Id.*

53. Ani Martinez, *Slave Case Penalty: 7 Years in Prison*, MIAMI HERALD, May 21, 2008, at B1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

guilty o[f] . . . injury to a child and aggravated kidnapping.”⁵⁸ Bearden agreed to home-school a twelve-year-old girl after the girl was sent from her family in Mexico to Bearden “to clean and provide childcare in exchange for schooling.”⁵⁹ Once the girl arrived, Bearden forced her into domestic servitude and kept her shackled in the backyard after she had completed her work for the day.⁶⁰ Bearden starved the child and would spray pepper spray in the child’s eyes when she fell asleep.⁶¹ Upon rescue, the young girl was “so weak [that] she had to be carried on a stretcher.”⁶²

Not surprisingly, victims of human trafficking may be a visitor or legal resident that entered into a written contract to lawfully work in the United States or another country.⁶³ Some victims might even be citizens of the very country in which they are relegated to slavery or indentured servitude.⁶⁴ Other victims might include individuals whose legal right to be in a country may have expired that are eager for employment and to avoid returning to their home country. For example, Jasmin Rivera, age thirty-one, and her brother Antonio Rivera, age thirty-four, owned and operated two bars in Long Island, New York.⁶⁵ From September 2007 until August 2009, the two lured women, some as young as seventeen, into the bars to work as wait staff and hostesses.⁶⁶ “After the [young] women began working in the bars, the [Riveras] forced them to engage in sex[ual] acts with bar patrons in exchange for money. . . .”⁶⁷ If the women refused, they were beaten and sexually assaulted by the Riveras.⁶⁸ Obedience and cooperation from the women were also maintained through threats to reveal them to U.S. immigration authorities.⁶⁹ The Riveras now face charges of sex trafficking, conspiracy, forced labor, and alien harboring.⁷⁰

In some cases, human traffickers conduct business with the tacit approval of

58. Stephanie Armour, *Part I: Some Foreign Household Workers Enslaved*, USA TODAY, Nov. 21, 2001, <http://www.usatoday.com/money/general/2001/11/19/cover.htm>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 41* (10th ed. 2010), available at <http://www.state.gov/documents/organization/142979.pdf>.

64. FACT SHEET, *supra* note 27, at 3.

65. Press Release, U.S. Immigration and Customs Enforcement, ICE Breaks Up Sex Trafficking Ring in Long Island: Owners and Managers of Two Bars Accused of Sex Trafficking and Alien Harboring (Aug. 10, 2009), available at <http://www.ice.gov/news/releases/0908/090810newyork.htm>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Press Release, U.S. Dep’t of Justice, Three Arrested in Long Island Sex Trafficking and Alien Harboring Case: Owners and Manager of Lake Ronkonkoma and Farmingville Bars Charged (Aug. 10, 2009), available at <http://www.justice.gov/usao/nye/pr/2009/2009aug10.html>.

corporations, companies, and professionals. For instance, Rozina Mohd Ali, a lawful U.S. resident from Malaysia, hired a woman through an Indonesian employment agency to work as a housekeeper.⁷¹ Two weeks later, Ali brought the woman to the United States on a temporary visa.⁷² After arriving in the United States, Ali confiscated the woman's passport and identification.⁷³ Ali forced the thirty-two-year-old victim to work long hours in domestic servitude for Ali and her relatives for five years, and would beat and threaten the woman.⁷⁴ Ali was sentenced to one year in prison and ordered to pay more than \$72,000 in restitution to the victim.⁷⁵

Perhaps one of the most publicized episodes of corporate involvement occurred in the case of *United States v. Kil Soo Lee*.⁷⁶ *Kil Soo Lee* is recognized by observers as the most significant human trafficking case to date because of the sheer number of victims rescued and the subsequent publicity generated thereby.⁷⁷ The case involved foreign defendants who operated a garment factory in American Samoa and were forcing individuals to work in the factory.⁷⁸ These individuals were held under guard and threatened with confiscation of their passports and false arrest.⁷⁹ After a jury trial, Kil Soo Lee, the owner of the factory, was convicted on almost all counts.⁸⁰

What is undeniably revealed by these examples—a conclusion for which there is nearly unanimous consensus—is that human trafficking is a heinous crime that can result in severe injury or death to its victims. The daily life of victims is characterized by anxiety, fear, torture, poverty, and social isolation.⁸¹ The victims are trafficked for commercial sexual exploitation; forced to perform “labor on farms[,] in restaurants, nursing homes, private homes, construction sites, and factories;” or forced into the drug trade or gang activity.⁸² In short,

71. Cindy George, *Sugar Land Woman Gets Prison, Fine for Forced Slavery*, HOUSTON CHRON., Apr. 4, 2008, <http://www.chron.com/news/houston-texas/article/sugar-land-woman-gets-prison-fine-for-forced-1598670.php>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. 159 F. Supp. 2d 1241 (D. Haw. 2001), *aff'd*, 472 F.3d 638 (9th Cir. 2006); *see also* Chacón, *supra* note 5, at 3034.

77. Chacón, *supra* note 5, at 3034.

78. *United States v. Kil Soo Lee*, 472 F.3d 638, 639-40 (9th Cir. 2006).

79. *See* Adam C. Clanton, *How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa*, 29 U. HAW. L. REV. 325, 365-66 (2007).

80. Chacón, *supra* note 5, at 3034; *see also Kil Soo Lee*, 472 F.3d at 639 (“Kil Soo Lee . . . was convicted of extortion, money laundering, conspiring to violate the civil rights of others, and holding workers to a condition of involuntary servitude.”).

81. Jones, *Invisible Man*, *supra* note 2, at 1148.

82. *Id.* at 1148-49; *see also* Franklyn M. Casale, President, St. Thomas University, Miami, Fla., *International Trafficking in Persons: Suggested Responses to a Scourge of Humankind*, Statement Presented to the United States House of Representatives Committee on Foreign Affairs

human trafficking is nothing short of “modern-day slavery.”⁸³

B. Standard Migrant Smuggling

The next category of migrants includes those whose relationship with the human smuggler ends once the migrant crosses the border and pays the smuggling fee.⁸⁴ Migrant smuggling “is always transnational in nature, since it requires crossing a national border and . . . involves an ‘illegal entry’ of a person into a country of which such a person does not have legal status.”⁸⁵ The migrant smuggling transaction does not *require* violations of the migrant’s consent, autonomy, or consumerist identity (though it may end up including such violations). The migrant’s illegal entry and subsequent freedom is the outcome desired by both parties involved in the migrant smuggling transaction. Unlike the individuals in Category A (standard human trafficking victims), Category B individuals—smuggled migrants—willingly violate immigration laws.⁸⁶ In short, the migrant smuggling transaction is a voluntary criminal transaction between the smuggler and the smuggled migrant.⁸⁷ The two parties generally cooperate with one another.⁸⁸ Their transaction is intended to be a mutually beneficial arrangement whereby one party benefits financially or materially, and the other party benefits via his or her illegal entry into a foreign state.⁸⁹ The smuggled migrant’s relationship with the smuggler traditionally ends once the border is crossed and the smuggling fee is paid.⁹⁰ This outcome, however, is not the same for every smuggled migrant.

C. Fraudulently Induced Smuggled Migrant and Human Trafficking Victims

Category C consists of smuggled migrants who become victims of human trafficking after initially agreeing to be transported across an international

(Oct. 18, 2007), in 3 INTERCULTURAL HUM. RTS. L. REV. 343, 344 (2008).

83. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 162 (2007).

84. See Nagle, *supra* note 33, at 133; see also FACT SHEET, *supra* note 27, at 2.

85. Mattar, *supra* note 31, at 370 (citation omitted). “Illegal entry . . . means ‘crossing borders without complying with the necessary requirements for legal entry’” into the destination country. *Id.* (quoting Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/55/383, at Art. 3(b) (Nov. 15, 2000)).

86. See FACT SHEET, *supra* note 27, at 4 (listing as one difference between human trafficking and smuggling, as “[p]ersons smuggled are complicit in the smuggling crime”).

87. *Id.* at 2 (“[S]muggling is generally with the consent of the person(s) being smuggled . . .”).

88. *Id.* at 4.

89. See Sarah King, *Human Trafficking: Addressing the International Criminal Industry in the Backyard*, 15 U. MIAMI INT’L & COMP. L. REV. 369, 371 (2008) (comparing definitions of human trafficking and smuggling).

90. See FACT SHEET, *supra* note 27, at 2; Nagle, *supra* note 33, at 133.

border.⁹¹ After crossing the border, the smuggled migrants are divested of their means to control their own destiny. The human trafficker robs these individuals of their freedom and treats them as profit-generating instruments rather than human beings.⁹² Rather than being set free after crossing the border, this category of migrants is coerced into performing sex or labor.⁹³ To cite but a few examples, in the aftermath of Hurricane Katrina, Signal International recruited more than one hundred Indian metal laborers to work in shipyards off the Gulf Coast.⁹⁴ The men allegedly paid \$20,000 to enter the United States after being promised “green cards.”⁹⁵ The men claimed they received only ten-month temporary worker visas,⁹⁶ and lived “like pigs in a cage in [the] company-run work camp,” which housed twenty-four laborers to a room.⁹⁷ Signal International deducted \$1050 from each man’s paycheck for these atrocious accommodations.⁹⁸ Contrary to their expectations, the victims’ documents were allegedly stolen and their wages were withheld as a means to isolate and trap them.⁹⁹

Their captors forced the men to live in isolation, helplessly awaiting a rescue that would never occur because the plight of the men was consciously ignored by the Immigration and Customs Enforcement Agency (ICE).¹⁰⁰ According to sworn testimony, rather than assist the enslaved men, ICE officials advised Signal International on how to deal with the enslaved men, whom Signal’s chief operating officer described as “chronic whiners.”¹⁰¹ One ICE official purportedly advised, “[t]ake them all out of the line on the way to work; get their personal belongings; get them in a van, and get their tickets, and get them to the airport, and send them back to India.”¹⁰² Several laborers managed to escape and protest

91. See Lisa Trigg, *Human Rights Day: FBI Agent Offers Ways to Stop Human Trafficking*, TRIB. STAR, Apr. 20, 2010, <http://tribstar.com/news/x993507071/Human-Rights-Day-FBI-agent-offers-ways-to-stop-human-trafficking> (describing situations where migrant workers pay to be smuggled into the United States, and are then forced to work to pay off the debt).

92. See Nagle, *supra* note 33, at 133.

93. FACT SHEET, *supra* note 27, at 1.

94. Editorial, *They Pushed Back*, N.Y. TIMES, June 29, 2010, at A30 [hereinafter *They Pushed Back*].

95. *Id.*

96. Pamela Constable, *Indian Workers Decry Recruitment Tactics*, WASH. POST, June 12, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/11/AR2008061103445.html>.

97. Steve Phillips, *Indian Workers Accuse Signal International of “Human Trafficking,”* WLOX13, Mar. 6, 2008, <http://www.wlox.com/Global/story.asp?S=7977223> (internal quotation omitted).

98. *Id.*

99. See *They Pushed Back*, *supra* note 94 (reporting that the workers were “told they would be fired and deported if they tried to leave or made trouble.”).

100. See Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12, available at http://www.nytimes.com/2010/02/02/us/02immig.html?_r=1.

101. *Id.*

102. *Id.*

the abuse.¹⁰³ Afterward, hundreds of Indian workers walked off the job and filed civil rights claims against Signal International, claiming that they were victims of human trafficking.¹⁰⁴ Signal International denied the allegations.¹⁰⁵

Similarly, in July 2006, Mabelle de la Rosa Dann transported a woman into the United States from Peru and forced her into domestic servitude.¹⁰⁶ Dann, a Peruvian native herself, confiscated the victim's passport and identification, making the victim think that she would be falsely accused of theft if she tried to flee.¹⁰⁷ Dann forced the smuggled woman to cook, clean, and provide childcare for twenty-one months without pay and repeatedly subjected her to humiliating and degrading treatment.¹⁰⁸ Through the help of local residents, the victim eventually escaped.¹⁰⁹ Dann was subsequently sentenced to five years in prison and ordered to pay more than \$100,000 in restitution.¹¹⁰

Along these lines, in 2003, federal officials detained 250 undocumented immigrants working in Wal-Mart stores throughout the United States who alleged that after agreeing to work for cleaning contractors used by Wal-Mart, they were subjected to severely substandard employment conditions.¹¹¹ Many of the undocumented employees complained that Wal-Mart underpaid them,¹¹² and, in some cases, locked the workers inside its stores overnight.¹¹³ Prosecutors never filed human trafficking charges against Wal-Mart or its subcontractors. Instead, Wal-Mart was charged by plaintiffs with violations of human smuggling laws and RICO enterprise claims after agreeing to pay the U.S. government \$11 million.¹¹⁴

Similarly, Global Horizons was investigated for human trafficking in the

103. See Phillips, *supra* note 97.

104. See *id.*

105. *Id.* Signal International issued a news release stating that the allegations were “baseless and unfounded,” and maintained that their facilities and labor practices had already been inspected and approved by the Department of Labor and the federal Immigrations and Customs division. *Id.* As of July 2008, the workers were staying in New Orleans, hoping that the Department of Justice would launch an investigation. *Id.*

106. Press Release, U.S. Dep't of State, California Woman Sentenced to Five Years Imprisonment for Forced Labor of Domestic Servant (Apr. 15, 2010), available at <http://www.state.gov/m/ds/rls/140326.htm>.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Immigration Workers*, N.Y. TIMES, Mar. 19, 2005, <http://query.nytimes.com/gst/fullpage.html?res=990CEED8113CF93AA25750C0A9639C8B63>; see also *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 300-01 (D. N.J. 2005).

112. *Zavala*, 393 F. Supp. 2d at 301.

113. *Id.* at 334.

114. See *id.* at 300 n.2, 315-16 (holding that the plaintiffs did not allege sufficient facts to support the RICO claim against Wal-Mart); Greenhouse, *supra* note 111.

summer of 2007.¹¹⁵ Pennsylvania's Creekside Mushrooms hired Global Horizons to recruit laborers from Thailand to pick mushrooms.¹¹⁶ Creekside Mushrooms paid Global Horizons, but Global Horizons did not pay the laborers.¹¹⁷ The laborers complained that they did not get paid despite having spent \$20,000 each to come to the United States in reliance on a promise of three-year employment.¹¹⁸ The men had to go fishing on some nights just to eat.¹¹⁹ Global Horizons denied all allegations of human trafficking.¹²⁰

Category C individuals share a commonality with Category A individuals: There is a coercive symmetry between Category A and Category C individuals after they cross the border, because each is divested of their freedom and autonomy and subject to coercive agents.¹²¹ Therefore, Category C individuals are morally and legally entitled to protection just as Category A individuals would be, on the ground that their initial consent to cooperate was vitiated by subsequent coercion.¹²²

Although it is relatively simple to classify Category C individuals whose consent is vitiated by coercion, other categories of individuals within the migrant smuggling–human trafficking spectrum are not as ascertainable or easily identified, because coercion is not readily obvious or present in many cases. As a result, conceptual vagueness arises, particularly in circumstances in which individuals, despite knowing the inhumane conditions under which they will labor, consent to remain in the custody of a criminal enterprise or coercive agent.

115. *Company in Pennsylvania, USA Accused of Trafficking*, HUMANTRAFFICKING.ORG (Aug. 5, 2007), <http://www.humantrafficking.org/updates/669>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* In 2010, Western Union agreed to pay the state of Arizona \$94 million as settlement of anticipated human smuggling charges. Randal C. Archibold, *Western Union to Pay in Border-Crime Deal*, N.Y. TIMES, Feb. 12, 2010, at A22, available at <http://www.nytimes.com/2010/02/12/us/12arizona.html>. The settlement was apportioned as follows: \$50 million to support law enforcement agencies working on combating human smuggling in Arizona, \$21 million to the state of Arizona, \$19 million to improve Western Union's own efforts, and \$4 million to a private monitor. *Id.* Evidence against Western Union began to emerge after law enforcement agents discovered the body of a Mexican immigrant inside a raided bungalow in Los Angeles, California, and linked the death to wire transfers to Western Unions in Caborca, Mexico. Josh Meyer, *Blood Money Flows by Wire to Mexico*, L.A. TIMES, June 8, 2009, <http://articles.latimes.com/2009/jun/08/nation/na-western-union8>. Earning the notorious name of "blood wires," money in a Western Union transmitter system was paid to traffickers between 1999 and 2007. *Id.* Despite the loss of a life due to the smuggling operations, Western Union was never charged. Rather, Western Union paid millions to avoid criminal prosecution. *See* Archibold, *supra*.

121. *See* Hsu, *supra* note 27, at 507 (concluding that in some instances the difference between human trafficking and human smuggling is largely immaterial).

122. *See id.*

D. The Consenting Debtor

Category D individuals constitute an often-overlooked, but very significant part of the human trafficking–migrant smuggling spectrum. These individuals willingly agree to perform sex or labor as payment for having been transported across an international border. As one astute FBI special agent attested, there are cases in which “migrant workers are actually ‘slaves’ who have paid their way to be illegally smuggled into the [United States] and now are working off their debt by earning wages for the human trafficker.”¹²³ With the exception of Category E individuals, this category of individuals has the greatest potential to generate confusion, particularly among law enforcement officials, because Category D individuals are smuggled migrants who consent to engage in high-risk criminal transactions. Although they are conceptually quite distinct from Category C individuals, who are subject to coercive agents and influences after crossing the border, Category D and Category C individuals nearly mirror one another because the somatic distinction between one who is enslaved by a coercive agent and one who freely consents to be a slave is not readily discernible. Consequently, persons who are forcibly enslaved on a marijuana farm to pay off their smuggling debts, after willingly entering the United States illegally, are easily perceived as criminals who freely consented to engage in such work rather than as victims of coercive agents. This outcome is often facilitated by attitudes among some law enforcement agents that a person who deliberately participates in a criminal exchange such as migrant smuggling can never qualify as a victim.¹²⁴ The challenge of classifying Category D individuals is rivaled only by the challenges posed when attempting to identify and treat individuals in Category E, which remains an open question for the reasons discussed in the next subsection.

E. The Consenting Participant

Similar to Category D, this group consists of individuals who may not have crossed a border illegally, but nonetheless are in such dire need of money, shelter, or food that they willingly consent to perform sex or slave labor. Consider the case of the “pig iron” laborers.¹²⁵ Pig iron is the main component of any steel-containing product manufactured in the United States.¹²⁶ Deep inside the Brazilian Amazon, labor inspectors discovered Alexandre Pereira dos Reis

123. See Trigg, *supra* note 91.

124. See William Lacy Swing, Editorial, GLOBAL EYE ON HUMAN TRAFFICKING, July 2009, at 2, available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/projects/showcase_pdf/global_eye_sixth_issue.pdf (“In the eyes of . . . the law [victims] may even be suspect as too often they will be living and working . . . in close proximity to criminal elements.”).

125. Michael Smith & David Voreacos, “*This Is Slavery*”: *It’s in Many Products We Use Every Day: Dishwashers, Refrigerators, Cars. Steel. And in the Steel? In Some Startling Cases, Forced Labor*, SEATTLE TIMES, Jan. 21, 2007, at F1.

126. See Michael Smith & David Voreacos, *The Secret World of Modern Slavery*, BLOOMBERG (Nov. 17, 2006), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aul9sXScm.QE>.

(“Reis”), a laborer dressed in soiled rags, worn-out plastic sandals, and plagued by a wheezing cough, who had been working at a charcoal labor camp near the city of Tucuruí, where he shoveled charcoal from a kiln.¹²⁷ He labored six days a week and lived “in a shack with no ventilation, running water, or electricity.”¹²⁸ He told the labor inspectors of the widespread malaria, episodes of chronic cough, and scorching ninety-five-degree temperatures that were prevalent at the camp.¹²⁹ Slave-labor camps like Transcameta, where Reis worked, “are scattered along the Amazon in Brazil, in a rain forest that covers an area [ten] times the size of France.”¹³⁰ The Brazilian labor ministry reports that individuals like Reis “are people who have absolutely no economic value except as cheap labor under the most inhumane conditions imaginable.”¹³¹ What might surprise some is that Reis, “[l]ike hundreds of thousands of workers in Latin America, [does not] collect[. . .] wages.”¹³² More shocking is that camp managers admit that the working conditions are “degrading.”¹³³

Despite the fact that the men do not earn any wages, and despite the presence of armed guards and treacherous working conditions,¹³⁴ the camp’s managers denied that the men laboring at the camps were slaves—because the men work at the camp voluntarily.¹³⁵ Because of their lack of money and shelter, and their location in the deep jungle, laborers like Reis choose to remain at the labor camp.¹³⁶ Reis confirmed the voluntary nature of his presence at the camp, claiming, “I would leave if I could, but I need the work.”¹³⁷ Individuals like Reis, who profess consent to working as slaves, serve as a catalyst for inconsistent jurisprudential treatment relative to the dispositive nature of consent when ascertaining a person’s status as a victim or criminal.

On the one hand, some might contend that Reis’s consent to working at the labor camp, coupled with the lack of fraud, force, or coercion in obtaining his consent, precludes Reis and, by extension, other individuals in Categories D and E from being classified as victims of human trafficking. On the other hand, some might assert that Reis, and other individuals in similar circumstances, are indeed victims of human trafficking, given their lack of palatable alternatives to working at the labor camp because of their dire need for money, food, and shelter. Under this view, if Reis, or others in like circumstances, were to engage in prostitution or drug trafficking, they would be branded as victims rather than criminals. This latter claim, at least conceptually, argues that individuals like Reis should be

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (noting that some pig iron workers are forced to work at gunpoint).

135. *Id.*

136. *Id.*

137. *Id.*

afforded the same status as individuals in Category A. Indeed, legitimate debate regarding treatment of individuals in Categories D and E is justifiable given that Category D and E individuals do not fit traditional conceptions of human trafficking victims or smuggled migrants. Nonetheless, proper classification of Category D and E individuals is of critical importance and largely dependent upon intuitive understandings about consent and moral culpability, which may preclude or enable a legitimate finding of coherency among Categories A, D, and E.

II. THE CONSENT QUESTION

A. Consent Informs Moral Culpability

The consent and voluntary nature of the conduct of individuals in Categories D, E, and perhaps C, shape their moral culpability and consequently encourage the apportionment of blame despite the harm suffered by the individual. The basis for the placement of blame is the undeniable connection between the individuals' risk-producing consent or deliberate actions and the harmful sequence that follows—namely, their becoming victims of human trafficking or indentured servants.¹³⁸ The trafficking or exploitation of autonomous individuals is not something thrust upon them by a coercive agent, but is instead a consequence of their deliberate conduct, which creates, to some degree, moral symmetry between the consenting agents.¹³⁹

The presence of consent in some arrangements (e.g., Categories D and E) and the absence of consent in other arrangements (e.g., Category A—the standard human trafficking victim) is significant enough to act as a basis for apportioning blame and moral culpability to Categories D and E, but not to Category A. The moral culpability that attaches to individuals in Categories D and E nullifies, or at least substantially weakens, any claim to victim status by individuals in Categories D or E. This perceived moral asymmetry between individuals in Category A, and those in Categories D and E, certainly highlights and shapes practical approaches to combating human trafficking and migrant smuggling.

On one hand, to divest individuals in Categories D and E of human trafficking victim status might strike some as intuitively incongruent with the purpose of anti-trafficking judicial constructs that purport to ban modern forms of slavery. On the other hand, some might be inclined to embrace the idea that divesting them of victim status is consistent with the American ethos and the fundamental reality that all individuals—particularly citizens of the United States—have a natural right to determine for themselves the direction of their lives without interference; individuals are not only entitled to the rewards produced by their decisions, but they are also responsible for any negative outcomes or consequences of their choices. As discussed later, each view has

138. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 223 (1989) (discussing the connection between behavior and intent or purpose).

139. See *id.*

certain limits as applied to the consent question.

B. The Competing Theories of Consent and Victimization

The extent to which an individual who consents to perform sex work or slave labor should be classified as a human trafficking victim or a willing participant has been the subject of heated debate among commentators.¹⁴⁰ Such commentators have explored the distinction between human trafficking and migrant smuggling in relation to the consent question.¹⁴¹ A 2000 United Nations report could not have been clearer regarding the role of consent in the human trafficking–migrant smuggling scheme: It stated that “[i]t is the non-consensual [sic] nature of trafficking that distinguishes it from other forms of migration.”¹⁴² The report went on to warn:

The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration. At the heart of this distinction is the issue of consent.¹⁴³

Years later, Navanethem Pillay, then United States High Commissioner for Human Rights, quite forcefully offered a slightly differing view, declaring that “when the elements of the crime of trafficking have been established, the consent of the individual is irrelevant.”¹⁴⁴ This claim, at least by implication, holds that an individual’s consent to engage in certain conduct may in fact be present, but may be ignored for purposes of satisfying the elements of the crime of human trafficking.¹⁴⁵ The quintessential question then becomes: *Should* it be?

One view, which I term the Liberal approach,¹⁴⁶ prioritizes consent by applying blame and moral culpability for the offense only under circumstances in which consent is negated by fraud, force, or coercion. Another view, which I

140. See Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 17-19 (2009) (outlining debates over consent and human trafficking law).

141. See generally *id.*

142. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, Comm’n on Human Rights, ¶ 12, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomaraswamy).

143. *Id.*

144. Navanethem Pillay, *Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Sexual Violence: Standing by the Victim*, 35 LAW & SOC. INQUIRY 847, 852 (2010).

145. See *id.*

146. The author’s use of the term, “Liberal,” relates to a widely accepted belief that, in a liberal democracy, respect for individual liberty and equality between all citizens is a fundamental prerequisite for social functionality and moral authority.

term the Gendered approach,¹⁴⁷ discounts the individual's consent, claiming instead that consent is irrelevant in circumstances in which the actor/consenter is being exploited. Each view is arguably supported by some component of anti-trafficking legislation. For instance, the Liberal view aligns squarely with the U.S. Department of Justice Model Criminal Statute ("DOJ Model"), which mandates that an individual's consent to an activity precludes that individual from being classified as a victim of human trafficking because the DOJ Model requires that "forced labor or services" be "obtained or maintained through" coercion.¹⁴⁸ Similarly, under the TVPA, an individual's consent to engage in certain conduct or work would preclude him or her from being classified as a victim of human trafficking, because criminality attaches only upon a finding of "force, fraud, or coercion."¹⁴⁹ Conversely, the Gendered approach arguably parallels the jurisprudential foundations of the UN Protocol relative to consent, which posits that the "consent of a victim of trafficking . . . to the intended exploitation . . . [is]

147. The author's use of the term, "Gendered," relates to a claim, made by some, that all citizens are not equally autonomous, and therefore, responsibility and accountability for the exercise of free choice or consent should not be ascribed evenly between citizens.

148. DEP'T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE § 2(4), at 70-71 (2007), *available at* <http://www.csg.org/knowledgecenter/docs/pubsafety/ModelStateAnti-TraffickingCriminalStatute.pdf>. Specifically the DOJ Model lists the following acts as sufficient to establish "forced labor or services":

- (A) causing or threatening to cause serious harm to any person;
- (B) physically restraining or threatening to physically restrain another person;
- (C) abusing or threatening to abuse the law or legal process;
- (D) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any actual or purported government identification document, of another person;
- (E) blackmail; or
- (F) causing or threatening to cause financial harm to [using financial control over] any person.

Id. (alteration in original).

149. The TVPA, defines "severe forms of 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.

Trafficking Victims Protection Act, 22 U.S.C. § 7102(8) (2006). It defines the term "coercion" as:

- (A) threats of serious harm to or physical restraint against any person;
- (B) 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
- (C) the abuse or threatened abuse of the legal process.

Id. § 7102(2).

irrelevant. . . .”¹⁵⁰ Though both positions are prone to significant jurisprudential challenge, the Liberal position appears most compatible with the requirement for laws to maintain and promote moral authority, jurisprudential practicability, and fairness.

C. Consent Is Relevant

The Gendered approach, which functionally trivializes the role of voluntary undertakings in human transactions or characterizes consent as irrelevant, suffers from several conceptual and empirical realities. First, it cannot reasonably be denied that individuals may in fact view certain types of sex work or slave labor as necessary or even favorable.¹⁵¹ Second, individuals sometimes make poor or morally questionable decisions even after having the benefit of good information, time to deliberate, and the availability of reasonable alternatives.¹⁵² Third, irrationality, temporal deficiencies in cognitive and emotional capacities (that fall short of mental impairment), and conscious ignorance can be inimical to the exercise of good judgment. These human realities do not, collectively or individually, nullify the individual’s consent or vitiate the voluntary nature of an individual’s conduct. Thus, the justification under the Gendered approach for interfering with or ignoring an individual’s voluntary actions in such circumstances cannot be based on the absence of, or the tainted nature of, the actor’s consent; rather, it must rest on the rationale that the actor’s voluntary behavior or consent to engage in certain acts is so objectionable that consent to perform the act is irrelevant.¹⁵³ That is, the Gendered views the actor’s conduct and perceived exploitation as so morally objectionable that the voluntary nature of the individual conduct can be ignored. Put succinctly, the role and importance of consent under the Gendered view are not determined by the free will of the individual, but rather by the consequences such consent produces.

The Gendered position thus rests on a claim that a third party should have the

150. G.A. Res. 55/25, Annex II, art. 3(b), U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter U.N. Women & Children Protocol].

151. See Chuang, *supra* note 8, at 1702 (recognizing the “possibility that ‘trafficked women’ may be migrant sex workers or migrant women attempting to meet their own needs or responding to labor demands in the West. What is called ‘trafficking’ when it involves sex is often called ‘international labor migration’ when it involves other kinds of work.”); Heidi Fleiss & Nadya Labi, *In Defense of Prostitution*, LEGAL AFFAIRS, Sept.-Oct. 2003, at 35, 35-36 (disclosing that she came from an upper middle-class family, chose prostitution because of the money, became a millionaire after only four months, and that her prostitutes were happy); Bob Sullivan, *Lawyer Turns Topless Dancer to Pay the Bills*, MSNBC, Sept. 13, 2011, http://redtape.msnbc.msn.com/_news/2011/09/12/7730301-lawyer-turns-topless-dancer-to-pay-the-bills (attorney turned stripper states that she is “glad” she had the option to work in a strip club after she got laid off from her law-practicing job).

152. HERZOG, *supra* note 138, at 237.

153. See *id.* (noting that, despite objections to paternalism, some choices are so bad, that we don’t care if they were voluntary).

right to ignore the actor's consent, or deny the actor's right to consent to engage in certain conduct, when the third party finds the actor's conduct morally objectionable. In effect, the Gendered claim permits third parties to impose their judgment and morals upon the actor (consentor) under the guise of saving or protecting the actors from themselves and oppressors, and upholding the actors' human dignity.¹⁵⁴ In this way, the Gendered claim is virtually indistinguishable from paternalism.¹⁵⁵ This feature of the Gendered claim produces several harmful effects.

First, the claim potentially disparages or patronizes actors by interfering with their ability to determine for themselves the scope and direction of their own choices, because it ignores an actor's choices and desires. Secondly, the Gendered approach's disregard of actors' consent or the voluntary nature of their undertakings and choices stands in sharp contrast to respect for the actors' human dignity. Indeed, one of the most salient paradoxes of the Gendered ideology exists in an enduring theoretical endeavor to protect human dignity alongside an equally ubiquitous failure to respect the actor's dignity.¹⁵⁶ To respect individuals' dignity means to acknowledge their right as human beings to be "free to determine their own purposes and functionality."¹⁵⁷ Respect for another's right to determine his or her own purpose is the moral foundation upon which Immanuel Kant based his famous means-end principle.¹⁵⁸

Kant believed that "[b]ecause of a person's moral personality, he or she possesses an intrinsic, unconditional, and absolute value"¹⁵⁹ to determine his or her direction, which should remain "uninfluenced by the opinion or estimation of another [or] . . . by feelings, impulses, heredity, social rank, or . . . advantages" that the actor's behavior might procure.¹⁶⁰ For Kant, respecting a person's

154. The tenets of the Gendered claim align in many respects with the protestations of various groups in the United States that have attempted to redefine "trafficking in persons" under the United Nations definition to include all forms of prostitution. SISKIN & WYLER, *supra* note 9, at 38; *see also* Chuang, *supra* note 8, at 1702 (recognizing that "[w]hat is called 'trafficking' when it involves sex is often called 'international labor migration' when it involves other kinds of work").

155. *See* HERZOG, *supra* note 138, at 237 ("[P]aternalism exists as an uneasy complement to consent theory."); *see also* GERALD DWORKIN, *PATERNALISM* (1971), *reprinted in* PHILOSOPHY OF LAW 230, 230 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (stating that paternalism involves limiting another's freedom for their own interest).

156. One cannot respect an individual's dignity without that person's choices regarding their profession and personal life. *See* R. Kent Greenawalt, *The Right to Silence and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 192, 193 (Michael J. Meyer & W.A. Parent eds., 1992).

157. Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 *DEPAUL L. REV.* 899, 930 (2010).

158. *See id.*

159. *Id.* at 931 (citing ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT'S ETHICS* 68 (1994)).

160. *Id.* (citing SULLIVAN, *supra* note 159, at 68 and IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 46-47 (Lewis White Black trans., Liberal Arts Press 1959) (1785)).

choices was synonymous with respecting the person's dignity.¹⁶¹ Hence, Kant's position, at least by implication, is that even though slave laborers like Reis may not have any property of monetary value, they have a human-dignity value by virtue of their being able to decide for themselves their own destiny, make their own choices, and exercise their autonomy. To take away, ignore, trivialize, or obstruct their choices and voluntary undertakings, Kant would argue, does more harm to these human agents than would divesting them of their property, because the value of their human dignity is worth more than their personal property.¹⁶²

One of the most ancient illustrations of respecting human dignity in circumstances where a person's exercise of free will produces objectionable results resides within the Judeo-Christian theological memorialization of the relationship between the Lord God, Adam, Eve, and the Serpent, as articulated in the *Book of Genesis*.¹⁶³ There, the Lord God created the world, all of its animals, and two human beings, Adam and Eve.¹⁶⁴ The Lord God told Adam and Eve not to eat from the Tree of Knowledge.¹⁶⁵ Being all powerful, the Lord God could have imposed His will upon Adam and Eve and prevented them from eating from the Tree of Knowledge. But the Lord God, loving Adam and Eve above all other creatures, gave them the free will to decide the direction of their own lives by either obeying the Lord God's wishes or consenting to the requests of the Serpent. When Adam and Eve chose to eat from the Tree of Knowledge, the Lord God did not absolve them of responsibility for consenting to the Serpent's request to eat from the Forbidden Tree under the presupposition that the beguiling Serpent exploited their vulnerabilities. Rather, the Lord God chose to respect their choice and held Adam and Eve accountable for their actions despite the Lord God's awareness of the unfavorable impact their actions had on their existence.¹⁶⁶

In his famous and influential work, *Summa Theologica*, St. Thomas Aquinas posits that the Lord God in the *Book of Genesis*, though not willing evil be done, decides that it is better for Him to allow human beings (Adam and Eve) to exercise free will, and permit evil in His world, rather than for Him to deny human beings free will and ban evil.¹⁶⁷ Hence, St. Thomas Aquinas, like Kant,

161. *Id.*

162. *Id.* at 931-32.

163. *Genesis* 3:1-24.

164. *See id.* at 2:7, 2:18-23.

165. *See id.* at 3:3.

166. *See id.* at 3:16-19.

167. *See* Saint Thomas Aquinas, *Summa Theologica*, Vol. I, Q. 19, Art. 9, (stating that "God . . . neither wills evil to be done, nor wills it not to be done, but wills to permit evil to be done; and this is a good."); *see id.* at Vol. I, Q. 22, Art. 2 (stating that man "has not a prefixed operating force determined to only the one effect, as in the case of natural things which are only acted upon as though directed by another towards an end, and do not act of themselves, as if they directed themselves towards an end, like rational creatures, free choice, by which they take counsel and choose . . . free is traced to God as to a cause, it necessarily follows that everything happening from the exercise of free will must be subject to divine providence."); *see id.* ("Since a rational creature

would reason that there is a fundamental and unalterable duty to respect every person's inherent right to be free to exercise his self-regarding choices that supersedes or outweighs any duty to interfere with those choices in order to avoid morally objectionable results.¹⁶⁸ Secondly, Aquinas and Kant would reason that there exists a benefit to humanity that resides in every person, as a rational agent, having an unfettered right to direct his self-regarding conduct that dwarfs any detriment that might befall him because of his exercising such a right.¹⁶⁹ In this light, each would reject the Gendered approach on grounds that it authorizes more harm upon humanity by divesting actors of their inherent human dignity and autonomy, which, in and of itself, constitutes a form of oppression and servitude.

In addition to individual harm, a societal harm results from applying the Gendered approach, given the fundamental necessity for laws to have moral authority.¹⁷⁰ Anti-trafficking statutes, as legal constructs, cannot rest upon "opaque or amoral" principles, because the potential for anti-trafficking statutes "to constrain behavior is limited or subject to override by moral demands."¹⁷¹ Therefore, anti-trafficking statutes must be aligned with social morality. Today, few obligations and actions are more recognized by society than the moral requirement arising from voluntary conduct.¹⁷²

Consent is widely accepted as an exercise of autonomy and freedom necessary to enter an agreement. When an individual freely consents to perform certain work, his or her consent is virtually impossible to ignore or discount because of the perceived moral rightness of the agreement. Indeed, it is within the sphere of agreements that the "moral universe of guilt, conscience, and duty

has, through its free choice, control over actions . . . it is subject to divine providence in a special manner, so that something is imputed to it as a fault, or as a merit; and there is given it accordingly something by way of punishment or reward.").

168. See *supra* note 167 and accompanying text.

169. See Aquinas, *supra* note 167, at Vol. I, Q.22, Art. 2; see also *supra* notes 159-62 and accompanying text.

170. See Samuel Vincent Jones, *Darfur, The Authority of Law and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 97, 111 (2007) (discussing arguments that "the law is limited by morality and . . . the obligation to obey it may be overridden in extreme cases") (citing H.L.A. HART, *THE CONCEPT OF LAW* 225 (1961); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897)); see also Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT'L L. 249, 294 (2006) (stating that although "there is a duty of obedience or an obligation to comply with IHL, the moral preeminence of the socio-contractarian influences on conduct may cause the civilian[s] to deem themselves excused from their obligation[s] to obey the law or refrain from hostilities").

171. See Samuel V. Jones, *The Moral Plausibility of Contract: Using the Covenant of Good Faith to Prevent Resident Physician Fatigue-Related Medical Errors*, 48 U. LOUISVILLE L. REV. 265, 293 (2009) [hereinafter Jones, *The Moral Plausibility of Contract*] (discussing the need for moral authority behind contractual relationships).

172. *Id.*

. . . [takes] its inception.”¹⁷³ Our belief that consent begets moral obligation emanates from the idea that when parties form agreements with one another, each believes that he or she is made better off by the transaction.¹⁷⁴ The assumption that each individual knows what is best for his or her life metamorphoses into a belief that what the individual is agreeing to is right for him or her.¹⁷⁵ As a result, individuals’ right to form and execute agreements without interference, so that they can achieve better outcomes based on their own individual specific knowledge and interest, supersedes any judgment of others who might disagree with the outcome or consequences of an actor’s voluntary conduct.¹⁷⁶

The Gendered position presumes to ignore the societal value in respecting agreements by exercising authority over an individual’s choices regarding matters that are often fundamentally personal and inherently immune to sovereign governance or scrutiny. This approach is inconsistent with well-established jurisprudential principles regarding social interference and individual liberty. As John Stuart Mill reasoned in his famous work *On Liberty*, when one overrules or denies another’s choice of direction and exercise of autonomy on self-regarding matters, the intrusion can only be “grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied” given that no one is more acquainted with the individual’s personal circumstances than he or she.¹⁷⁷ Mill justifies his position by highlighting the interest and knowledge disparities between the actor and the person interfering:

[The actor] is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong. . . .¹⁷⁸

Mill’s reasoning, coupled with the perceived moral rightness inherent in consensual agreements, the inclination to respect human dignity, and societal

173. *Id.* at 292-93 (first alteration in original) (quoting Friedrich Nietzsche, *On the Genealogy of Morals* (1887), reprinted in CLASSICAL READINGS IN CULTURE AND CIVILIZATION 95, 99 (John Rundell & Stephen Mennell eds., 1998)).

174. *Id.* at 291.

175. *Id.*

176. *See id.*

177. *See* Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 291 (2011) (quoting JOHN STUART MILL, ON LIBERTY (1859), reprinted in PHILOSOPHY OF LAW 219, 221-22 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991)).

178. JOHN STUART MILL, ON LIBERTY (1859), reprinted in PHILOSOPHY OF LAW 219, 221 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

respect for personal autonomy, catapults consent or “free choice into the realm of moral rightness.”¹⁷⁹ An actor’s right to choose for himself is a humanistic and societal good that is independent of the wisdom of his choices. Because the Gendered approach fails to recognize the individual and the societal cost of interfering with or ignoring an individual’s consent, Mill would assert that it is ill positioned, as any benefits that might be gained are wholly outweighed by the harm it produces collectively and individually within society.

D. Consent and Reasonable Alternatives

As discussed, respecting consent or recognizing the preeminence of consent is well justified. Nevertheless, reliance on consent in the victim identification process cannot be defended without careful examination of the merit of the purported consent on which it relies. To do so, one must consider the circumstances under which the purported consent is tendered. Don Herzog posits, rather persuasively, that in order for consent to be effective, there must be some reasonable alternative to withholding it.¹⁸⁰ He reasons that if giving consent is the only means to survive or avoid starvation, as may be the case for Category D and E individuals, the purported consent is ineffective, because there is no reasonable alternative to withholding it.¹⁸¹ To support his claim, Herzog poses the following scenario: If “a merchant [is] at sea, and a vicious storm blows up; [and] the only way [the merchant] can survive is to throw . . . goods overboard” and he does so, the merchant does not act voluntarily.¹⁸² Herzog claims that the harmful nature of the storm and the merchant’s need to survive vitiate the voluntary nature of the merchant’s actions, because there is no reasonable alternative to the merchant’s throwing the goods overboard.¹⁸³ Herzog’s claim presents at least one crucial challenge to the merit of the Liberal claim as it relates to consent.

Indeed, interpretations or approaches to victim identification that view consent as effective so long as it is not tainted by the presence of obstructive agents, such as fraud, force, and coercion, are limited given that such obstructive agents need not be present to nullify or vitiate consent. As Herzog’s merchant hypothetical illustrates, one can be faced with circumstances that vitiate consent even in the absence of obstructive interferences such as coercion.¹⁸⁴ The emphasis on fraud, force, and coercion, as illustrated in anti-trafficking juridical frameworks, arises from the basic premise that an obstructive agent like coercion is merely one clear means to highlight the lack of reasonable alternatives available to the actor, which Herzog argues must be present in order for consent to be effective.¹⁸⁵ Hence, the merit or validity of an individual’s consent is

179. Jones, *The Moral Plausibility of Contract*, *supra* note 171, at 291.

180. HERZOG, *supra* note 138, at 225.

181. *Id.* at 226-27.

182. *Id.* at 227.

183. *Id.*

184. *Id.*

185. *Id.* at 225 (“[T]o say one has consented requires that there have been some way of

inextricably connected to the factual context under which the consent is purportedly given. Herzog's contention, however, does not nullify the merits of Liberal reliance on the preeminence and effectiveness of consent even in cases where there is a clear lack of reasonable alternatives to withholding it.

Herzog's claim regarding the availability of reasonable alternatives as a prerequisite for consent appears strained by his neglect of certain empirical realities. First, very few people can live without subordinating or subjecting themselves to others to some degree. In that sense, virtually everyone is in a position of vulnerability, and therefore is subject to making choices, even of an unpalatable nature, that are forced upon them because of their status within the social hierarchy. The underlying premise for this view is advanced and defended by Robert Nozick in his influential piece *Anarchy, State, and Utopia*.¹⁸⁶ Nozick argues, contrary to Herzog, that an individual's compulsion to choose between working or starving does not render the apparent consent to work involuntary.¹⁸⁷ He asserts that the actor's consent is voluntary so long as the actor's choice between two "unpalatable alternatives" was not the result of improper actions or intentions of the person to whom the consent is given.¹⁸⁸ Hence, so long as the person to whom consent is given is not the cause of the impending starvation, or lack of reasonable alternatives, then the consent is voluntary.¹⁸⁹

Turning to the Reis example, Nozick's claim, when taken to its logical limit, would be that so long as the slave labor camp is not responsible for the lack of palatable alternatives Reis finds himself faced with, Reis's choice to work at the labor camp is just as voluntary as the labor camp's choice to permit him to work.¹⁹⁰ Herzog would likely contend that because Reis had no reasonable alternative to working at the slave labor camp, given that his alternative would be to starve and live without shelter, Reis's consent is involuntary. Although neither Herzog's nor Nozick's treatment of the consent question sufficiently considers

withholding consent. . . . [T]o say some action [is] voluntary requires that there were alternatives.").

186. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

187. *Id.* at 263-64 ("A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.").

188. *Id.*

189. For example, Nozick states:

Similar considerations apply to market exchanges between workers and owners of capital. *Z* is faced with working or starving; the choices and actions of all other persons do not add up to providing *Z* with some other option. (He may have various options about what job to take.) Does *Z* choose to work voluntarily? (Does someone on a desert island who must work to survive?) *Z* does choose voluntarily if the other individuals *A* through *Y* each acted voluntarily and within their rights.

Id. at 263.

190. See *id.* Our right to engage in certain transactions is attached to another's right to engage, or not, in the same transaction. *Id.* at 264 ("Rights to engage in relationships or transactions have hooks on them, which must attach to the corresponding hook of another's right that comes out to meet theirs.").

the connection between an individual's choices and the resulting condition that gave rise to the risk-producing alternatives, Nozick's treatment offers the more effective approach because it holds both the consentor and consentee accountable as autonomous beings for their choices. While conversely, Herzog's approach seemingly ignores accountability and autonomy.

To illustrate, let's draw from Herzog's illustration regarding the merchant.¹⁹¹ Herzog asserts that the throwing of the goods into the water is involuntary because of the merchant's need to survive.¹⁹² Herzog claims that if the goods were being shipped for someone else, that person would not be justified in blaming the merchant for discarding the goods, because the merchant had no real choice but to throw the goods overboard.¹⁹³ Herzog's contention, however, fails to consider the conduct of the merchant that shaped or facilitated the conditions under which the merchant found himself. To ascribe merit to Herzog's claim, one must rely on there being no connection between the merchant's actions and the perilous situation in which he found himself, which may not be the case in all situations.

Let's assume that the merchant was told before sailing off that there was a very high probability that a storm might cross his path. Let's also assume that the merchant was informed that the goods should not be shipped in the vessel he chose, given the high probability of the storm and the small size of the vessel. Additionally, let's say that the merchant fully understood the risks, but knew that his compensation for sailing with the goods would be much greater than it would be on another day, using a larger vessel. Finally, let's assume that the merchant, fully aware of the facts, deliberately sets sail with the goods in order to maximize his financial position, with knowledge of the conditions he will likely encounter. If the storm hits, the merchant knows he will throw the goods overboard because that was the planned action in the event his decision to sail did not yield a favorable result. The act of jettisoning the goods in this scenario is not the result of an immediate sudden crisis thrust upon him, but rather a predetermined result of a sequence of choices that the merchant knew or suspected he would make in the event the decision to sail did not yield the intended favorable results. Whether the merchant's voluntary undertaking is born out of ill-conceived ambition or careful deliberation, the merchant's decision to sail would be entitled to respect and any goods lost because of his decision would rightfully subject the merchant to blame. The merchant's decision to accept the risk and sail may indeed constitute a very poor and morally objectionable decision. But any error the merchant has committed against advice and warning would be far outweighed by what John Stuart Mill described as the "evil" of allowing others to restrict the merchant's freedom based on their notions of what the merchant should do under the guise of protecting him from himself or from being exploited.¹⁹⁴

191. *See supra* notes 180-85 and accompanying text.

192. HERZOG, *supra* note 138, at 227.

193. *Id.*

194. *See* MILL, *supra* note 178, at 222 ("[I]n each person's own concerns, his individual spontaneity is entitled to free exercise. . . . All errors which he is likely to commit against advice

Hence, when Category D and E individuals agree to perform certain acts, those acts may not be born out of immediacy, but may emanate from deliberate actions and informed choices of the actor. An individual's deliberate choices and exercise of consent determine or set conditions under which the individual acts, pursues future choices, or submits to conditions under which there is a lack of possible choices. Thus, a proper evaluation of consent considers the availability of reasonable alternatives in conjunction with an examination of the actor's exercise of autonomy and choices that produced the condition of limited palatable or reasonable alternatives. Put differently, evaluation of the effectiveness of an individual's consent must incorporate some investigation into the availability of the individual's reasonable alternatives to withholding the consent and the circumstances that led the actor to a condition of vulnerability and lack of palatable alternatives.

To offer a simplistic illustration of this claim, assume that one finds oneself in the middle of a jungle without food or water after a plane crash, and the only means to acquire necessities is to consent to work for a slave labor camp or brothel in Las Vegas. Most would reasonably agree that the consent is vitiated by the stark lack of reasonable alternatives to withholding consent. But if the same consent is given as a means to procure wine and caviar rather than food and water, which is plentiful, or if the consent to work in the brothel or slave labor camp is necessitated by the actor having willingly gambled and drunk away a small fortune the night before, the claim of victimization on the basis of forced consent is substantially weakened by the deliberate actions of the actor that created the unfortunate circumstances.

Under this view, one might find that laborers such as Reis, and other Category D and E individuals, may not have consented to the exchange sufficiently to bar them from being classified as victims. However, the fact that they find themselves vulnerable and faced with unpalatable choices does not, in and of itself, entitle them to victim classification or nullify their consent. The question remains complex. What appears more certain is that if consent is a question that cannot be decided without consideration of the reasonable alternatives and the conditions that led to the circumstances giving rise to the lack of alternatives, then distinguishing between migrant smuggling and human trafficking criminals and victims is not possible in many circumstances.

CONCLUSION

Issues surrounding social influence and the limits of consent within the context of the migrant smuggling and human trafficking phenomenon are complex. By isolating the jurisprudential, conceptual, and practical distinctions between victims of human trafficking and willing participants in migrant smuggling schemes, one can readily ascertain that the capacity to distinguish between the two is largely informed by societal notions about human dignity and

and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.”).

moral culpability and how each situates consent.

In carefully weighing the two dominant approaches, this Article proposes a jurisprudential paradigm that recognizes consent as a necessary prerequisite to respecting human dignity and advancing the law's authority. The Gendered approach to resolving questions of consent and victim identification not only fails to account for the moral rightness of consent, but also discounts the connection between human dignity and the exercise of personal autonomy. The Liberal approach, as discussed, safeguards the preeminence of consent and respect for human dignity and voluntary undertakings. To be effective, though, a careful evaluation of the availability of reasonable alternatives and sequence of choices that gave rise to the lack of palatable alternatives is necessary. Regardless of whether one is jurisprudentially inclined to agree with the Gendered or Liberal approach, what appears undeniable is that each view is supported by an anti-trafficking construct. Hence, confusion regarding victim identification is likely to continue—and probably increase—so long as the contours of consent remain ill-defined within the spectrum of human trafficking and migrant smuggling jurisprudential framework.