

The Coercion of Trafficked Workers

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ABSTRACT: Theories of coercion exist across multiple disciplines to explicate the ability of one actor, the coercer, to diminish the free will of another, the coercee, in the absence of overt physical force. A valid claim of coercion places legal blame on the coercer or relinquishes the coercee from legal responsibility for a coerced act or omission. Defining the point at which coercion occurs, however, is the conceptually more difficult task. Recently, coercion has emerged as a significant source of analytic concern in a developing area of the law—contemporary involuntary labor or human trafficking. It is in this setting where coercion is explicitly codified as a fundamental legal element in human-trafficking crimes. However, the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion. Legal scholars, moreover, have not yet engaged in a focused exploration of this issue to bring efficacy and substantive meaning to coercion within the human-trafficking framework. This Article examines the empirical and normative scope of coercion in the laws addressing contemporary involuntary labor. Incorporating perspectives from modern philosophy, this Article critiques older standards of coercion within Thirteenth Amendment doctrine and advances a new theory of coercion sensitive to the intricate power dynamics that characterize many human-trafficking cases. Called “situational coercion,” this new paradigm recognizes that instead of experiencing coercion through direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation, such as a lack of legal immigration status and poverty. By more accurately capturing the sociological realities of human trafficking, which victimize workers in subtle ways, the situational coercion framework

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advances the Thirteenth Amendment's aim to ensure free labor and protect a broad category of coerced workers.

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I. INTRODUCTION

Even in the absence of direct physical restraint, many immigrant workers remain in exploitive work situations, tolerating subminimum wages, unconscionably long workdays, and substandard living conditions. Why do they stay? In one case, farm-labor contractors recruited undocumented men and boys from Mexico to work in the agricultural fields of upstate New York.¹ The workers lived in “isolated, overcrowded and unsanitary conditions” and labored around the clock for little pay.² To ensure the workers’ compliance, the employer–contractors threatened that the workers would be deported or “hunted down” and returned to the farm-labor camps if they tried to escape.³ In another case, a domestic worker from the Philippines “felt compelled to remain” in a Wisconsin home under the control of an abusive employer who refused to send money to the worker’s family if she did not submit to the employer’s demands.⁴ In a final case, a New Orleans property-management company threatened to evict its undocumented employees who resided in employer-provided housing when the workers complained about receiving less than the promised wages.⁵ In all cases, federal courts held that these employers *coerced* the workers to labor involuntarily, thereby establishing violations of forced labor⁶ and human trafficking⁷ under the Thirteenth Amendment.⁸ This begs the question, What is coercion?

Theories of coercion exist across multiple disciplines to explicate the ability of one actor, the coercer, to diminish the free will of another, the coercee, in the absence of overt physical force. Sociologists speak of power-dependence relationships that exert coercive pressure upon the dependent actor to succumb to the wishes of a more powerful actor.⁹ Psychologists refer

1. United States v. Garcia, No. 02-CR-110S-01, 2003 WL 22938040, at *1 (W.D.N.Y. Dec. 2, 2003).

2. *Id.*

3. *Id.*

4. United States v. Calimlim, 538 F.3d 706, 711 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 935 (2009).

5. Garcia v. Audubon Cmty. Mgmt., LLC, No. 08-1291, 2008 WL 1774584, at *1, *3 (E.D. La. Apr. 15, 2008).

6. 18 U.S.C. § 1589 (Supp. II 2008).

7. 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, 20, 22, 27, 28, 42 U.S.C.) (describing the purpose of the Act as “combat[ing] trafficking in persons, especially into the sex trade, slavery, and involuntary servitude”).

8. U.S. CONST. amend. XIII, §§ 1–2 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.”).

9. See generally Linda D. Molm, *Risk and Power Use: Constraints on the Use of Coercion in Exchange*, 62 AM. SOC. REV. 113 (1997).

to “mind control” as coercively persuading individuals to succumb to the bidding of another.¹⁰ Philosophers and legal theorists recognize that in contrast to direct physical force that can literally cause another to involuntarily act or not act, coercion often involves the manipulation of a coercee’s alternatives to achieve his or her compliance.¹¹

To illustrate an example of the latter category, the use of physical force, locked gates and barbed-wire fences of a garment-factory sweatshop outside of Los Angeles involuntarily confined undocumented workers who desired to leave the premises.¹² Yet, one can imagine nonphysical forces that might effectively confine the same workers, such as an employer’s threat to have the workers deported if they left the work situation. Confronted with this threat, the workers may choose to stay in the sweatshop because the alternative, deportation, is less viable. By imposing upon the workers a constrained choice set of “two evils,” the employer’s threat undermines the workers’ autonomy and pressures them into choosing the lesser evil. Thus, similar to physical force, coercion is antithetical to full freedom.¹³ Consequently, what counts as coercion depends largely on how it is ontologically defined. Philosophers have engaged in this definitional inquiry, seeking to identify and explain the necessary and sufficient conditions for coercion.¹⁴ Legal scholars have also pursued this exploration, recognizing that evidence of coercion has important normative consequences.¹⁵ For example, proof of coercion exculpates individuals from

10. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

11. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); ALAN WERTHEIMER, *COERCION* (1987). This Article focuses on philosophical and legal frameworks for coercion to develop a normative understanding of coercion in the context of human trafficking laws. Although sociological and psychological theories of coercion also present important theoretical inquiries, they are beyond the scope of this Article.

12. Julie Su, *El Monte Thai Garment Workers: Slave Sweatshops*, in *NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS* 143, 143 (Andrew Ross ed., 1997).

13. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 11 (1960) (“We are concerned in this book with that condition of men in which coercion of some by others is reduced as much as is possible in society. This state we shall describe throughout as a state of liberty or freedom.”); Samuel DuBois Cook, *Coercion and Social Change*, in *NOMOS XIV: COERCION* 107, 126 (J. Roland Pennock & John W. Chapman eds., 1972) (“In a sense, freedom and coercion are antithetical relations or realities: freedom entails the absence of coercion, and coercion involves the absence of freedom.”).

14. NOZICK, *supra* note 11; WERTHEIMER, *supra* note 11; David Zimmerman, *Taking Liberties: The Perils of “Moralizing” Freedom and Coercion in Social Theory and Practice*, 28 *SOC. THEORY & PRAC.* 577 (2002).

15. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 *TEX. L. REV.* 717 (2005) (examining coercion in several different legal contexts, such as contractual duress, unconscionability, plea bargains, unconstitutional conditions, and bankruptcy, and discussing the inadequateness of ex post remedies to the coerced party when the coercion is credible); John Gardner, *Prohibiting Immoralities*, 28 *CARDOZO L. REV.* 2613 (2007) (analyzing the relationship between coercion and morality within the context of the state as a moral agent); John Lawrence Hill, *Moralized Theories of Coercion: A Critical Analysis*, 74 *DENV. U. L. REV.* 907

the legal responsibility of their actions. Criminal mens rea is negated where the actor committed the crime in question under the coercive pressure of a third-party threat.¹⁶ Contractual obligations are invalidated where duress or improper threat caused the making of the agreement.¹⁷ In torts, the affirmative defense of assumption of risk is unsuccessfully asserted if a defendant's coercive conduct left a plaintiff with no reasonable alternative but to accept a danger.¹⁸ The law may also punish a coercer for his or her coercive actions. The crime of blackmail, for instance, finds a coercer guilty for threatening to expose embarrassing information about another individual to induce that individual to confer some benefit on the coercer.¹⁹

A valid claim of coercion places legal blame on the coercer or relinquishes legal responsibility from the coercee for a coerced act or omission. Defining the point at which coercion occurs, however, is the more conceptually complex task. What type of conduct is coercive? And, when does the allegedly coercive conduct reduce the volition of an agent to the degree of having legal significance? In other words, what constitutes a legally sufficient claim of coercion? Legal scholars have proposed numerous approaches to this question, concentrating their analysis on the role of coercion within particular areas of the law. Some have explored the effectiveness of coercion in negating the voluntariness of confessions and consent to searches in criminal law.²⁰ Others have challenged the government's endorsement of religion in certain contexts as a coercive violation of the Establishment Clause.²¹

(1997) (comparing traditional theories of duress with moralized theories of coercion in which the voluntariness of a coerced choice is immaterial to the determination of whether the coercive conduct was wrongful); Peter Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541 (discussing the core elements and theoretical underpinnings of coercion).

16. See MODEL PENAL CODE § 2.09 (1962); see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 803 (1978) (arguing that the actor should not be held accountable because, "[w]ere it not for the external pressure, the actor would not have performed the deed").

17. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

18. See RESTATEMENT (SECOND) OF TORTS § 892B (1979).

19. Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1639 (1993).

20. Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2207 (1996); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941 (1997); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37, 38 (2004); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2001); Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 217.

21. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463; Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417 (2009); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621 (2006); Eric Fleetham, Note, *Lee v. Weisman: Psychological Coercion Offends the Traditional Notion of Coercion Under the Establishment Clause*, 24 U. TOL. L. REV. 725 (1993).

More recently, coercion has emerged as a significant source of analytic concern in a developing area of the law: contemporary involuntary labor or human trafficking. It is in this setting where coercion is explicitly codified as a fundamental legal element in human-trafficking crimes. However, the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion. Legal scholars, moreover, have not yet engaged in a focused exploration of this issue to bring efficacy and substantive meaning to coercion within the human-trafficking framework.

This Article sets forth a theory of coercion in the context of human trafficking, expanding upon the current theoretical discourse on coercion and providing much needed guidance on the implementation and adjudication of human-trafficking laws. Enacted pursuant to the Thirteenth Amendment's Section 2 enforcement power, the Trafficking Victims Protection Act of 2000 ("TVPA")²² criminalizes the use of coercion to compel labor. The TVPA's prohibition against "forced labor," in particular, is designed to provide prosecutors and courts with the tools to identify and convict traffickers by capturing forms of involuntary servitude that occur without visible signs of physical restraint.²³ The TVPA further aims to protect and advance the rights of human-trafficking victims by providing them with immigration status²⁴ and a private right of action²⁵ for human-trafficking violations that involve "force, fraud, or *coercion*."²⁶ Thus, a legal determination that a victim was compelled to work by means of coercion, at the same time, criminalizes the coercer, confers immigration benefits to the coerced, and provides the coerced with a civil claim against the coercer.

In according legal value to coercion, the TVPA represents a significant departure from previous Thirteenth Amendment doctrine, which limited cases of involuntary servitude to those evidencing actual or threatened physical or legal restraint.²⁷ The expansion of the Thirteenth Amendment to include nonphysical and nonlegal coercion captures the sociological complexity of modern-day servitude, which is inextricably linked to the forces of global labor migration. It is estimated that ninety percent of labor-

22. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

23. See 18 U.S.C. §§ 1589-1591 (Supp. II 2008). See generally U.S. DEP'T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005 (2006), available at http://www.justice.gov/crt/crim/trafficking_report_2006.pdf (discussing various methods employed to prevent forced labor).

24. 8 U.S.C. § 1101(a)(15)(T)-(U).

25. 18 U.S.C. § 1595.

26. 22 U.S.C. § 7102(8) (emphasis added).

27. See *United States v. Kozminski*, 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000.

trafficking cases in the United States involve immigrant workers.²⁸ Poverty, political instability, or discrimination pushes migrant workers out of their home countries, while a demand for cheap labor in destination countries draws them.²⁹ A lack of legal migration options coupled with tight border controls and rigid immigration enforcement facilitates their exploitation rather than prevents it.³⁰ Thus, trafficking victims frequently begin as voluntary economic migrants, whose need and desire for a better life motivates their acceptance of risky employment. This initial consent is later vitiated by their employer's coercive actions. Yet, identifying the location of this shift from initial voluntariness to subsequent coercion is difficult, particularly when coercion is entirely nonphysical.

This Article examines the empirical and normative scope of coercion in the laws addressing contemporary involuntary labor. In doing so, this Article incorporates perspectives from modern philosophy to critique older standards of coercion within Thirteenth Amendment doctrine and to advance a new theory of coercion sensitive to the intricate power dynamics that characterize many human-trafficking cases. This exploration is not just a theoretical exercise. The aim of this conceptual analysis is ultimately practical—to delineate a normative structure from the empirical legal analysis and to determine if it is the appropriate one given sociological realities. Social and economic life is inundated with hard choices between undesirable alternatives. Philosophical inquiry assists in identifying coercion within these difficult choice sets—an important endeavor given that “true instances of coercion undermine freedom . . . and should have no legal standing.”³¹ In the realm of human-trafficking law, a valid charge of coercion arguably has an even greater normative impact. In addition to its prosecutorial purpose, the TVPA provides a previously unrecognized class of undocumented workers with eligibility for legal status and civil relief,

28. Robert Moossy, Roger Plant, Maria Suarez & William C. Vocke Jr., *Forced To Labor: The Cost of Coercion*, CARNEGIE COUNCIL (May 14, 2009), <http://www.cceia.org/resources/transcripts/0163.html>.

29. Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31, 36–38 (2002) (discussing the impact of globalization on the displacement of people that leads to trafficking); Kelly E. Hyland, Note, *The Impact of the Protocol To Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, HUM. RTS. BRIEF, Winter 2001, at 30, 30–31 (citing causative socioeconomic factors behind the vulnerability to being trafficked).

30. Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits To Protect the Victims of Trafficking and To Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 257 (2004) (“A lack of viable and legal migration options leads people into trafficking; fear of deportation keeps them there.”); see also BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IOM MIGRATION RESEARCH, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN?: A MULTI-COUNTRY PILOT STUDY 8 (IOM Migration Research Ser. No. 15, 2003) (“[T]rafficking’ is a corrupted mode of migration, that transforms very specific migratory projects, such as the desire to accumulate savings or support one’s dependants by migrating to work, the dream of securing a better future . . . into nightmares.”).

31. Joan McGregor, *Philips on Coerced Agreements*, 7 LAW & PHIL. 225, 230 (1988).

increasing their civil-rights protections and providing them with membership to the greater political community. Thus, a finding of coercion confers substantive rights, augmenting the importance of defining its dimensions for the proper execution of the Thirteenth Amendment.

This Article's five parts merge the analytical and theoretical. Part II outlines the spectrum of coercion acknowledged within Thirteenth Amendment doctrine before the passage of the TVPA. This historical perspective provides the backdrop for Part III's introduction of modern philosophical coercion theory from which I draw to identify and analyze the ontological framework for the legally recognized types of coercion that predated the TVPA. This theoretical inquiry illuminates the normative limitations of the pre-TVPA coercion framework, setting the stage for the TVPA's expansion of the coercion standard.

Part IV introduces the TVPA's coercion standard. Under the TVPA, the coercion of labor may be established both indirectly and purely psychologically. Yet as enacted in 2000, the TVPA's initial iteration of coercion was amorphous, causing some law-enforcement officials and other adjudicators to relegate certain cases of coerced labor to the category of "exploitation," falling below a misappropriated standard required to establish trafficking violations. A normative analysis of these determinations reveals a misguided adherence to the restrictive ontological framework for coercion that existed prior to the TVPA's passage, thereby excluding the full range of coerced-labor cases contemplated by the TVPA.

Part V analyzes legislative changes to the TVPA in 2008 and a progression of significant court opinions that have clarified and reinforced the TVPA's broad coercion standard. Coercion under the TVPA is distinct from its predecessors not only descriptively, but also conceptually. Rather than experiencing direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation, such as lack of legal immigration status and poverty. Thus, coercion in the trafficking context presents a new paradigm, which I call "situational coercion."

Part VI returns to modern philosophical theory to define the ontology of situational coercion and defend it against possible moral and legal challenges. This part also explores the scope and application of the situational coercion framework to undocumented workers as compared to theories of exploitation and structural coercion. The situational coercion framework determines the sufficiency of coercion by evaluating all the circumstances of the case, including power inequalities between the trafficker and trafficked worker and the trafficked worker's vulnerabilities. The development of this framework has important normative implications. By more accurately capturing the sociological realities of human trafficking, which victimize workers in subtle ways, the situational coercion framework

advances the Thirteenth Amendment's aim to ensure free labor and protect a broad category of coerced workers.

II. THE THIRTEENTH AMENDMENT'S SPECTRUM OF COERCION

Over the last decade, as human trafficking has gained widespread public attention, individuals use the term human trafficking interchangeably with slavery, peonage, and involuntary servitude. Conceptually, there is tremendous overlap between these terms. All refer to forms of coerced labor in which private actors compel individuals to work for the benefit of another without the workers' fully informed consent.³² Yet, while used interchangeably, these terms have specific legal meanings, each signifying a particular sociohistorical context. Human trafficking is only the most recent manifestation of unfree labor. Courts and commentators agree that the drafters of the Thirteenth Amendment and its enforcement statutes intended to capture these evolving forms of slavery.³³ And along with each

32. See, e.g., *Clyatt v. United States*, 197 U.S. 207, 215 (1905) ("Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of servitude. . . . [P]eonage, however created, is compulsory service, involuntary servitude."); see also LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 23–28 (1998) (discussing game theory and rational choices that individuals make in difficult circumstances with few options). "To take the classic example, when a captive agrees to slavery rather than be killed, the choice of enslavement is the making of a bargain." *Id.* at 26. In the case of coercion or fraud, not only may options be few, but misinformation negates the meaningfulness of any bargain struck. See generally *FREE AND UNFREE LABOUR: THE DEBATE CONTINUES* (Tom Brass & Marcel van der Linden eds., 1997) (discussing the social, economic, and political factors that characterize free and unfree labor).

33. See, e.g., Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981 (2002) (discussing the reach of the Thirteenth Amendment to human trafficking and modern-day slavery); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *DUKE L.J.* 1609 (2001); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 *GEO. IMMIGR. L.J.* 651 (2004) (contemplating Thirteenth Amendment protection for undocumented migrant workers subjected to exploitive labor conditions); James Gray Pope, *Labor's Constitution of Freedom*, 106 *YALE L.J.* 941 (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U. PA. L. REV.* 437, 438 (1989) (finding evidence in the congressional record and the history of the Thirteenth Amendment suggesting that it stood for "a much broader idea of employee autonomy and independence"); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 *COLUM. L. REV.* 973 (2002) (applying the Thirteenth Amendment to U.S. corporations that participate in forced-labor violations overseas); see also William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 *HARV. C.R.-C.L. L. REV.* 17 (2004) (arguing that racial profiling, as a vestige of slavery, also violates the Thirteenth Amendment); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 *CALIF. L. REV.* 171 (1951); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 *B.C. L. REV.* 307 (2004) (contending that the Thirteenth Amendment protects not only freedom from slavery, but also civil rights).

newly enacted Thirteenth Amendment-related law, a new form of coercive conduct was identified and prohibited.³⁴

A. PHYSICAL COERCION

“Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”³⁵ Institutionalized by a governmental regime that permitted the absolute legal ownership of one person over another, chattel slavery once existed in the United States and the Thirteenth Amendment abolished it in 1865.

The legal ownership of slaves conferred upon slave owners the authority to implement a system of physically violent punishments for failure to comply with their demands. Historian David Brion Davis notes that “[e]ven the most kindly and humane masters knew that only the threat of violence could force gangs of field hands to work from dawn to dusk Frequent public floggings reminded every slave of the penalty for inefficient labor, disorderly conduct, or refusal to accept the authority of a superior.”³⁶ Slaves actively resisted their servitude through uprisings, work slowdowns, and other methods.³⁷ Without the power to punish, slavery could not have existed.³⁸ Moreover, the effectiveness of punishments depended on their severity. In the words of a plantation manager speaking of the necessity to physically abuse disobedient slaves: “[S]ome negroes are determined never to let a white man whip them and will resist you, when you attempt it; of course you must kill them in that case.”³⁹ Thus, chattel slavery is most prominently characterized as work compelled through the use of direct or threatened physical force, or for purposes of this Article, what I term “physical coercion.”

B. LEGAL COERCION

In addition to physical coercion, legal coercion maintained the institution of slavery. Fugitive-slave laws provided for the return and punishment of escaped slaves.⁴⁰ Slave patrols, empowered to enforce the

34. A comprehensive survey of slavery is beyond the scope of this Article. I merely touch on broad examples of physical and legal coercion.

35. Convention To Suppress the Slave Trade and Slavery art. 1, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

36. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 196 (2006).

37. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 175 (20th anniversary ed. 1999).

38. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 171 (1956) (“Without the power to punish, which the state conferred upon the master, bondage could not have existed. By comparison, all other techniques of control were of secondary importance.”).

39. ZINN, *supra* note 37, at 175 (internal quotation marks omitted).

40. U.S. CONST. art. IV, § 2, cl. 3.

slave laws, monitored the movements of slaves and brutalized escapees.⁴¹ Even after the Thirteenth Amendment eliminated this practice in 1865, Black Codes continued to regulate freed slaves. Southern states, concerned that freed African-Americans would not work without the threat of physical violence, amended Black Codes to legally restrain workers through contracts of adhesion. A worker's breach of the contract resulted in harsh penalties authorized by law: "[Negroes] must make annual contracts for their labor in writing; if they should run away from their tasks, they forfeited their wages for the year. . . . Fugitives from labor were to be arrested and carried back to their employers."⁴² Most of these statutes were repealed in 1866 when the northern states took military control over the southern states. However, additional forms of slavery emerged, also utilizing the threat of penal sanctions to force labor. For example, peonage, a form of debt bondage, subjected a worker to criminal penalties for failure to repay a debt, imposing a significant legal restraint on the worker's freedom to quit.⁴³

In 1867, empowered by Section 2 of the Thirteenth Amendment, Congress passed the Anti-Peonage Act.⁴⁴ The measure criminalized peonage, defined as the "status or condition of compulsory service, based upon the indebtedness of the peon to the master."⁴⁵ The Act voided all state laws that enforced "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise."⁴⁶ Thus, peonage could be found even where a worker, at the outset, voluntarily agreed to the work situation. The illegality of the work arrangement depended, instead, on the subsequent servitude of the worker due to the threat of criminal sanctions.

Throughout the late nineteenth and early twentieth centuries, as new manifestations of slavery persisted, the implementation of the Thirteenth Amendment's prohibition against "slavery and involuntary servitude" and the Anti-Peonage Act broadened Thirteenth Amendment jurisprudence and the existing definitions of slavery. The Supreme Court in the 1873 *Slaughter-House Cases*, which involved Mexican peonage and the Chinese coolie

41. See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001) (detailing the historical practice of monitoring slaves in certain southern states).

42. 1 ELLIS PAXSON OBERHOLTZER, *A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR* 128 (1917) (citing Mississippi law at the time).

43. Scholars have referred to peonage as the second progeny of slavery. See generally Azmy, *supra* note 33 (developing a modern conception of meaning and application of the Thirteenth Amendment); Wolff, *supra* note 33 (applying the core principles of the Thirteenth Amendment to the current trend of U.S. firms using slave labor overseas).

44. Act of Mar. 2, 1867, ch. 187, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (2006)).

45. *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

46. 14 Stat. at 546.

system,⁴⁷ recognized the reach of the Thirteenth Amendment to extend beyond cases of chattel slavery: “[Although] negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”⁴⁸ Similarly, in *Chyatt v. United States*, the Supreme Court upheld the constitutionality of the Anti-Peonage Act by emphasizing that the Thirteenth Amendment established “universal freedom” and noting that peonage also constituted slavery.⁴⁹ Finally, in *Bailey v. Alabama*, the Court invalidated Alabama’s false-pretenses statute that imposed criminal punishment on workers if they abandoned a labor contract while fulfilling a debt to an employer.⁵⁰ The Court declared the statute unconstitutional because it criminally compelled the performance of labor, even if the labor had been voluntarily assumed at the outset.⁵¹ This amounted to involuntary servitude and violated the Thirteenth Amendment:

[T]he State could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force.⁵²

Thus, the distinction between free and unfree labor progressed from physical violence or bodily confinement to a broader notion of coercion that included direct or threatened legal restraint. Along with this expansion was the understanding that a worker’s initial consent to employment was immaterial to a finding of a Thirteenth Amendment violation.

C. PSYCHOLOGICAL COERCION

The issue of psychological coercion in an involuntary-servitude case first arose in *United States v. Ingalls*, a 1947 case denying a motion for a new trial by a defendant convicted of holding her domestic worker in involuntary servitude.⁵³ In contrast to the Thirteenth Amendment cases of the past, *Ingalls* did not involve direct physical force or legal restraint. Instead, the victim, Dora Jones, had been compelled to work through a variety of nonphysical threats and verbal abuse.⁵⁴ In order to understand the impact of these threats, the court explored Jones’s subjective perception of the

47. 83 U.S. (16 Wall.) 36 (1873).

48. *Id.* at 72; *see also* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (“[T]he [Thirteenth A]mendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”).

49. 197 U.S. at 217–18.

50. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

51. *Id.* at 244–45.

52. *Id.* at 244.

53. 73 F. Supp. 76 (S.D. Cal. 1947).

54. *Id.* at 77–78.

threats, “rather than any objective harm that would come to her.”⁵⁵ The court concluded that Ingalls’s overall treatment of Jones subverted Jones’s free will, forcing her to comply with the deplorable working conditions.⁵⁶ The court further opined that Jones’s apparent opportunities to escape did not preclude a finding of involuntary servitude. Rather, the fact that Jones did not leave the highly exploitive work situation emphasized her lack of meaningful “freedom of action.”⁵⁷

In 1948, Congress passed 18 U.S.C. § 1584, a new involuntary-servitude statute authorizing criminal punishment of “[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term.”⁵⁸ Section 1584 did not specifically define involuntary servitude. It consolidated older antislavery statutes that addressed slavery-like practices beyond chattel slavery. In theory, it broadened the scope of involuntary servitude to cover all persons laboring against their will to benefit another under some type of coercion. Thus, some courts interpreted § 1584 to prohibit not only physical and legal coercion but also psychological coercion.⁵⁹

For example, the Ninth Circuit in *United States v. Mussry* decided unanimously that a violation of involuntary servitude could be founded on nonphysical and nonlegal coercion.⁶⁰ *Mussry* involved the recruitment of poor, non-English speaking and uneducated Indonesian men and women to serve as domestic workers in Mussry’s household.⁶¹ The Ninth Circuit determined that “the realities of modern economic life” could compel labor

55. Goluboff, *supra* note 33, at 1667 (discussing the *Ingalls* case).

56. *Ingalls*, 73 F. Supp. at 78.

57. *Id.*

58. Act of June 25, 1948, ch. 645, 62 Stat. 683, 773 (codified as amended at 18 U.S.C. § 1584 (Supp. II 2008)).

59. See, e.g., *United States v. Mussry*, 726 F.2d 1448, 1455 (9th Cir. 1984) (reversing the district court’s dismissal of § 1584 charges, finding that “the use, or threatened use, of law or physical force is not an essential element of a charge of ‘holding’ in involuntary servitude”), *overruled by* *United States v. Kozminski*, 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.); *United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir. 1983) (relying on the employers’ “reign of physical terror” over their farm laborers, which included beatings and positioning guards outside their doors at night, to sustain their convictions); *United States v. Booker*, 655 F.2d 562, 566–67 (4th Cir. 1981) (affirming convictions under § 1584, finding that beatings, assaults, and threats of the same were sufficient to categorize the employment as involuntary); *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977) (affirming defendants’ convictions under § 1584 and defining coercion under the statute as any situation in which an employer places his employee “in such fear of physical harm that the victim is afraid to leave, regardless of the victim’s opportunities for escape”). *But see* *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964) (reversing the defendant’s conviction under § 1584, finding that his threats of deportation were insufficient to violate the statute).

60. 726 F.2d 1448.

61. *Id.* at 1450.

by more subtle methods.⁶² Certain methods of nonphysical coercion, such as cultural and linguistic isolation, could be just as powerful, if not more powerful, than physical or legal coercion to induce a worker to perform services involuntarily.⁶³ In interpreting § 1584 broadly, the court emphasized the evolutive nature of the Thirteenth Amendment:

[Y]esterday's slave may be today's migrant worker or domestic servant. Today's involuntary servitor is not always black; he or she may just as well be Asian, Hispanic, or a member of some other minority group. Also, the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion.⁶⁴

Thus, it was necessary to consider nonphysical coercion to ensure the Thirteenth Amendment's guarantee of a system of "free and voluntary labor."⁶⁵

In *United States v. Warren*, the Eleventh Circuit broadly interpreted § 1584 in a case involving the forced labor of migrant agricultural workers.⁶⁶ While the facts of this case included acts of direct physical violence upon the workers, the court held that "[v]arious forms of coercion may constitute a holding in involuntary servitude" and only that "[t]he use, or threatened use, of physical force to create a climate of fear is the most grotesque example of such coercion."⁶⁷ The court discussed the recruitment and abuse of migrant laborers, including misrepresented opportunities of good jobs that later turn into compelled work through threats that "create a climate of fear which intimidates the workers and prevents them from leaving the camp."⁶⁸ As in *Ingalls*, the court emphasized that chances of escape did not preclude a finding of involuntary servitude since the defendants' conduct had effectively placed the workers in such fear of harm that they were afraid to leave.⁶⁹

Other courts rejected psychological coercion as sufficient for a finding of involuntary servitude. The Second Circuit in *United States v. Shackney* addressed the recruitment of a Mexican family coerced to work on a chicken farm under threats of deportation and psychological intimidation.⁷⁰ Judge Friendly, writing for the court, determined that only the direct or

62. *Id.* at 1451-52.

63. *Id.* at 1453.

64. *Id.* at 1451-52 (footnotes omitted) (citation omitted).

65. *Id.* at 1451 (quoting *Pollock v. Williams*, 322 U.S. 4, 17-18 (1944)) (internal quotation marks omitted).

66. 772 F.2d 827 (11th Cir. 1985).

67. *Id.* at 833-34.

68. *Id.* at 834.

69. *Id.* at 833.

70. 333 F.2d 475 (2d Cir. 1964).

threatened use of physical force or legal coercion⁷¹ was sufficiently “superior and overpowering” to subjugate the will of another.⁷² Other means of coercion, while perhaps entailing “consequences that are exceedingly bad,” still left the worker with a choice.⁷³

In 1988, the Supreme Court resolved the circuit-court split in *United States v. Kozminski*, a five–four opinion authored by Justice O’Connor.⁷⁴ At the core of *Kozminski* was the legal significance of psychological coercion in determining a violation of involuntary servitude. The case involved two mentally challenged farmworkers, Louis Molitoris and Robert Fulmer, who had intelligent quotients of sixty and sixty-seven respectively.⁷⁵ The two men were more or less homeless when the defendants, Ike and Margarethe Kozminski, recruited them to work on their dairy farm in Michigan.⁷⁶ In exchange for room and board, Molitoris and Fulmer accepted the job as general farm laborers.⁷⁷ The two men endured years of abusive conditions, including substandard housing in a trailer with no running water, spoiled food, and physical and verbal abuse from the Kozminski family.⁷⁸ The Kozminski family isolated the men from the public and discouraged them from speaking to visitors.⁷⁹

The government’s chief argument was that through a pattern of isolation, verbal and physical abuse, and harsh living and working conditions, the Kozminski family subjected Molitoris and Fulmer to an extreme form of psychological coercion sufficient to constitute involuntary servitude.⁸⁰ The district court convicted the Kozminski family and “broadly defin[ed] ‘involuntary servitude’ to include purely psychological coercion.”⁸¹

On appeal, the Sixth Circuit reversed, objecting to the lower court’s definition of involuntary servitude.⁸² Instead, the Sixth Circuit defined

71. Legal coercion is the threat of a criminal penalty for failure to work. See *Peonage Cases*, 123 F. 671, 682–83 (M.D. Ala. 1903) (explaining the ways in which legal threats may be used to coerce one into a condition of peonage).

72. *Shackney*, 333 F.2d at 486 (quoting *Hodges v. United States*, 203 U.S. 1, 34 (1906) (Harlan, J., dissenting)) (internal quotation marks omitted).

73. *Id.*

74. 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

75. *Id.* at 934–35.

76. *Id.* at 935.

77. *Id.*

78. *Id.*; see also *United States v. Kozminski*, 821 F.2d 1186, 1188–89 (6th Cir. 1987) (detailing the abusive conditions), *aff’d*, 487 U.S. 931.

79. *Kozminski*, 487 U.S. at 935.

80. *Id.* at 935–36.

81. *Kozminski*, 821 F.2d at 1188.

82. *Id.* at 1192.

involuntary servitude as occurring when a worker believed “he or she ha[d] no viable alternative but to perform service for the master . . . because of” the direct or threatened use of physical force, or where the defendant used fraud, deceit, or the “use or threatened use of state-imposed legal coercion” to obtain the services of “a minor, an immigrant, or one who is mentally incompetent.”⁸³

The Supreme Court affirmed the Sixth Circuit, settling widespread judicial inconsistency by providing a final definition of involuntary servitude.⁸⁴ Citing turn-of-the-century Thirteenth Amendment cases, the *Kozminski* Court found that involuntary servitude was intended to cover forms of “compulsory labor akin to African slavery,” which consisted of direct or threatened physical force.⁸⁵ Referencing a long line of early peonage cases, the Court also found that involuntary servitude included coercion “by threat of legal sanction to work off a debt to a master.”⁸⁶ Thus, the Court concluded that involuntary servitude consisted solely of direct or threatened physical force or legal coercion.⁸⁷

In reasoning its decision, the Court appealed to the rule of lenity or strict construction of vague statutes to argue that any interpretation of involuntary servitude encompassing psychological coercion would be far too amorphous to be consistent with lenity’s maxims of fair notice and legislative supremacy.⁸⁸ Psychological coercion was improperly subjective and reliant on the victim’s state of mind.⁸⁹ Such subjective determinations opened the door for an individual to erroneously assert that “his will to quit ha[d] been subdued by a threat which seriously affect[ed] his future welfare but as to which he still ha[d] a choice, however painful.”⁹⁰

Similar to the *Shackney* court, the *Kozminski* Court could not justify a finding of involuntary servitude with an availability of alternatives no matter how restricted. Physical and legal coercion exemplified the most obvious and objective means of constraining a worker’s choices because both were “superior and overpowering” enough to overcome the will of the victim. Thus, while the Court referenced the rule of lenity in support of its position, the Court also made a normative assessment on the boundaries of protection for unfree labor—psychological coercion did not amount to involuntary servitude.

83. *Id.*

84. *Kozminski*, 487 U.S. at 953.

85. *Id.* at 942.

86. *Id.* at 943.

87. *Id.* at 943–44.

88. *Id.* at 951–52.

89. *Id.* at 949.

90. *Id.* at 950 (quoting *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964)) (internal quotation marks omitted).

III. THE PREVAILING ONTOLOGY OF COERCION UNDER THE THIRTEENTH AMENDMENT

A. THE FOUNDATIONS OF MODERN COERCION THEORY

Because of its opposition to liberty, the concept of coercion has been a source of great concern for political, moral, and legal philosophers. Historically, many prominent thinkers from Thomas Aquinas to Robert Hale have focused attention on the legitimacy of state use of coercion to enforce laws through the threat of punishment.⁹¹ More recently, coercion theory has expanded to examine how it operates within relationships between private actors. Much of the current theoretical debate on coercion was launched by Robert Nozick's seminal essay *Coercion*.⁹² In this essay, Nozick sought to clarify the concept of coercion by attempting to identify its necessary and sufficient conditions. Importantly, his exploration laid out certain fundamental aspects that served to frame much of the discussion today. Most, if not all, subsequent theorists on coercion make reference to him and adopt some of the essential features of his coercion framework and scrutinize others.⁹³

Nozick's framework posits that in order for coercion to occur, there must be a coercer, *P*, and a coercee, *Q*. Second, the coercive mechanism at issue is not direct physical force, but some sort of threat. Third, the threat operates to alter the coercee's will and intention through manipulating the coercee's alternatives. Fourth, coercion is targeted toward a specific act, *A*,

91. 2 THOMAS AQUINAS, SUMMA THEOLOGICA question 96, art. 5, at 1020 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1273) ("[T]he notion of law contains two things; first, that it is a rule of human acts; secondly, that it has coercive power."); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 475 (1923); see also ARISTOTLE, *Ethica Nicomachea* (Nicomachean Ethics), in THE BASIC WORKS OF ARISTOTLE 935, 964–65 (Richard McKeon ed., 1941) (c. 384 B.C.E.) (explaining that coercion occurs when one is forced to act upon external pressures); H.L.A. HART, THE CONCEPT OF LAW 201 (2d ed. 1994) ("[C]oercive power, thus established on its basis of authority, . . . may be used to subdue and maintain, in a position of permanent inferiority, a subject group For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its victims, not its beneficiaries."); IMMANUEL KANT, THE METAPHYSICS OF MORALS 26 (Mary Gregor trans., Cambridge Univ. Press reprinted 2003) (1797) (explaining that coercion may be justified if used to prevent the violation of rights: "[r]ight and authorization to use coercion therefore mean one and the same thing").

92. Robert Nozick, *Coercion*, in PHILOSOPHY, POLITICS AND SOCIETY 101 (Peter Laslett et al. eds., 4th series 1972).

93. See *infra* text accompanying notes 114–16; see also Bar-Gill & Ben-Shahar, *supra* note 15, at 750–51 (citing Nozick and arguing for a refocus of coercion analysis on the credibility of a coercer's threat rather than on the effect of the threat on the coercee); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-incrimination*, 93 CALIF. L. REV. 465, 525 (2005) (employing Nozick's conceptual framework in the criminal-procedure context); Robert A. Holland, Comment, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CALIF. L. REV. 1595, 1673–75 (1992) (applying Nozick's coercion theory to the Establishment Clause context).

which *Q* is less willing to do because of *P*'s threat. Fifth, the coercive threat must be credible. That is, the coercer subjectively intends for the threat to manipulate the actions of the coercee and the coercee subjectively believes that the threatened consequence is a less savory alternative than not doing *A*. Finally, each condition of coercion must be fulfilled—in other words, coercion must be successful. If the coercee rejects the coercer's threats and chooses to do *A*, coercion has not occurred.

Thus, according to Nozick, the true conditions for coercion in somewhat simplified form are as follows:

- (1) *P* threatens to bring about or have brought about some consequence if *Q* does *A*;
- (2) *A* with this threatened consequence is rendered substantially less eligible as a course of conduct for *Q* than *A* was without the threatened consequence;
- (3) Part of *P*'s reason for deciding to bring about the consequence or have it brought about if *Q* does *A* is that *P* believes this consequence worsens *Q*'s alternative of doing *A*;
- (4) *Q* does not do *A*;
- (5) Part of *Q*'s reason for not doing *A* is to avoid (or lessen the likelihood of) the thing that *P* has threatened to bring about or have brought about; and
- (6) *Q* believes that, and *P* believes that *Q* believes that, *P*'s threatened consequence would leave *Q* worse off having done *A* than if *Q* didn't do *A* and *P* didn't bring about the consequence.⁹⁴

The centerpiece of Nozick's framework is the requirement of a threat to establish coercion.⁹⁵ According to Nozick, threats coerce while offers do not.⁹⁶ A threat makes a coercee worse off than what the coercee would expect in his or her normal course of expected events if the coercee fails to comply with the coercer's demands.⁹⁷ Thus, threats alter a coercee's choice

94. Nozick, *supra* note 92, at 102–06.

95. Some scholars have critiqued the necessity of a threat to establish coercion, arguing that external pressures or conditional offers can also coerce. See WILLIAM A. EDMUNDSON, THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY 97 (1998) (discussing “pressure theory” as a framework for understanding coercion); HARRY FRANKFURT, *Coercion and Moral Responsibility*, in THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 26, 45–46 (1988) (arguing that external pressures may constrain an individual's choices to render his or her action as not voluntary); Mitchell Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 63 (2002) (proposing that regardless of whether an individual's choices are constrained by natural forces or human ones, an individual may still be said to be coerced); *infra* text accompanying notes 129–37; see also David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 123 (1981) (arguing that nonthreatening offers may also coerce); *infra* text accompanying notes 283–86.

96. See Nozick, *supra* note 92, at 112.

97. *Id.*

set in an unacceptable way from the perspective of the coercee.⁹⁸ An offer brings some sort of benefit to the coercee and, therefore, does not constitute coercion: “If [the proposal] makes the consequences of Q’s action worse than they would have been in the normal and expected course of events, it is a threat; if it makes the consequences better, it is an offer.”⁹⁹ So the classic example of a robber’s statement to a victim, “Your money or your life,” illustrates a threat because, under the normal course of events, the robber’s victim would live.¹⁰⁰ The robber, therefore, coerces the victim into handing over money to avoid the threatened consequence of losing one’s life. Conversely, a salesperson who offers a vacation package for \$1000 and who withholds the vacation package if the buyer refuses to pay \$1000 makes a proposal. Under the normal course of events, the buyer keeps \$1000 and is not worse off by not receiving the vacation package.

Nozick explains that at times, the predictable normal course of events diverges from what is morally acceptable.¹⁰¹ When this occurs, morality may determine whether an individual’s proposal constitutes a threat or an offer. Nozick illustrates this with the example of a slave and master.¹⁰² The slave is beaten every day. One day, the master proposes to not beat the slave if the slave agrees to do a specific act, A. Under the normal course of events, the slave would be beaten regardless of whether or not the slave does A. Thus, the master’s beating of the slave for failure to do A would not leave the slave any worse off in the predictable state of affairs. Nonetheless, Nozick considers the master’s proposal a coercive threat based on the immorality of beating a slave¹⁰³ in addition to the subjective preference of the slave to not be beaten.¹⁰⁴

As a nonlegal theoretician, Nozick does not address the Thirteenth Amendment directly. Nonetheless, his concept of coercion is helpful for understanding the underlying normative framework for the Thirteenth Amendment’s early prohibitions of physical and legal coercion. Though the practice of physical punishments for failure to work was accepted practice in the antebellum South, it was morally wrong and, therefore, inherently coercive. Similarly, it may be said that the indentured peon also experienced coercion due to the moral wrongfulness of criminal penalties for failure to work, though at the time such criminal penalties were lawful.

98. *Id.*

99. *Id.* (footnote omitted).

100. *See id.*

101. *Id.* at 116.

102. *Id.* at 115–16.

103. *Id.* at 116 (“I suggest that we have here a situation of a threat, and that here the morally expected course of events takes precedence over the normal course of events in assessing whether we have a threat or an offer.”).

104. *Id.* (“[T]he slave himself would prefer the morally expected to the normal course of events . . .”).

Nozick's framework makes intuitive sense when the moral baseline is clear: it is wrong to beat or imprison an individual for failure to work. However, the cases of psychological coercion described above introduce many possible scenarios that are morally ambiguous. For example, in *Ingalls*, when Dora Jones complained about her working conditions, the defendant threatened that if she were to leave, she would be committed to a mental institution because of her poor intelligence.¹⁰⁵ Assuming the threat credible, commitment to a mental institution is not within Ms. Jones's normal course of events. However, whether it would leave the victim worse off in comparison to her deplorable working conditions is a normative judgment open to varying interpretations. Nozick proposes that such ambiguities be resolved by the subjective preferences of the coercee.¹⁰⁶ Similarly, the *Ingalls* court determined that Dora Jones's subjective apprehension of this threat sufficed for a Thirteenth Amendment violation.¹⁰⁷

In contrast, the *Kozminski* Court took issue with psychological coercion because of its reliance on the subjective perceptions of the victim.¹⁰⁸ Legal recognition of psychological coercion as a violation of involuntary servitude could potentially criminalize a wide range of morally acceptable day-to-day activities.¹⁰⁹ The *Kozminski* Court gave as an example parents threatening to withdraw familial affection to their adult son or daughter who refuses to work for the family business.¹¹⁰ Under Nozick's framework, this threat is coercive; the *Kozminski* Court would object and would thus view Nozick's framework as inapt for the legal standard of coercion. The child is made worse off compared to his or her preferred and expected normal course of events of retaining his or her parents' affection if he or she were to reject the parents' demands. Yet, although the child prefers to avoid the

105. *United States v. Ingalls*, 73 F. Supp. 76, 77 (S.D. Cal. 1947).

106. Nozick, *supra* note 92, at 116 (explaining that morality does not always determine whether a proposal constitutes a coercive threat or an offer). For example, a drug addict is told by his dealer that he will continue to supply the addict only if the addict attacks a certain person. *Id.* at 112. Nozick reasons that this may also constitute a coercive threat because the addict subjectively prefers to continue receiving the drugs even though this is not a morally preferable outcome. *Id.* at 116. Thus, the subjective preferences of the coercee matter. The slave prefers to not be beaten, which coincides with the moral view. The addict prefers to receive drugs, which coincides with his expected normal course of events:

It may be that when the normal and morally expected courses of events diverge, the one of these which is to be used in deciding whether a conditional announcement of an action constitutes a threat or an offer is the course of events that the recipient of the action prefers.

Id.

107. *Ingalls*, 73 F. Supp. at 79.

108. *United States v. Kozminski*, 487 U.S. 931, 960 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

109. *Id.* at 949.

110. *Id.*

withdrawal of his or her family's affection, this threatened consequence is not clearly morally objectionable. Thus, the *Kozminski* Court appeared to recognize that not all threats rise to the level of coercion. Some threatened consequences are simply ordinary outcomes of everyday interactions.¹¹¹

B. THE NO REASONABLE ALTERNATIVE FRAMEWORK

In order to prevent the occurrence of a slippery slope within the legal standard for coercion, the *Kozminski* Court adopted a narrower test, what I call the "no reasonable alternative" framework. The no reasonable alternative framework is based on the constraints of an unreasonable choice set, which coerces a worker to choose between the lesser of two evils. What constitutes the unreasonableness of the proposed alternative is a fundamentally moral judgment. In his influential book *Coercion*, philosopher Alan Wertheimer identifies a framework for coercion similar to the no reasonable alternative framework, which he calls the "moral baseline" approach.¹¹² According to Wertheimer, the moral baseline approach to coercion both prevails in the law and is preferential in terms of philosophical defensibility.¹¹³

In *Coercion*, Wertheimer incorporates Nozick's basic framework into his theory of coercion, but emphasizes the importance of a moral baseline.¹¹⁴ Wertheimer develops and defends his model by surveying legal reasoning in the areas of contracts, criminal responsibility, plea bargains, blackmail, and consent to searches and medical procedures. Drawing from a comprehensive empirical analysis of court opinions, Wertheimer finds a consistent ontology of coercion based on a moralized two-prong framework. *A*, the coercer, coerces *B*, the coercee, when both prongs are satisfied. First, the proposal prong is coercive when *A* threatens *B* by wrongfully proposing to *B* that, unless *B* complies, *B* will be in a worse position than *B* was otherwise entitled to expect to be. Second, the choice prong succeeds in coercing when *B* is morally justified in complying because there is no reasonable alternative for *B* and *B* does comply with *A*'s proposal.¹¹⁵

As Wertheimer shows the proposal prong requires that a coercer make specific threats that are wrongfully intended to make the coercee worse off if

111. *Id.* For example, an employer may threaten to fire a worker if the worker fails to work. Though the worker would be left worse off if fired and would prefer to keep the job and receive a salary while not performing his or her work responsibilities, this type of threat is not coercive—it is a normal part of legal commerce to receive payment for providing labor and to not receive payment for failure to work.

112. WERTHEIMER, *supra* note 11.

113. *Id.* at 307–08 ("My account of coercion in the law is, I think, strengthened by the argument that the legal theory is philosophically defensible.").

114. *Id.* at 8 ("On a moralized theory, unlike on an empirical theory, the truth of a coercion claim requires moral judgments at its core.").

115. *Id.* at 172.

the coercer's demand is denied. The choice prong then leaves a coercee with no reasonable alternative but to comply with the wishes of the coercer. Both prongs—the wrongfulness of the threat as well as the reasonableness of alternatives—rest on moral and normative judgments. The satisfaction of both prongs is then morally transformative. Any consent that the coercee may have given to the coercive proposal is nullified and the coercee's acts are deemed morally justified because of the coercer's blameworthy conduct.¹¹⁶

The above descriptions of pre-TVPA involuntary-servitude cases present legal tests that comport with the prevailing coercion framework as described by Wertheimer. Most courts considering violations of § 1584 seemed to agree that a finding of involuntary servitude required that the means of coercion were severe enough to render the victim with no alternative but to perform the labor. In *Kozminski*, this meant physical or legal threats only.¹¹⁷ In *Shackney*, even the legal threat of deportation would not suffice for a finding of involuntary servitude because it still left the victim with an alternative.¹¹⁸ The *Mussry* court also utilized the no reasonable alternative framework, yet in contrast to *Shackney* and *Kozminski*, permitted psychological threats as sufficient to establish coercion so long as they evidenced the employer's improper and wrongful conduct, leaving the victim with "no alternative but to perform the labor."¹¹⁹ In addition, the *Mussry* court clearly distinguished between an employer's improper conduct from general societal conditions such as "economic necessity," which could have a coercive effect, causing individuals "to accept jobs that they would prefer not to perform or to work for wages they would prefer not to work for," but could not establish involuntary servitude.¹²⁰

116. *Id.* at 184 (describing the "normative or moral force of a coercion claim" (emphasis omitted)); see also Berman, *supra* note 95, at 57 (categorizing two kinds of normative functions, one that has to do with the wrongfulness of the coercer's threat and the other that has to do with the moral responsibility of the coercee).

117. See *United States v. Alzanki*, 54 F.3d 994, 1000 (1st Cir. 1995) ("In sum, the requisite compulsion under section 1584 obtains when an individual, through an actual *or* threatened use of physical *or* legal coercion, intentionally causes the oppressed person reasonably to believe . . . that she has *no alternative* but to remain in involuntary service for a time." (first and third emphases added) (citing *United States v. Kozminski*, 487 U.S. 931, 952–53 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.))).

118. *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964).

119. *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir. 1984) ("The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person. A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has *no alternative* but to perform the labor." (emphasis added)), *overruled by Kozminski*, 487 U.S. 931.

120. *Id.*

What accounts for these jurisprudential variations in the unreasonableness of alternatives? As Wertheimer explains, the existence of coercion depends on whether a threat violates a preexisting moral baseline, a normative question. Thus, setting the baseline depends on whether the proposal not only makes the coercee worse off, but whether it also violates the coercee's rights.¹²¹ Conversely, if the proposal was within the coercer's rights to make, then the proposal arguably does not violate a moral baseline. The *Kozminski* Court determined that while psychological threats may make a coercee worse off—such as the adult child threatened with losing parental affection—psychological threats did not violate the coercee's rights and may also be within the coercer's rights to make. In other words, psychological threats may be undesired but still a legitimate part of everyday ordinary conduct. Thus, the *Kozminski* Court set the baseline at threats involving physical and legal harm, which were clearly morally objectionable and objectively identifiable. The *Shackney* court agreed that psychological threats were not severe enough to overcome a worker's freedom to choose. The *Mussry* court reasoned that some psychological threats could effectively constrain a worker's alternatives for purposes of establishing involuntary servitude. In the end, Wertheimer acknowledges that his framework, like Nozick's, may suffer from a slippery-baseline dilemma. He admits that it may be impossible to construct a univocal baseline for all scenarios since the question of coercion necessarily depends on the normative judgments of the evaluator.¹²²

In the context of laws prohibiting involuntary servitude, the normative judgment of the *Kozminski* Court majority prevailed. Physical and legal coercion are clear harms with a historical background in Thirteenth Amendment doctrine. The objective severity of threats of physical or legal harm signaled their moral reprehensibility and demanded legal intervention. Thus, the *Kozminski* Court's setting of the baseline at this high threshold makes intuitive sense. Yet, even the *Kozminski* Court struggled with applying this standard to actual instances of involuntary servitude, which are by their nature much more nuanced. The majority and minority opinions in the case illustrate normative disagreements over the standard of coercion. For example, in elaborating on the scope of physical coercion, the Court analyzed the Padrone statute of 1874.¹²³ Congress enacted this statute to dismantle a late-nineteenth-century exploitive system of contract labor, whereby padrones lured young Italian boys into leaving their homes and then forced them to work as musicians or beggars in the United States.¹²⁴ The statute criminalized the kidnapping or inveiglement of a person with

121. WERTHEIMER, *supra* note 11, at 217.

122. *Id.*

123. *Kozminski*, 487 U.S. at 947.

124. *Id.*

the intent to place that person in involuntary servitude.¹²⁵ While the term “inveigle” implied nonphysical means of compulsion, the *Kozminski* Court concluded that the actual conditions of servitude that the Padrone statute forbade included only physical or legal coercion.

Curiously, the Court’s characterization of the Padrone system evidenced little similarity to any conventional understanding of physical coercion. Instead of hitting or beating as examples of physical coercion, the Court regarded the cultural isolation and economic dependence of the victims of the Padrone system as physical coercion: “These young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency. . . . The padrones took advantage of . . . their victims, placing them in situations where they were physically unable to leave.”¹²⁶ As Justice Brennan remarked in his concurrence, the majority’s notion of physical coercion in the context of the Padrone system was tenuous at best: “[T]he coercion involved, even as the Court describes it, was obviously psychological, social, and economic in nature [L]abeling such coercion ‘physical’ is at best strained and (other than making the legislative history fit the Court’s statutory interpretation) accomplishes little”¹²⁷

The *Kozminski* Court also identified threats of deportation as a possible form of legal coercion sufficient for a finding of involuntary servitude: “[I]t is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.”¹²⁸ Thus, the Court indicated that the no reasonable alternative framework might be slightly adjusted to the factual circumstances of a case. However, in the end, by explicitly setting the normative baseline at physical or legal harm, the *Kozminski* Court left little room for flexibility within the coercion standard.

C. THE CLIMATE OF FEAR TEST

While the predominant no reasonable alternative test relies on a priori normative commitments, the *Ingalls* and *Warren* courts adopted a different test based on the subjective experience of the coerced victims—what I term the “climate of fear” test. Both the *Ingalls* and *Warren* courts agreed that fear paralyzed the workers to submit to their employers’ demands. In *Ingalls*, the court recounted details of the victim’s abuse, including degrading working

125. *Id.*

126. *Id.* at 947–48.

127. *Id.* at 958 n.5 (Brennan, J., concurring); see also *id.* at 957 n.4 (“[T]he Court today adopts an expansive but rather obscure understanding of what ‘physical’ coercion encompasses, it is difficult to tell which, if any, of the means of coercion described in the [Padrone system] the Court would deem ‘physical.’” (citation omitted)).

128. *Id.* at 948 (majority opinion).

conditions and threats to expose information regarding Ms. Jones's illegitimate pregnancy and abortion from an adulterous relationship many years before.¹²⁹ Thus, the totality of abuse inflicted by the defendant culminated into pressure so great that it overcame the will of the worker: "It appears that these threats and numerous others acted effectively upon the servant to hold her against her free will" ¹³⁰ Similarly in *Warren*, one of the victims in the case experienced verbal intimidation and indirect threats of violence through witnessing his employer beat other workers as well as hearing about the defendant's propensity for violence from other workers at the camp.¹³¹ This worker traveled into the local town unaccompanied on several occasions, yet based on what he observed at the worksite, "[h]e never asked anyone to help him get home because he did not feel like a free man and he was afraid of the Warrens."¹³² The court explained that the facts of this case demonstrated "a climate of fear which intimidate[d] the workers and prevent[ed] them from leaving the camp."¹³³

The mode of analysis employed by the *Ingalls* and *Warren* courts did not ask whether the defendants wrongfully threatened the victims with an unreasonable alternative for failure to comply with the exploitive work situation. Instead, these courts looked to the totality of the circumstances to determine the level of subjective fear or psychological pressure the victims experienced. Philosopher William Edmundson describes an analogous theoretical framework, which he calls "pressure theory," based on "the idea that coercion is a matter of psychological pressure, pure and simple."¹³⁴ "Pressure theory" presents a nonmoralized concept of coercion. It avoids the question of baselines and instead asks whether the degree of psychological pressure placed on a coercee was "very great."¹³⁵ Edmundson notes that unless the pressure threshold is set very high, this framework tends to be overinclusive, encompassing many more cases of alleged coercion than its moralized counterparts.¹³⁶ At the same time, Edmundson explains that this theory may also be underinclusive because some potentially coercive situations may place no pressure at all on a particular coercee due to his or her individual traits that may be resistant to such pressure.¹³⁷

The *Kozminski* opinion appears to be similarly concerned with the possible overinclusiveness of a subjective test of psychologically coercive pressure. Motivating the *Kozminski* Court's adoption of the narrower no

129. *United States v. Ingalls*, 73 F. Supp. 76, 77 (S.D. Cal. 1947).

130. *Id.*

131. *United States v. Warren*, 772 F.2d 827, 830-31 (11th Cir. 1985).

132. *Id.* at 831.

133. *Id.* at 834.

134. EDMUNDSON, *supra* note 95, at 97.

135. *Id.*

136. *Id.*

137. *Id.* at 98.

reasonable alternative framework was the idea that any interpretation of involuntary servitude that criminalized psychological coercion was impermissibly subjective and ambiguous. The Court contended that psychological coercion, reliant on the victim's state of mind, would "criminalize a broad range of day-to-day activity."¹³⁸ Moreover, without objective criteria derived from specific statutory guidance, broad definitions of involuntary servitude would inevitably result in arbitrary enforcement and inconsistent criminal standards.¹³⁹

D. THE NO REASONABLE ALTERNATIVE FRAMEWORK PREVAILS

In the end, the Supreme Court's decision in *Kozminski* solidified what I have termed the no reasonable alternative framework as the prevailing test and the one that subsequent courts would utilize. Courts that later applied the no reasonable alternative framework did so conservatively, limiting the scope of unreasonable alternatives to means of coercion considered *objectively identifiable and severe*. Following the precedent of *Kozminski*, this meant that the relevant baseline for finding a violation of involuntary servitude included only coercive threats of physical or legal harm.

For example, in *Kimes v. United States*,¹⁴⁰ the defendant sought to reverse her conviction for holding undocumented maids from Mexico in involuntary servitude, contending that the *Kozminski* Court's interpretation of § 1584 eliminated psychological coercion as legally sufficient for a violation of involuntary servitude. The Ninth Circuit overturned its decision in *Mussry* but upheld the conviction because all the evidence presented at trial showed physical and legal coercion employed by the defendant to hold her victims in involuntary servitude: "Kimes used locks and fences and threats of deportation to keep the victims from leaving the premises. In addition, she physically abused some of them."¹⁴¹ Furthermore, the Ninth Circuit noted that in order to convict Kimes of involuntary servitude, the trial judge instructed the jury that it had to find force or threat of force that left the victim with "*no alternative but to perform the labor*."¹⁴² This instruction comported with the *Kozminski* holding since the allegations of the defendant's criminal conduct consisted of physical and legal coercion. The *Kimes* court explained that there was no evidence of psychological coercion; had the conviction been based on psychological coercion, the court would have had to vacate the conviction.¹⁴³

138. *United States v. Kozminski*, 487 U.S. 931, 949 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

139. *Id.*

140. 939 F.2d 776 (9th Cir. 1991).

141. *Id.* at 777.

142. *Id.* at 778 (emphasis added) (internal quotation marks omitted).

143. *Id.*

Also, in *United States v. Alzanki*, a 1995 case involving the involuntary servitude of a Sri Lankan domestic worker, the First Circuit explained that “the evidence must establish that the victim reasonably believed she was left with *no alternative* to continued servitude that was not the equivalent of ‘imprisonment or worse.’”¹⁴⁴ The facts satisfied the test. The victim in the case, Gedara, a native of Sri Lanka, was employed by defendant’s family as a domestic servant in their Kuwaiti home before being sent to defendant’s home in the United States. In the United States, the Alzankis threatened their worker with death if anything were to happen to their child while under the care of Gedara. The defendants also “threatened to sew up Gedara’s mouth with a needle and thread, and throw her into the ocean” if she disobeyed the Alzankis’ orders.¹⁴⁵ Gedara also received threats of deportation to Kuwait, instead of her home country Sri Lanka, which the court determined “confronted [Gedara with] an alternative to continued involuntary service which she reasonably considered at least as severe as imprisonment.”¹⁴⁶ The clear evidence of the physical and legal coercion “left no doubt whatever that psychological pressure alone would not satisfy the ‘force or threat’ element of the involuntary servitude offense.”¹⁴⁷ Thus, the jury rightfully convicted the defendant of involuntary servitude.

Beginning in the mid-1990s, momentum within the government spurred the development of new legislation addressing human trafficking. Reports from the Department of Justice to Congress emphasized the need for a new standard of coercion in the laws addressing modern-day involuntary servitude. In his testimony to Congress in 2000, then-Deputy Assistant Attorney General William Yeomans provided an example of a case that he considered forced labor, yet was unprosecutable under *Kozminski*.¹⁴⁸ The case involved a domestic worker in a midwestern private home. She worked sixteen hours per day, seven days a week and was provided with little food. Her employers threatened to have her deported when she complained about the working conditions. They prevented her from leaving the home unaccompanied by threatening that they would have her arrested. Yeomans explained that despite the worker’s exploitation, “it is unlikely that we can prosecute this case because *psychological and economic coercion* was the method used to keep the victim trapped in a condition of involuntary servitude.”¹⁴⁹

144. 54 F.3d 994, 1004 (1st Cir. 1995) (emphasis added) (quoting *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964)).

145. *Id.* at 999.

146. *Id.* at 1004.

147. *Id.* at 1001.

148. *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 80 (2000) (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

149. *Id.* (emphasis added).

Yeomans emphasized the unique vulnerabilities of trafficked immigrants, who “are particularly susceptible to coercion because of their unfamiliarity with our language, laws and customs.”¹⁵⁰ He also recognized that means of coercion varied from case to case and that physical force would not be necessary in situations characterized by great differentials in power:

We have also had situations where the use of physical force is really unnecessary. For instance, when people are brought in from societies with a caste system, and when lower-class people are used to accepting orders and they will accept those orders, under conditions that simply would not be tolerated in this country.¹⁵¹

He contended that *Kozminski*'s narrow definition of involuntary servitude could not adequately reach the cases of subtle coercion that the Department of Justice was encountering with more frequency:

[W]e must expand the types of coercion that can be used to demonstrate involuntary servitude and peonage under Federal law. One of the biggest enforcement hurdles we face is that the U.S. Supreme Court requires a showing that the defendant used actual force, threat of force, or threat of legal coercion to enslave the victim. As a result, Federal law suffers from gaps in coverage. Law enforcement cannot reach and prosecute those who intentionally use more subtle, but no less heinous, forms of coercion that wrongfully keep the victim from leaving his or her labor or service.¹⁵²

IV. A NEW COERCION STANDARD

In a significant step, the TVPA of 2000 overturned the *Kozminski* holding, expanding the legal definition of “coercion.” The emergence of human trafficking as the prevailing form of involuntary labor demanded new laws that could capture its complexity. Specifically, it demanded laws broader in scope, capable of addressing the more nuanced and nonphysical ways used to coerce modern-day involuntary laborers to work. The TVPA was reauthorized and amended in 2003, 2005, and 2008. In addition to appropriating funding for continued antitrafficking efforts, the 2003 amendments included a private right of action.¹⁵³ The 2005 amendments

150. *Id.* at 78.

151. *Id.* at 82.

152. *Id.* at 80.

153. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 8, 18, 22 U.S.C.) (amending the TVPA and appropriating funds for 2004 and 2005).

included provisions to increase research and prevention efforts.¹⁵⁴ The 2008 reauthorization¹⁵⁵ greatly expanded the TVPA to reach a wider range of prohibited conduct and to confer additional civil rights to trafficked persons.¹⁵⁶

This Part focuses on the definition of coercion in the 2000 version of the TVPA and some of the difficulties that emerged from its application. Due to a lack of conceptual guidance, law enforcement, immigration adjudicators, and courts demonstrated an adherence to the older no reasonable alternative framework of coercion that predated the TVPA, despite legislative intent to repeal *Kozminski*'s strict standard and reconceptualize modern-day involuntary labor. In Parts V and VI, I attempt to rectify these difficulties by analyzing a progression of federal-court opinions and the 2008 amendments to the TVPA in order to provide greater detail to the coercion standard. Then, I draw from philosophical theory to construct a new conceptual framework for coercion, which more accurately reflects the TVPA's liberal vision to protect a wide range of coerced workers.

A. COERCION AS DEFINED UNDER THE TVPA OF 2000

The TVPA defines "severe forms of trafficking" as either:

(A) sex trafficking¹⁵⁷ in which a commercial sex act¹⁵⁸ 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.¹⁵⁹

The definition acknowledges that the various purposes of trafficking persons include exploitation in both the commercial-sex industry and other industries, such as agriculture, domestic service, garment manufacturing, construction, and restaurants.¹⁶⁰ The definition recognizes traditional violations of the Thirteenth Amendment and its enforcement statutes, such

154. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22, 42 U.S.C.).

155. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-147, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, 28, 42 U.S.C.).

156. 8 U.S.C. §§ 1375b–c (Supp. II 2008).

157. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102(9) (2006) (amended 2008) (defining sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act").

158. *Id.* § 7102(3) (defining a commercial sex act as "any sex act on account of which anything of value is given to or received by any person").

159. *Id.* § 7102(8).

160. Hyland, *supra* note 29, at 31.

as slavery and peonage, as well as new forms of exploitation, such as sex trafficking and debt bondage.

In addition to “force” and “fraud,” the definition explicitly includes “coercion” as one of the means by which an individual may be trafficked into sex or labor exploitation. Moreover, any initial consent to the work situation that a trafficked individual may have given is rendered immaterial due to the trafficker’s forceful, deceptive, or coercive conduct and subsequent exploitation. Finally, while migration across international borders is often a characteristic of human trafficking, the TVPA’s definition makes clear that any “recruitment, harboring, transportation, provision, or obtaining” of an individual for the purpose of involuntary labor qualifies as human trafficking.¹⁶¹ Thus, cross-border movement is not a requirement to meet the legal definition of human trafficking.

The TVPA supports a broad vision of coercion. It recognizes that in addition to physical force, psychological abuse and nonviolent coercion create an environment of fear and intimidation that may prevent a worker from leaving an exploitive work situation.¹⁶² Uniquely shaped by the United States’ own history of modern Thirteenth Amendment jurisprudence, the TVPA makes multiple references to the *Kozminski* Court’s narrow holding and its intended deviation from it, underscoring the contentious background regarding the scope of coercion in cases of involuntary labor.¹⁶³ As indicated in the Act’s purpose and findings, Congress explicitly proclaimed that crimes of involuntary servitude should include those perpetrated through psychological abuse and nonviolent coercion, effectively superseding the restrictive definition set forth in *Kozminski*:

Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18 [of the *United States Code*], should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.¹⁶⁴

The TVPA’s legislative-conference report also emphasized the Act’s intent to “provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as

161. 22 U.S.C. § 7102(8)(B).

162. *Id.* § 7102(2), (5) (defining coercion and involuntary servitude for trafficking provisions).

163. *Id.* § 7101(b)(13) (current version).

164. *Id.*

defined in *Kozminski*.¹⁶⁵ This expansive view on the role of nonphysical coercion to compel involuntary labor presents a crucial opportunity to protect the broadest range of exploited workers in the United States today. It is this recognition of the efficacy of nonphysical coercion that comprises the TVPA's most significant contribution to Thirteenth Amendment jurisprudence and the evolving discourse on involuntary labor.

Unlike older standards of coercion that required evidence of direct or threatened physical abuse or legal restraint, "coercion" under the TVPA is not limited to specific acts. Instead, it represents a more open-ended evaluation of both circumstances and conduct. Yet, similar to its Thirteenth Amendment predecessors, the TVPA's coercion standard has undergone its own evolutionary process. In its attempt to capture the complexity of human trafficking, the 2000 TVPA initially promulgated an ambiguous standard of coercion, leading to inconsistencies in its interpretation and implementation.

The 2000 TVPA defined 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.¹⁶⁶

The legislative conference report further declared that "statutes on involuntary servitude have been narrowly construed, in the absence of a definition by Congress, to exclude certain cases in which persons are held in a condition of servitude by nonviolent coercion."¹⁶⁷ Thus, the TVPA incorporates "coercion" into a new definition of involuntary servitude:

The term "involuntary servitude" includes a condition of servitude induced by means of—

- (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
- (B) the abuse or threatened abuse of the legal process.¹⁶⁸

Finally, the new crime of forced labor, like the new definition of involuntary servitude, also incorporates the broadened meaning of coercion, officially

165. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

166. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 103(2), 114 Stat. 1464, 1469 (current version at 22 U.S.C. § 7102(2) (Supp. II 2008)).

167. H.R. REP. NO. 106-939, at 89.

168. § 103(5), 114 Stat. at 1469 (current version at 22 U.S.C. § 7102(5)).

expanding the forms of unfree labor prohibited under the Thirteenth Amendment:

Whoever knowingly provides or obtains the labor or services of a person—

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process¹⁶⁹

The accompanying legislative conference report instructs that Congress meant the above provisions to address the subtle methods that traffickers use to “place their victims in modern-day slavery.”¹⁷⁰ Such subtle methods include threats to “harm . . . third persons, restrain[ing the] victims without physical violence or injury, or [threats of] dire consequences by means other than overt violence.”¹⁷¹ “The term ‘serious harm’ . . . refers to a broad array of harms, including both physical and nonphysical”¹⁷² Moreover, in addition to direct threats, traffickers may employ “a scheme, plan, or pattern,” amounting to a more subtle, but equally effective, form of coercion.¹⁷³ The conference report also explains that Congress intended the language of serious harm and scheme, plan, or pattern to assist prosecutors in proving forced-labor violations in the absence of “physical harm or threats of force against victims.”¹⁷⁴

Congress characterized coercion as unequivocally broad, encompassing “threat[s] of ‘serious harm’” that are both physical and nonphysical.¹⁷⁵ Yet, the term serious harm lacked specificity. Serious harm of a physical form may not require explicit description, as it is commonly understood to include any type of offensive touching, such as hitting, pushing, sexual assault, or attacks with weapons.¹⁷⁶ Nonphysical serious harm, however, is not commonly understood, and examples do not readily come to mind. Rather than provide a more detailed definition of nonphysical harm, the TVPA vaguely referred to it as all forms of harm in the absence of physical

169. *Id.* § 112, 114 Stat. at 1486–87 (current version at 18 U.S.C. § 1589).

170. H.R. REP. NO. 106-939, at 101.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. KENNETH S. ABRAHAM, A CONCISE RESTATEMENT OF TORTS § 7, at 2 (2000) (defining “physical harm” as “the physical impairment of the human body”).

force.¹⁷⁷ Described in the negative, encompassing all that is simply not physical, the notion of nonphysical serious harm provoked only more questions than answers. What is the range of nonphysical harms that constitute coercion? What are examples of threats of dire consequences or serious harm? Is it serious harm when a trafficker threatens to withhold pay if the worker complains about poor working conditions? What is a scheme, plan, or pattern? Is it a scheme, plan, or pattern when a trafficker terminates noncompliant workers to send a message to an economically dependent worker that she could also lose her job if she failed to comply with exploitive labor conditions? With minimal guidance to resolve these uncertainties, implementation of the Act required courts, prosecutors, and other adjudicators to interpret the definition of coercion, leading to inconsistent results.

B. IMPLEMENTATION OF THE 2000 TVPA'S COERCION STANDARD

Unlike previous Thirteenth Amendment-enforcement legislation, the institutional design of the TVPA not only criminalizes human trafficking but also prioritizes victims' rights and protections by providing immigration relief in the form of "continued presence,"¹⁷⁸ or a T or U visa,¹⁷⁹ and a civil right of action.¹⁸⁰ As a result of the TVPA's multi-tiered strategy to combat human traffickers and protect trafficking victims, the TVPA's implementation and interpretation involves numerous legal sectors and enforcement agencies. Criminal laws are prosecuted by federal law enforcement, T and U visa applications are reviewed by the Department of Homeland Security Customs and Immigration Services, and civil cases are pursued by individual trafficked plaintiffs. Juries determine the guilt or liability of alleged traffickers and judges interpret the human-trafficking statutes and establish rules of law. Throughout these various levels of enforcement, the TVPA's provisions are applied, and coercion, a fundamental legal element in the trafficking laws, is assessed.

According to the Department of Justice, a total of 238 trafficking cases have been criminally prosecuted through fiscal year 2009.¹⁸¹ One thousand five hundred ninety-one victims have received "refugee-type benefits" under

177. H.R. REP. NO. 106-939, at 101.

178. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7105(c)(3) (2006) (amended 2008).

179. 8 U.S.C. § 1101(a)(15)(T)-(U) (amended 2008 and 2009).

180. 18 U.S.C. § 1595 (amended 2008).

181. ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2009, at 48 (2010) [hereinafter ATTORNEY GENERAL'S ANNUAL REPORT 2009], available at <http://www.justice.gov/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf>.

the TVPA.¹⁸² Approximately thirty civil cases utilizing the trafficking private right of action have been filed from the date of its enactment in 2003.¹⁸³ There are, however, an estimated 14,500 to 17,500 individuals trafficked into U.S. borders annually.¹⁸⁴ A 2006 Government Accountability Office study notes the “considerable discrepancy between the numbers of observed and estimated victims of human trafficking.”¹⁸⁵ There are many speculated reasons for this discrepancy. The nature of human trafficking is hidden, victims may be afraid to come forward, and some critics have even argued that the estimates of victims in the United States are exaggerated.¹⁸⁶ Other commentators report that the government’s emphasis on combating sex trafficking has neglected the more frequently occurring labor trafficking, resulting in disproportionately small numbers of identified victims.¹⁸⁷ I theorize that, at least in part, the vast majority of trafficking victims have not been recognized due to an absence of an appropriate conceptual framework for understanding coercion in the trafficking context. Contrary to the fear of the *Kozminski* Court that legal recognition of psychological coercion would open the door to indiscriminate overenforcement, I suggest that the TVPA’s standard of coercion has been narrowly applied, excluding the broad range of coerced workers that Congress intended the TVPA to protect.

For example, the vast majority of cases criminally investigated and prosecuted evidence overt physical force, rather than the “subtle methods” of “psychological coercion” that the TVPA’s conference report described.¹⁸⁸ A survey of the TVPA prosecutions described in the Department of Justice’s annual reports on anti-trafficking activities through 2009 indicates that

182. *Id.* at 38 (stating the number of approved principal T visa applications from 2001 to 2009).

183. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL. F. 247, 292.

184. U.S. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 23 (2004), available at <http://www.state.gov/documents/organization/34158.pdf>.

185. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2–3 (2006), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-06-825>; see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT 08-26, MANAGEMENT OF THE OFFICE OF JUSTICE PROGRAMS’ GRANT PROGRAMS FOR TRAFFICKING VICTIMS 79 (2008) (noting that the number of trafficking victims assisted by the Office for Victims of Crime was smaller than expected).

186. Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A9.

187. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN J. C.R. & C.L. 317, 325 (2007).

188. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

almost 75% of these cases evidenced physical force or physical abuse.¹⁸⁹ Such cases, however, are not representative of the scope of trafficking cases today. As a local law-enforcement agent reports: “Instead of outright force and physical coercion, we are finding victims who are subjected to more psychological and situational coercion and duress tactics.”¹⁹⁰ The agent further explains that Immigration and Customs Enforcement and the Department of Justice rejected a case involving Malaysian and Singaporean women trafficked to brothels as not sufficiently “severe” enough to prosecute under the TVPA.¹⁹¹ However, according to the agent, the case qualified as human trafficking because of the means of nonphysical coercion used against the workers, such as the confiscation of passports, cultural and linguistic isolation, and monitoring of movements.¹⁹² Finally, a recent report reinforces the notion that definitional inconsistencies as to what constitutes trafficking and arbitrary determinations by law-enforcement officials have been one of the primary difficulties in the implementation of the TVPA:

Internal disagreements among task force members about the definition, elements and nature of this crime increase the

189. This data was extrapolated from the “Examples of Cases” and “Descriptions of Cases” sections of the 2003 to 2009 Attorney General’s annual reports to Congress on human trafficking. Among the cases described within these reports, I focused on prosecutions of sex-trafficking or labor-trafficking violations under the TVPA, leaving out prosecutions of sex tourism and child sexual exploitation (unrelated to trafficking). I also omitted cases that lacked any description of the means of force, fraud, or coercion used to keep victims in servitude. Out of the remaining sample of 106 trafficking cases, 72, or 72.28%, evidenced overt physical force. See REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003, at 22–26 (2004), *available at* <http://www.justice.gov/archive/ag/annualreports/tr2003/050104agreporttocongressvpr10.pdf>; REPORT TO CONGRESS FROM ATTORNEY GENERAL ALBERTO R. GONZALES ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, at 23–31 (2005), *available at* <http://www.justice.gov/archive/ag/annualreports/tr2004/agreporhumantrafficking.pdf>; ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2005, at 18–21 (2006), *available at* <http://www.justice.gov/archive/ag/annualreports/tr2005/agreporhumantrafficking2005.pdf>; ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2006, at 43–53 (2007), *available at* <http://www.justice.gov/archive/ag/annualreports/tr2006/agreporhumantrafficking2006.pdf>; ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2007, at 64–71 (2008) [hereinafter ATTORNEY GENERAL’S ANNUAL REPORT 2007], *available at* <http://www.justice.gov/archive/ag/annualreports/tr2007/agreporhumantrafficking2007.pdf>; ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2008, at 83–86 (2009), *available at* <http://www.justice.gov/archive/ag/annualreports/tr2008/agreporhumantrafficking2008.pdf>; ATTORNEY GENERAL’S ANNUAL REPORT 2009, *supra* note 181, at 108–17.

190. DEREK J. MARSH, HUMAN TRAFFICKING—RECENT TRENDS: A LOCAL LAW ENFORCEMENT PERSPECTIVE 9 (2009), *available at* <http://homeland.house.gov/SiteDocuments/20090319100952-86886.pdf>.

191. *Id.* at 9–10.

192. *Id.*

challenges of multi-agency task force responses. . . . In human trafficking cases the situation is much more ambiguous. In the task forces we observed there were situations where members of the group did not agree about whether or not someone was in an exploitive situation freely or whether they were a victim of force, fraud or coercion.¹⁹³

Criminal law enforcement's reluctance to investigate coerced-trafficking cases results in not just fewer criminal prosecutions, but also has a devastating impact on trafficking victims' access to immigration relief and other protections. Applications for T and U visas require that victims demonstrate compliance with all reasonable requests for assistance in the investigation and prosecution of the trafficking crime.¹⁹⁴ Continued presence is another form of immigration relief conferred upon direct request by a law-enforcement official investigating the case.¹⁹⁵ Thus, to some extent, the acquisition of immigration status is contingent on law enforcement's selection of a case for further investigation and prosecution. Indeed, from 2005 through 2007, the Bureau of Justice Assistance Human Trafficking Task Force identified 2116 trafficking victims, yet only 289 victims had continued presence requested on their behalf by federal law enforcement.¹⁹⁶ Another study notes that "[d]efinitional disagreements often have serious consequences for potential victims, such as determining

193. INST. ON RACE & JUSTICE, NE. UNIV., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 104 (2008), *available at* http://www.humantrafficking.neu.edu/news_reports/reports/documents/Understanding%20and%20Responding_Full%20Report.pdf.

194. Victims of Trafficking and Violence Protection Act of 2000, 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2006) (amended 2008 and 2009) (explaining that children under eighteen who are sex-trafficking victims do not need to meet the criterion of complying with assistance in the investigation or prosecution of the trafficking crime); *id.* § 1101(a)(15)(U)(i)(III). The 2005 Violence Against Women and Department of Justice Reauthorization Act provided for a hardship exception to the requirement that the T visa applicant demonstrate compliance with requests for assistance in the criminal investigation and prosecution of the trafficking. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 801(a)(3), 119 Stat. 2960, 3053-54 (codified at 8 U.S.C. § 1101(a)(15)(T)(iii)) ("[I]f the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.") (repealed 2008). To date, I am unaware of any cases that have successfully used this provision. Other criteria for T visa eligibility include that the applicant "is or has been a victim of a severe form of trafficking in persons"; is present in the United States, American Samoa, or Northern Marianas on account of trafficking; and "would suffer extreme hardship" upon removal. 8 U.S.C. § 1101(a)(15)(T)(i)(I)-(II), (IV) (amended 2008 and 2009).

195. 22 U.S.C. § 7105(c)(3)(A)(i) (amended 2008).

196. ATTORNEY GENERAL'S ANNUAL REPORT 2007, *supra* note 189, at 20.

whether or not they will receive benefits that allow them to receive medical and cash assistance and to stay in the country lawfully for some time.”¹⁹⁷

Definitional ambiguities have led to law enforcement’s generally narrow view of coercion, which may serve sensible goals given the structure of criminal law. The burden of proof is high in criminal law, and evidence of overt violence or physical force may more easily convince a jury to convict a defendant. Moreover, coercive conduct may lack hard evidence since it frequently consists of threats that must be corroborated by victim or witness testimony. Yet, witnesses are rare in trafficking cases since violations occur in isolation and victims may be afraid to testify. Additionally, like the majority in *Kozminski*, prosecutors may view the concept of psychological coercion as too amorphous to apply. Adhering to the rule of lenity, prosecutors may be wary of broad interpretations of coercion. Finally, as discussed in Part III, there may be an underlying bias based on the continuing normative presumption that only direct or threatened physical force can be coercive. Thus, even outside of the courtroom, the no reasonable alternative framework may make more intuitive sense to criminal prosecutors who believe that, in the absence of physical or legal threats, workers freely choose to remain in exploitive work situations.

The notion that some workers freely choose exploitation is compounded in the context of the undocumented-immigrant workplace, where it is believed that workers and employers engage in a collusive and mutually advantageous employment arrangement in deliberate violation of immigration laws. These workers may be seen as illegal aliens first and foremost, subject to deportation. Any exploitation they suffer is largely ignored.¹⁹⁸ Underlying these attitudes may also be gendered and racialized discriminatory preferences for the “innocent” victim, who also happens to be female and passive, rather than the “criminal” alien, who is often male, assertive, and brown.¹⁹⁹

Many commentators have discussed similar issues in the context of rape law. Though not the focus of this Article, the concepts of consent and coercion within sexual relations evoke concerns analogous to those discussed in the context of human trafficking.²⁰⁰ There is a vast literature supporting the expansion of rape law to include violations in the absence of physical force. These scholars have critiqued the lack of criminal-law

197. INST. ON RACE & JUSTICE, *supra* note 193, at 105.

198. See Kim, *supra* note 183, at 259–61.

199. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3021–24 (2006); Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 *GENDER & SOC’Y* 923, 923–37 (2003).

200. This Article aims to first establish a theoretical framework for coercion in the context of human trafficking. This framework may then serve as a foundation for future exploration and more detailed comparative critiques with other areas of the law.

enforcement of rape by nonviolent means, such as fraud, deception, and coercion.²⁰¹ Moral philosophers like Wertheimer have also focused considerable attention on this issue to determine what should count as consent to sexual relations for moral and legal purposes. He notes that rape law has historically “drawn a bright line between the threat of bodily injury and other threats, perhaps reflecting the view that ‘no fear justifies a woman’s surrender of her body “against her will,” except the fear of physical harm.”²⁰² Whether or not this bright-line distinction is normatively appropriate, Wertheimer explains that the structure of criminal law, which relies on a high standard of proof as well as an objective analysis of the perpetrator’s mens rea and actus reus rather than the subjective experience of the victim, may preclude successful claims of “coerced rape.” The absence of hard, physical proof of rape leaves rape by coercive threats underenforced. Furthermore, because many casual sexual relationships are consensual, accusations of acquaintance rape must overcome this primary presumption. Other scholars like Catherine MacKinnon argue that the presumption of consent in rape cases points to an inherently misogynistic criminal legal system that discounts the complexity of rape and trivializes injuries derived from nonconsensual sex: “When a rape prosecution is lost because a woman fails to prove that she did not consent, she is not considered to have been injured at all.”²⁰³

In a previous work, I have also critiqued the disjunction between the objective criminal-law framework and the presumptive subjectivity of a coercion analysis, which relies in part on the subjective response of the

201. Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (discussing the need for rape-law reform to specifically include rape by fraud and rape by coercion, in addition to the traditional notion of rape by physical force); Kristen L. Isaacson, Note, *Rape by Fraud or Impersonation: A Necessary Addition to Michigan’s Criminal Sexual Conduct Statute*, 44 WAYNE L. REV. 1781 (1999) (arguing that Michigan’s criminal sexual-conduct statute should acknowledge rape by fraud or impersonation as “coercion,” a necessary element to establish rape in the state); Rosemary J. Scalo, Note, *What Does “No” Mean in Pennsylvania?—The Pennsylvania Supreme Court’s Interpretation of Rape and the Effectiveness of the Legislature’s Response*, 40 VILL. L. REV. 193, 202 (1995) (defining “forcible compulsion” in rape cases to include not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person’s will); Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force To Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003) (proposing that the current definition of “force” in rape law needs to be reformed to systematically address nonphysical coercion by the offender, much like contract law, which comprehensively regulates nonphysical coercion through the doctrines of duress, undue influence, and unconscionability).

202. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 21 (2003) (quoting Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 65 n.75 (1952)).

203. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 180 (1989).

coercee.²⁰⁴ Given the inherent tension in the structure of legal remedies for human-trafficking victims, some commentators have proposed to divorce criminal-law enforcement from contingent benefits.²⁰⁵ There is good reason to support such initiatives. The prosecutorial goal of law enforcement is at cross-purposes with victim-protection measures.²⁰⁶ Victims may experience retraumatization from having to demonstrate cooperation with law-enforcement investigations to obtain a T visa.²⁰⁷ Law enforcement may exercise too much discretionary power in determining an individual's status as a victim of human trafficking. Personal biases and reluctance to "give away green cards" may cause law enforcement's refusal to endorse otherwise eligible T visa applicants.²⁰⁸

However, even when law enforcement supports the status of a worker as a victim of trafficking, immigration adjudicators have also contested the coercive labor situation alleged by T visa applicants. Arguably, the determination of coercion in the realm of immigration law should not face the same procedural challenges posed by the criminal framework. T visa applications are adjudicated under an "any credible evidence" standard that allows for all corroborating evidence of the victim's claim,²⁰⁹ including the victim's own affidavit.²¹⁰ Nonetheless, coercion claims have been rejected based on what appear to be overly restrictive standards of adjudication.

For example, in a case involving a trafficked teacher from the Philippines, criminal-law enforcement investigated, requested "continued presence" for the victim, and supplied the victim with an attestation declaring his status as a victim of trafficking.²¹¹ Yet, Citizenship and Immigration Services ("CIS") denied his affirmative application for T visa

204. Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 969 (2007).

205. See Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 31 (2007); Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 833 (2007); Charles Song & Suzy Lee, *Between a Sharp Rock and a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Cooperation Requirement*, 1 INTERCULTURAL HUM. RTS. L. REV. 133, 135 (2006); Tala Hartsough, Note, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77, 98 (2002).

206. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 1 (2004).

207. Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 381 (2005).

208. FREE THE SLAVES & HUMAN RIGHTS CTR., *HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES* 28 (2004).

209. 8 C.F.R. § 214.11(d)(3) (2010).

210. *Id.* § 214.11(f)(3).

211. Ivy Lee, Appellate Brief, *An Appeal of a T Visa Denial*, 14 GEO. J. ON POVERTY L. & POL'Y 455, 463-65 (2007).

relief.²¹² The victim in this case, Jose Ligaya, came to the United States on false promises of a teaching job and lawful residence.²¹³ Ligaya paid the traffickers' \$12,000 in recruitment and transportation fees.²¹⁴ Upon arrival, the traffickers informed Ligaya that there was no teaching job and required him to do hard manual labor and domestic work in a private home for no pay.²¹⁵ Ligaya complied under threats of deportation and other harm for failure to repay the \$12,000 debt.²¹⁶ Attorneys for Ligaya argued that "[d]efendants kept Ligaya bound . . . not through physical force, but by a strategy recognized by Congress . . . as a sophisticated means used by traffickers to control their victims: nonviolent coercion."²¹⁷

Despite affidavits from a witness and a law-enforcement investigator supporting these facts, CIS's denial of the T visa cited insufficient proof that Ligaya was forced to perform labor: "Although the indictment contains items considered part of severe forms of trafficking in persons, it does not *conclude* you are a victim of severe forms of trafficking in persons as defined."²¹⁸ Further, in rejecting Ligaya's supporting testimony that he feared retribution from his traffickers, CIS stated that "it is unclear to this Service, why they would want to threaten or kill you."²¹⁹ CIS requested additional evidence of an "independent and objective nature" despite the "any credible evidence" standard applicable in T visa adjudications. The "any credible evidence" standard simply looks to the credibility of the evidence to establish an applicant's eligibility for immigration relief. This standard accommodates the reality that immigrant victims of crime may not "have access to the range of documents available to the ordinary visa petitioner for a variety of reasons."²²⁰ The appeal of this T visa denial sharply criticized CIS's incorrect imposition of a much higher standard of evidence that demanded that Ligaya provide conclusive proof of his victimization.²²¹

Another immigration scholar writes about the improper denial of a T visa by CIS based on the applicant's failure to conclusively prove that the trafficker intended to victimize her: "[CIS] determined that not only is the burden on the victim to prove the intent of her trafficker, but that this

212. *Id.* at 460.

213. *Id.* at 464.

214. *Id.*

215. *Id.* at 470.

216. *Id.*

217. *Id.* at 475.

218. *Id.* at 470 (internal quotation marks omitted).

219. *Id.* at 479 (internal quotation marks omitted).

220. *Id.* at 467 (quoting Memorandum from Paul W. Virtue, Office of Gen. Counsel, INS, to Terrance O'Reilly, Dir., Admin. Appeals Office, INS, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children 4 (Oct. 16, 1998)) (internal quotation marks omitted).

221. *Id.* at 486.

burden is set at ‘conclusive proof.’”²²² The author goes on to explain that the applicant had provided abundant circumstantial evidence, including “threats of violence and actual violence perpetrated on [the victim’s] mother in an attempt to control [the victim].”²²³ Nonetheless, CIS rejected her claims based on an insufficiency of proof.²²⁴ Thus, even in the administrative realm of immigration law, which employs a lower “any credible evidence” standard of proof, adjudicators may apply a narrow conception of coercion, requiring “objective” and “conclusive” proof of forced labor. Restrictive definitions of coercion, then, are not simply a product of the procedural constraints of the criminal-law system; they may be widespread and systemic.

Narrow interpretations of the TVPA have also extended to the courts. In *Zavala v. Wal-Mart Stores, Inc.*, a federal court dismissed the plaintiffs’ claim of involuntary servitude.²²⁵ The plaintiffs, undocumented janitorial workers, alleged that Wal-Mart’s contractors forced them to work under coercive threats, including threats of deportation.²²⁶ They further alleged that Wal-Mart intentionally locked the janitors in their stores during their shifts against their will.²²⁷ The court held that the allegations of involuntary servitude were insufficient, citing *Shackney* to argue that the plaintiffs did not allege “that they did not have any way to avoid ‘continued service or confinement.’”²²⁸ Though the court acknowledged the TVPA’s reversal of *Kozminski* and inclusion of psychological coercion in the new definition of forced labor, the court required that the plaintiffs “allege that [they] had no choice” in their continued employment in order to establish a violation of involuntary servitude.²²⁹ Thus, the *Zavala* court employed a test of coercion that conformed to the no reasonable alternative framework that predominated prior to the passage of the TVPA. The availability of a choice rendered the plaintiffs’ involuntary-servitude claim unviable.²³⁰

I have argued in this Part that the absence of a conceptual framework for the TVPA’s coercion standard, in some cases, has resulted in the

222. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures To Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 360–61 (2007).

223. *Id.* at 361.

224. *Id.*

225. 393 F. Supp. 2d 295 (D.N.J. 2005) (dismissing the complaint); 447 F. Supp. 2d 379 (D.N.J. 2006) (dismissing the second amended complaint), *denying motion to certify appeal*, 2007 WL 1134110 (D.N.J. 2007).

226. Second Amended Class Action Complaint & Jury Demand at 56, *Zavala*, 447 F. Supp. 2d 379 (No. 03-Civ.-5309 (JAG)), 2005 WL 3522044.

227. *Id.* at 17.

228. *Zavala*, 393 F. Supp. 2d at 311 (quoting *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964)).

229. *Zavala*, 447 F. Supp. 2d at 384.

230. *Id.* at 384–85.

persistence of the no reasonable alternative framework. Because this account of coercion relies on a moral baseline, set by the normative judgments of the evaluator, it has permitted arbitrary enforcement and the application of overly narrow standards of coercion. When faced with an alleged case of trafficking, law-enforcement officials may exhibit divergent views on the kinds of threats that are morally blameworthy and therefore requiring legal intervention. Further, the no reasonable alternative framework requires that the coercer make specific, objectively identifiable threats to the coercee. Such objectively identifiable threats may not exist in many cases of human trafficking where the negative consequences of noncompliance, such as deportation or destitution, are often unspoken but tacitly known. The next two Parts study recent legal developments and alternative philosophical theories on coercion to delineate the ontology of the coercion standard under the TVPA. By identifying the correct conceptual framework, I hope to provide the proper normative foundation for continued implementation of the law.

V. RECONCEPTUALIZING COERCION AS SITUATIONAL

A. *LEGISLATIVE DEVELOPMENTS TO THE TVPA'S COERCION STANDARD*

Congress amended the TVPA in 2008, slightly reorganizing the coercion standard and codifying parts of the TVPA's original conference report. The legislative history of the 2008 amendments does not indicate what prompted these changes. Yet, in what follows, I suggest that these changes reinforce a broad coercion standard and help to rectify the limited application and definitional inconsistencies described in Part IV. In Subpart B, I analyze recent case law, which provides further support of this broader interpretation of the TVPA's coercion standard.

The 2008 TVPA amendments require the following for the crime of "forced labor":

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not

perform such labor or services, that person or another person would suffer serious harm or physical restraint²³¹

The 2008 amendments further define “abuse or threatened abuse of the law or legal process” as:

the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.²³²

Additionally, the concept of nonphysical coercion is encapsulated under the term “serious harm”:

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.²³³

The 2008 TVPA amendments indicate that the range of nonphysical harms that are legally sufficient to establish forced labor include “psychological, financial, or reputational harm.”²³⁴ To determine the seriousness of the harm, the statute instructs consideration of “all the surrounding circumstances” and applies the standard of a “reasonable person” with the “same background and in the same circumstances”²³⁵ as the alleged trafficked person, thereby contemplating the trafficked person’s individual characteristics. Furthermore, with respect to legal coercion, the 2008 TVPA amendments clarify that compelling labor through threats of any legal proceeding, whether “administrative, civil, or criminal,”²³⁶ also constitutes a violation of forced labor. Thus, threats of deportation—which requires an administrative proceeding—also qualify as a prohibited means of legal coercion.

The 2008 TVPA again makes clear that any type of direct or threatened physical or legal harm, including deportation, constitutes legally sufficient coercion. These provisions comport with the no reasonable alternative standard of coercion that predated the TVPA. As referenced in Part III, however, what sets the TVPA apart from its predecessors is its expansive notion of “serious harm,” which includes “psychological, financial, or

²³¹. 18 U.S.C. § 1589(a) (Supp. II 2008).

²³². *Id.* § 1589(c)(1).

²³³. *Id.* § 1589(c)(2).

²³⁴. *Id.*

²³⁵. *Id.*

²³⁶. *Id.* § 1589(c)(1).

reputational harm”; its emphasis on the “circumstances” of the trafficked victim to determine the seriousness of the threatened harm; and its inclusion of an indirect “scheme, plan, or pattern” of coercion as a sufficient basis for a forced-labor violation. These latter provisions codify portions of the TVPA’s original conference report that emphasized an open-ended approach to coercion, responsive to the wide variability in means of coercion depending on the characteristics of individual cases.

For example, in determining the degree of coercion that is legally actionable, the 2008 TVPA incorporates the conference report’s instruction that courts take into account the victim’s individual circumstances, such as age and background.²³⁷ Furthermore, the 2008 TVPA’s reference to “psychological, financial, or reputational harm” as forms of serious harm reflects the conference report’s three case examples involving subtle, nonphysical coercion.²³⁸ In one case example, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her “to believe that children in her care will be harmed if she leaves the home.”²³⁹ In another scenario, a trafficker subjects a worker to a “scheme, plan, or pattern” when the worker is caused “to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country.”²⁴⁰ In a third example, individuals traffic children into forced labor by means of “nonviolent and psychological coercion,” including “isolation, denial of sleep, and other punishments.”²⁴¹ These examples describe broader conduct, rather than specific threats, where individuals are coerced into submission by fear of negative consequences other than bodily harm. Additionally, these examples encompass not only a trafficker’s directly coercive conduct, but also contemplate the worker’s individualized economic and social pressures. For instance, in the scenario of the domestic worker who faces her family’s banishment, starvation, or bankruptcy, one can imagine such a consequence for many workers who must migrate for work to sustain their families in their countries of origin. Economically dependent on his or her job, the worker may feel indirectly forced to endure exploitive labor conditions to send money to his or her family to prevent their destitution.

Distinct from the no reasonable alternative framework for coercion, which sets the relevant baseline at physical or legal harm, the TVPA does not limit the range of conceivable possibilities within the realm of nonphysical coercion. Instead, the TVPA’s coercion standard depends on the particular circumstances of the trafficking victim. Threatened “harm,” whether explicit

237. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

238. 18 U.S.C. § 1589(c)(2).

239. H.R. REP. NO. 106-939, at 101.

240. *Id.*

241. *Id.*

or implied, is determined according to an assessment of the alleged victim's "background" and "surrounding circumstances"; in other words, the TVPA recognizes that coercion can operate *situationally*. As explained in Part IV, although the prevalence of trafficking cases has evidenced more overt forms of physical force, several federal cases involving nonphysical coercion have survived constitutional challenges of vagueness and overbreadth and motions to dismiss. I analyze these cases to better define the structure of the TVPA's coercion standard and to bring substance and efficacy to the situational coercion framework.

B. SITUATIONAL COERCION GAINS SUBSTANTIVE LEGAL FORCE

In *United States v. Bradley*, workers from Jamaica were trafficked to New Hampshire and forced to labor on a tree farm.²⁴² Defendants paid the workers above minimum wage, and the workers were free to travel to the nearby town unaccompanied.²⁴³ Yet, the workers also labored unconscionably long hours and lived in a dilapidated shack with no running water.²⁴⁴ Through a pattern of intimidation and indirect threats of harm, the workers felt coerced to continue working for the defendants and felt they did not have the freedom to quit.²⁴⁵ A federal prosecution rendered guilty verdicts against each of the defendants for violation of the TVPA's forced-labor provision.²⁴⁶ The defendants appealed the verdict, arguing that "forced labor" required evidence of physical force and could not be based on nonphysical coercion.²⁴⁷ The First Circuit rejected the defendants' argument and affirmed the lower court's ruling.²⁴⁸ The *Bradley* court reasoned that the TVPA was intended to encompass "subtle psychological methods of coercion."²⁴⁹ Yet, the court also cautioned that juries could misconstrue coercion as encompassing an employer's legitimate, noncriminal conduct:

[T]he phrase "serious harm," as extended to non-physical coercion, creates a potential for jury misunderstanding as to the

242. 390 F.3d 145, 148 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

243. *Id.* at 149.

244. *Id.* at 148.

245. *Id.*

246. *Id.* at 149–50 ("[T]he jury convicted the defendants on all counts except for the false statement charge and the attempted forced labor charges (which the jury did not consider after convicting on the underlying offenses).").

247. *Id.* at 150 ("Bradley and O'Dell contest both their convictions and their sentences. In particular, they challenge a number of alleged errors in the district court's jury instructions; the introduction of evidence regarding their treatment of Wilson and Clarke in 1999–2000; and the application of two sentencing enhancements They do not say that the evidence was inadequate to support their convictions.").

248. *Id.* at 157.

249. *Id.* at 150 (discussing various interpretations of coercion under the Act and drawing upon the Act's conference report).

nature of the pressure that is proscribed. Taken literally, Congress' "threats" and "scheme" language could be read to encompass conduct such as the employer's "threat" not to pay for passage home if an employee left early. Depending upon the contract, surely such a "threat" could be a legitimate stance for the employer and not criminal conduct.²⁵⁰

The First Circuit advised that other cases would require courts to distinguish between criminally coercive threats and those that constitute "permissible warnings of adverse but legitimate consequences."²⁵¹ Thus, the *Bradley* court recognized the dilemma in drawing the boundary between unlawful coercion and lawful pressures. Yet, the court also refrained from proposing a framework that evaluated the coerciveness of threats based on independent and objective severity. Unlike the *Kozminski* Court, the First Circuit was not concerned with whether the defendants' threats wrongfully left the victims with no choice but to perform the labor. In fact, the court emphatically rejected the defendants' proposed jury instructions, which endorsed the no reasonable alternative framework.²⁵² For example, one contested instruction stated that the "use of psychological coercion to force someone to work is not enough to find a defendant guilty of Forced Labor. . . . The Government must prove that [the victims] reasonably believed they had no alternative to continue working other than imprisonment or worse."²⁵³ According to the court, this instruction "so badly understated the reach of the [TVPA] that it would have been improper to have given them."²⁵⁴

Instead, the *Bradley* court upheld the constitutionality of jury instructions that emphasized the victims' "special vulnerabilities" and the power inequality between the defendants and the victims to determine whether the victims could have felt compelled to work by the defendants' conduct:

"You may also consider Mr. Hutchinson's and Mr. Flynn's special vulnerabilities, if any. In this regard you may consider whether or not all persons are of the same courage or firmness. You may consider, for example, Mr. Hutchinson's and Mr. Flynn's background, physical and mental condition, experience, education, socioeconomic status, and any inequalities between Mr. Hutchinson and Mr. Flynn and the defendants with respect to these considerations, including their relative stations in life. You may consider and weigh whether or not Mr. Hutchinson and Mr. Flynn were vulnerable in some way so that the actions of the

250. *Id.* at 151.

251. *Id.*

252. *Id.*

253. *Id.* at 151 n.3 (alterations in original).

254. *Id.* at 151.

defendant, even if not sufficient to compel another person to work, were enough to compel Mr. Hutchinson and Mr. Flynn to work.”²⁵⁵

In *United States v. Calimlim*, the Seventh Circuit also upheld a forced-labor conviction against the defendants’ claims that the phrases “serious harm” and “threatened abuse of the law or the legal process” were unconstitutionally vague and overbroad.²⁵⁶ This case involved a Philipino domestic worker, Irma Martinez, forced to work under implicit threats of deportation and other forms of nonphysical harm.²⁵⁷ After examining the allegations, the court concluded that the defendants’ actions “could reasonably be viewed as a scheme to make [the victim] believe that she or her family would be harmed if she tried to leave. That is all the jury needed to convict.”²⁵⁸ The court emphasized that the forced-labor provision under the TVPA overturned *Kozminski*’s definition of involuntary servitude:

[A]fter the Supreme Court ruled that . . . involuntary servitude . . . prohibited only servitude procured by threats of physical harm, Congress enacted § 1589. The language of § 1589 covers nonviolent coercion, and that is what the indictment accused the [defendants] of doing; there was nothing arbitrary in applying the statute that way.²⁵⁹

Significantly, the *Calimlim* defendants never made direct threats against Martinez. Instead, the court explained that the defendants “manipulated the situation” to compel Martinez to remain:

They knew that they were telling Martinez that if she did not do everything they asked, they would not send money back home for her. The Calimlins also knew that not sending money back home was, for Martinez, a “serious harm.” The Calimlins also warned

²⁵⁵. *Id.* at 152–53.

²⁵⁶. 538 F.3d 706, 710 (7th Cir. 2008) (quoting 18 U.S.C. § 1589 (Supp. II 2008)) (internal quotation marks omitted) (“The Calimlins challenge their convictions on several grounds: that the forced labor statute is vague and overbroad, that the jury instructions on the forced labor counts failed to exclude the possibility of a conviction for innocent actions, and that there was insufficient evidence of financial gain on the harboring counts.”), *cert. denied*, 129 S. Ct. 935 (2009).

²⁵⁷. *Id.* at 709. The court found:

The evidence showed that the Calimlins intentionally manipulated the situation so that Martinez would feel compelled to remain. They kept her passport, never admitted that they too were violating the law, and never offered to try to regularize her presence in the United States. Their vague warnings that someone might report Martinez and their false statements that they were the only ones who lawfully could employ her could reasonably be viewed as a scheme to make her believe that she or her family would be harmed if she tried to leave.

Id. at 713.

²⁵⁸. *Id.*

²⁵⁹. *Id.* at 712 (citations omitted).

Martinez about her precarious position under the immigration laws, conveniently omitting anything about their own vulnerability.²⁶⁰

The court found that these indirect threats of financial harm to Martinez's family and vague warnings about Martinez's lack of immigration status constituted a "scheme, pattern, or plan" sufficient for a forced-labor conviction.²⁶¹ The defendants' intent could be established by looking at Martinez's situation: The facts showed that Martinez's "family was poor and depended on [her] salary,"²⁶² and her undocumented status gave her no "exit option"—she could not "freely work for another employer."²⁶³ The defendants took advantage of Martinez's powerlessness to drive "a hard bargain," in which they "received a manifest benefit at a drastically reduced price."²⁶⁴

The defendants argued that their statements constituted legitimate warnings of fact, not threats, analogizing their case to hypothetical scenarios involving "employer[s] who tell[] [their] employees that they must start paying a portion of their health insurance premiums or face the loss of their health insurance benefits" or "innocent employers who merely warn their workers about the consequences of illegal immigration."²⁶⁵ The court rejected this line of reasoning, focusing on the inequality of bargaining power between the defendants and Martinez. The court explained that the hypothetical employer who informs her employees of a loss of health-insurance coverage "is not procuring labor by means of this statement, only lower wages or a renegotiation of the employment contract."²⁶⁶ In contrast, the court made clear that the defendants victimized Martinez "by targeting her special vulnerability" as an illegal alien, which the court regarded as "the most vulnerable of the broader group who are forced into labor."²⁶⁷

Other trafficking cases exhibit similar attention to power inequalities and the exploitation of workers' vulnerabilities. In *Garcia v. Audubon*, a lawsuit on behalf of undocumented workers in New Orleans, a federal judge certified the plaintiffs for U visas and affirmed their eligibility as victims of human trafficking for TVPA-related immigration relief.²⁶⁸ The court recognized that "legal coercion was used against the Plaintiffs to continue working without pay," and that the defendants engaged in a "pattern of

260. *Id.* at 711.

261. *Id.* at 710.

262. *Id.* at 712.

263. *Id.* at 708.

264. *Id.* at 715.

265. *Id.* at 712.

266. *Id.*

267. *Id.* at 717.

268. *Garcia v. Audubon Cmty. Mgmt., LLC*, No. 08-1291, 2008 WL 1774584, at *2-4 (E.D. La. Apr. 15, 2008).

conduct . . . to force the plaintiff-employees to work by taking advantage of [their] undocumented immigration status.”²⁶⁹ The defendants also threatened “serious harm” by manipulating the workers’ dependency on their defendant-provided housing. In response to complaints regarding the underpayment of wages, the defendants threatened to evict the plaintiffs.²⁷⁰

Finally, *United States v. Kaufman*, a Tenth Circuit case involving the mistreatment of mentally ill adults in a residential treatment center, also described the impact of unequal-power relationships in determining the sufficiency of a forced-labor violation.²⁷¹ In this case, mentally ill residents were coerced to perform sexually explicit acts and manual labor for their doctor, who also resided at the treatment center.²⁷² This case included some evidence of direct and threatened physical coercion in the form of beatings when patients used “offensive language.”²⁷³ Yet, the court also emphasized the power differential between the defendant and his victims, which contributed to the victims’ compliance with the defendant’s directives.²⁷⁴ The court recounted the testimony of one victim:

“It’s difficult to say no to someone who is your landlord, who is your therapist, who to me was, you know, a very influential person in my life. It’s very difficult to say no even if the things he asks you to do are painful or illegal, as they were on occasion. I didn’t wanna be kicked our [sic] of the house. I feared them . . . I feared that.”²⁷⁵

C. THE OBJECTIVE–SUBJECTIVE DICHOTOMY

The situational coercion framework evaluates all the circumstances surrounding the alleged trafficking scenario, paying special attention to power inequalities and the workers’ individual characteristics that may render them vulnerable to exploitation. Is this framework applied subjectively or objectively? The 2008 TVPA indicates that the evaluation of “serious harm” must be “reasonable,” connoting an objective standard.²⁷⁶ Yet, the 2008 TVPA also states that reasonableness should be judged against the victim’s background and all the surrounding circumstances, contemplating the victim’s particularized traits, which connotes a subjective analysis.²⁷⁷

²⁶⁹. *Id.* at *2.

²⁷⁰. *Id.*

²⁷¹. 546 F.3d 1242 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1013 (2009).

²⁷². *Id.* at 1248–50.

²⁷³. *Id.* at 1265.

²⁷⁴. *Id.*

²⁷⁵. *Id.* (omission in original).

²⁷⁶. See *supra* text accompanying note 233.

²⁷⁷. See *supra* text accompanying note 233.

Professor Alafair Burke discusses the objective–subjective dichotomy in the domestic-violence context, which operates in the determination of whether a victim who kills her abuser can successfully assert a battered-women’s-syndrome claim of self-defense.²⁷⁸ When evaluating the viability of a battered-women’s defense, courts generally hold that the characteristics of the defendant, or domestic-violence survivor, and all the circumstances of the case must be taken into account. Burke proposes that this standard is more appropriately termed “contextualization” because it combines both objective and subjective analyses.²⁷⁹ A pure objective approach would hold the “defendant’s beliefs against those of a hypothetical reasonable person, without taking into account the individual characteristics of the defendant,” while a pure subjective approach would presumably consider only the defendant’s subjective beliefs regardless of whether they were reasonable.²⁸⁰ Contextualization, like situational coercion, considers the reasonableness of the defendant’s beliefs in light of her individual circumstances. Thus, rather than characterizing the evaluation of battered-women’s syndrome as objective or subjective, the requirement of reasonableness is contextualized.

Similarly, in the trafficking realm, coercion is also highly contextualized. The trafficked victim’s subjective feelings of being coerced must be objectively reasonable when considering the trafficked victim’s circumstances. “Circumstances” include both the victim’s particular vulnerabilities as well as the specific facts surrounding the case. As the *Bradley* court stated, “Viewed with the rest of the charge, the district court’s instruction makes clear that any fear of serious harm on the part of Hutchinson or Flynn needed to be reasonable for an individual with his special vulnerabilities.”²⁸¹

A similar dichotomous analysis takes place in *United States v. Farrell*.²⁸² In this case, the defendants recruited individuals from the Philippines to work as housekeepers in their hotels in South Dakota.²⁸³ The defendants subjected the workers to harsh working conditions and coerced the workers’ compliance through threats of violence, deportation, and social isolation.²⁸⁴ The court determined that the evidence established sufficient coercion for a finding of forced labor.²⁸⁵ The workers “subjectively feared” the defendants because they believed that the defendants were capable of “hunt[ing] them

278. Alafair S. Burke, *Rational Actors, Self-defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002).

279. *Id.* at 286–87.

280. *Id.* at 288.

281. *United States v. Bradley*, 390 F.3d 145, 153 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

282. 563 F.3d 364 (8th Cir. 2009).

283. *Id.* at 366–67.

284. *Id.* at 367–70.

285. *Id.* at 372.

down . . . if they were not able to meet their debt obligations or left the Farrells' employment."²⁸⁶ Furthermore, the court found that the victims' subjective fears were reasonable and supported by objective evidence.²⁸⁷ For example, the evidence showed that one of the defendants "regularly lost his temper during meetings at the hotel, revealing to the workers his volatile temper and sparking fears that he would resort to physical violence."²⁸⁸ The victims also reasonably believed that the defendants were "powerful people" because they showed the workers a letter from South Dakotan congresspersons "fixing" the workers' visas: "The visas were subsequently approved, leading the workers to believe that the Farrells were well connected politically."²⁸⁹

The above legal analysis demonstrates that the TVPA's coercion standard is situational, placing primary emphasis on the victim's individual circumstances, vulnerabilities, and lack of power to determine the sufficiency of a defendant's coercive conduct for a forced-labor violation. Why is this standard preferred over the no reasonable alternative framework to address coercion in the trafficking context? What are the ontological features of situational coercion and what is its scope? The next Part addresses these questions.

VI. THE ONTOLOGY OF SITUATIONAL COERCION

A. *SITUATIONAL COERCION AND NO REASONABLE ALTERNATIVE COMPARED*

As discussed in Part II, the no reasonable alternative framework operating in involuntary-servitude cases prior to the enactment of the TVPA resembles the predominant ontology of coercion identified in modern moral philosophy. This framework consists of (1) a proposal in which the coercer wrongfully threatens to make the coercee worse off with respect to a moral baseline if the coercee fails to comply with the coercer's demands, and (2) a choice in which the coercee submits to the wishes of the coercer to avoid the threatened unreasonable alternative. This "standard" account of coercion is favored in the law because it reflects normative commitments that can morally justify or excuse a coercee's compliance with a coercer's demands, especially when the coercee's conduct, standing alone, would not be morally defensible. For example, a coercee who steals bread under threat of a coercer who threatens to kill a coercee's family may be excused from the criminality of the theft and may also be justified to steal in order to protect his or her family. The standard account also explains when a coercer's threat may be criminally culpable. For example, the robber who threatens to kill a victim unless the victim hands over his wallet violates the

²⁸⁶. *Id.* at 373.

²⁸⁷. *Id.*

²⁸⁸. *Id.*

²⁸⁹. *Id.* (internal quotation marks omitted).

victim's rights to preserve his life and keep his possessions. In both cases, the coercer's threats clearly violate the coercee's rights and undermine the coercee's freedom by severely constraining the coercee's choice set.²⁹⁰

Traditionally, within the Thirteenth Amendment context, the baseline for the no reasonable alternative framework has been set at threats of physical or legal harm. This makes intuitive sense for a moralized theory of coercion: it is morally wrong when a coercer threatens a coercee with physical harm or legal restraint for failure to work. This moral aspect appears to be the focal point for Wertheimer's theory of coercion. Though he acknowledges the relevance of context in setting the baseline and that baselines may vary depending on the case, he places primary emphasis on defining coercive threats according to their rights-violating effects: "But how do we *set* B's moral baseline? In my view, a full answer to this question would require nothing less than a complete moral and political theory. . . . Generally speaking, the moral baseline approach rests on a theory of *rights*."²⁹¹

Consequently, if coercion analysis involves substantive moral judgments, then "[d]epending on one's moral outlook—utilitarian, Kantian, contractarian, libertarian—one will understand the moral baseline in very different ways."²⁹² Thus, in the harder cases of involuntary servitude and trafficking that involve nonphysical coercion and indirect threats of nonviolent harm, the no reasonable alternative framework for coercion may be inappropriate. For example, an employer might warn an employee that he will not send money to the employee's family if the employee complains about the working conditions.²⁹³ In another case, an employer threatens to evict a worker from his employer-provided housing if he fails to work.²⁹⁴ The moral baseline is unclear in these cases, particularly when the workers enjoy some amount of freedom and may even earn more than minimum wage.²⁹⁵ These cases may be void of directly coercive threats that are objectively identifiable and severe. It is these "blurry line" cases that are subject to arbitrary assessments by the evaluator, whether a judge, jury, or prosecutor of trafficking crimes or immigration officer determining T visa eligibility.

290. Zimmerman, *supra* note 95, at 134 ("The intuitive idea underlying coercion is that the person who does the coercing undermines, or limits the freedom of the person who is coerced" (emphasis omitted)).

291. WERTHEIMER, *supra* note 11, at 217.

292. JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 169 (2005).

293. United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 935 (2009).

294. Garcia v. Audubon Cmty. Mgmt., LLC, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

295. United States v. Bradley, 390 F.3d 145, 145 (1st Cir. 2004) (explaining that the trafficked workers earned more than minimum wage and could travel outside of the farm unaccompanied), *vacated on other grounds*, 545 U.S. 1105 (2005).

Depending on one's normative convictions, a case may count as coercion or not. As discussed in Part III, in the absence of an adequate conceptual framework for implementing the TVPA's coercion standard, the ambiguity of such cases has often resulted in the persistence of the conservative application of the no reasonable alternative framework. The attempt to identify clear violations of moral baselines in cases whose complexity and subtlety defy evidence of overt threats has excluded abused workers from the TVPA's protections.

B. SITUATIONAL COERCION: CIRCUMSTANCES, POWER, AND VULNERABILITY

I have proposed a situational coercion theory, which better accommodates the empirical realities of trafficking cases described above. In actuality, many human-trafficking cases appear to fall somewhere between consent and coercion. Those who are willing are easier to coerce. Thus, trafficked persons often begin as voluntary migrants who seek economic opportunity. Subsequent to arrival, the trafficked worker, legally disenfranchised and culturally alienated, is far more vulnerable to exploitation. Workers may receive compensation. They may even be free to run errands or move throughout their neighborhood. However, they may not have the freedom to leave their work situation because of a mix of the employers' intimidating conduct with the workers' own economic or social circumstances.

Like the no reasonable alternative framework, situational coercion is also a phenomenon of constrained choice sets, which limit an individual's freedom, but its sufficiency does not rely on violation of that individual's moral baseline. Instead, the constraints on a worker's alternatives depend on all the circumstances of the case, including the worker's vulnerabilities and the power inequality between the worker and the employer. Vulnerabilities can include such things as irregularized immigration status, cultural and linguistic isolation, poverty and impoverished dependent family members, youth, and illiteracy. Differentials in power are characterized by the worker's dependency on the employer and the employer's ability to inflict some type of harm on the worker. The situational coercion framework asks whether the alleged trafficker took advantage of these vulnerabilities and power imbalances to obtain labor or services at an exploited price. Thus, as described in *Garcia v. Audubon*, the undocumented status of the workers and their dependency on their employer for housing provided the employer with enormous power over them. The employer exercised this power and forced the workers to comply with the exploitive working conditions by "taking advantage of the [workers'] undocumented immigration status" and threatening the workers with eviction when they complained about the

substandard working conditions.²⁹⁶ The court determined that the workers established a prima facie case for coercion under the TVPA.²⁹⁷

Philosopher Joan McGregor adopts a similar approach in a critique of *Garrity v. New Jersey*,²⁹⁸ a Supreme Court case involving a police officer threatened with losing his job if he refused to answer questions that subjected him to self-incrimination.²⁹⁹ What makes this case coercive, according to McGregor, is that the state had the “power” and “bargaining advantage” to cause the police officer harm.³⁰⁰ She explains that “[c]oercion is based on the nature of the alternatives and the relative bargaining positions of the agents involved.”³⁰¹ Moreover, “The circumstances in which the proposal was made are significant to the determination of coercion.”³⁰² McGregor also applies this model of coercion to economic transactions: “[C]oercion involves exercising power over another; in the market, it involves exercising superior bargaining power.”³⁰³ The sufficiency of coercion is based on the nature of this power relationship and whether it entails the dependence of the weaker party on the stronger party. If the stronger party then takes advantage of the weaker party’s vulnerabilities, this constitutes coercion.³⁰⁴

The relevance of power and vulnerability in the determination of a trafficking violation has been recognized by a number of psychological and sociological studies.³⁰⁵ A recent report explains that the “most common and

296. *Garcia*, 2008 WL 1774584, at *2.

297. *Id.*

298. 385 U.S. 493 (1967).

299. McGregor, *supra* note 31, at 231 (critiquing Michael Philips’s discussion of *Garrity* in his article, *Are Coerced Agreements Involuntary?*).

300. *Id.* at 232.

301. *Id.*

302. *Id.*

303. Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RES. ARCHIVES 23, 25 (1989).

304. *Id.* at 34.

305. ANTI-SLAVERY INT’L, TRAFFICKING FOR FORCED LABOUR IN EUROPE: REPORT ON A STUDY IN THE UK, IRELAND, THE CZECH REPUBLIC AND PORTUGAL (2006) [hereinafter ANTI-SLAVERY INT’L, EUROPE], available at http://www.antislavery.org/includes/documents/cm_docs/2009/t/trafficking_for_fl_in_europe_4_country_report.pdf; INT’L LABOR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (2005); KLÁRA SKRIVÁNKOVÁ, ANTI-SLAVERY INT’L, TRAFFICKING FOR FORCED LABOUR: UK COUNTRY REPORT (2006); OFFICE OF THE SPECIAL REPRESENTATIVE & CO-ORDINATOR FOR TRAFFICKING IN HUMAN BEINGS, ORG. FOR SEC. & CO-OPERATION IN EUR., OCCASIONAL PAPER SER. NO. 3, A SUMMARY OF CHALLENGES ON ADDRESSING HUMAN TRAFFICKING FOR LABOUR EXPLOITATION IN THE AGRICULTURAL SECTOR IN THE OSCE REGION (2009) [hereinafter OSCE No. 3], available at http://www.osce.org/publications/cthb/2009/07/38709_1338_en.pdf; OFFICE OF THE SPECIAL REPRESENTATIVE & CO-ORDINATOR FOR TRAFFICKING IN HUMAN BEINGS, ORG. FOR SEC. & CO-OPERATION IN EUR., OCCASIONAL PAPER SER. NO. 1, A SUMMARY OF CHALLENGES FACING LEGAL RESPONSES TO HUMAN TRAFFICKING FOR LABOUR EXPLOITATION IN THE OSCE REGION (2006), available at <http://www.osce.org/>

perhaps the most problematic” means of coercing labor is through the “abuse of power or of a position of vulnerability.”³⁰⁶ The characteristics that render victims vulnerable to coercion are wide ranging, including “insecurity or illegality of the victim’s administrative status, economic dependence or fragile health.”³⁰⁷ Vulnerability may be “physical, psychological, emotional, family-related, social or economic.”³⁰⁸ The presence of vulnerabilities facilitates coercion. Explicit threats are not needed when the workers, because of their desperate situations, must depend on their employer for basic essentials: “Economic deprivation creates dependence on the trafficker for food and shelter, with victims unable to find other viable options.”³⁰⁹ These “multiple dependenc[ies]” exacerbate power differentials, allowing for increased opportunity to manipulate and control the insecure workers.³¹⁰

McGregor contends that the moral baseline approach (or what I have called the no reasonable alternative framework) does not consider the relevance of power inequalities in the determination of coercion claims: “[T]he ‘better off’/‘worse off’ distinction ignores the power relationships that occur when there are radically disparate bargaining strengths.”³¹¹ This proposition seems correct, providing more support for my suggestion that the situational coercion framework is better suited for the more nuanced contemporary forced-labor cases. For example, under the no reasonable alternative approach, it is not clear that the employer’s conduct in *Garcia v. Audubon*³¹² violated the workers’ moral baseline. The undocumented status of the workers constricted their options for employment, and they lacked housing before they came into the employ of the defendant. The employer offered the workers employment and housing in exchange for their labor at a lower price.³¹³ Therefore, by gaining employment and housing, the employer’s proposal improved the workers’ situation relative to their

publications/cthb/2008/01/23622_811_en.pdf; Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185 (2006).

306. OSCE NO. 3, *supra* note 305, at 38 (quoting Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319) (internal quotation marks omitted).

307. *Id.* (quoting Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report, ¶ 83, at 38, C.E.T.S. No. 197 (May 15, 2005)) (internal quotation marks omitted).

308. *Id.* (quoting Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report, *supra* note 307, at ¶ 83, at 38).

309. Hopper & Hidalgo, *supra* note 305, at 198.

310. ANTI-SLAVERY INT’L, EUROPE, *supra* note 305, at 10.

311. McGregor, *supra* note 303, at 24.

312. *Garcia v. Audubon Cmty. Mgmt., LLC*, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

313. *Id.* at *1.

baseline. Taking away the employment and housing would simply return the workers to their pre-proposal situation. Under the no reasonable alternative model of coercion, the employer's proposal constituted a noncoercive offer. The employer's conduct did not threaten to make the workers worse off according to their baseline.

Is there a baseline approach that might characterize offers such as these as coercive? David Zimmerman proposes that some offers do coerce if the baseline is nonmoralized.³¹⁴ In his article addressing coercive wage offers, Zimmerman critiques the notion that only threats can coerce by developing additional conditions that may be relevant to the determination of whether a proposal is coercive.³¹⁵ He argues that some proposals present an alternative that improves the recipient's baseline. Thus, they are not rights violating, yet may still be coercive. He imagines a proposer, *A*, who transports *Q* to a desert island.³¹⁶ Destitute on the island, *Q* will starve to death. *A* then offers *Q* a job at a grossly substandard wage. There are no other means of income available. *Q* takes the job. Zimmerman contends that this offer is coercive. He contrasts this example with another. *Q* is already destitute and on the desert island. *B* offers him a job at the same grossly substandard wage offered by *A*. This offer is not coercive. Why? *B* was not responsible for causing *Q*'s pre-proposal situation, while *A* was responsible for creating *Q*'s vulnerable circumstances. Zimmerman suggests that if *B* offers *Q* the job and then prevents *Q* from improving his circumstances by leaving the island, then *B*'s offer becomes coercive. Zimmerman's theory rests on the proposer causing the recipient's vulnerable pre-proposal situation or actively preventing the recipient from improving situations. Thus, in the end, the nonmoralized baseline account of coercion is not all that different from the moralized baseline account. If the proposer took no part in creating the recipient's background conditions or interfering in *Q*'s betterment, the proposer is merely taking advantage of the recipient's circumstances, which may constitute exploitation, but not coercion.³¹⁷

C. THE SCOPE OF SITUATIONAL COERCION: A THEORY OF
EXPLOITATION OR COERCION?

What is the difference between coercion and exploitation, and how is this question relevant to the scope of situational coercion? According to the moral baseline approach, acts of coercion require more immediate intervention because they involve rights-violating threats to a coercee's welfare, which are "specifically attributable" to the coercer.³¹⁸ Exploitation,

314. Zimmerman, *supra* note 95, at 123.

315. *Id.*

316. *Id.* at 133.

317. *Id.*

318. WERTHEIMER, *supra* note 11, at 219 ("[T]he moral baseline approach allows us to distinguish—to the extent that we want to—between *B*'s background conditions for which *A* is

on the other hand, involves the exercise of superior bargaining strength to take advantage of another's preexisting adversity, of which the exploiter took no part in creating.³¹⁹ Exploitation also includes "hard bargaining," which occurs with mutual consent, may even be mutually beneficial, and therefore, may not call for the law's intervention. As I have explained, the situational coercion model focuses on the vulnerability of the trafficked worker regardless of whether the trafficker actually caused or, instead, took advantage of these preexisting vulnerabilities. Moral baseline advocates may therefore regard the situational coercion framework as a form of exploitation, preferring the no reasonable alternative framework for coercion because of its focus on the coercer's objectively identifiable and severe threats. By equating situational coercion with exploitation, moral baseline advocates may also contend that situational coercion has less normative force than the no reasonable alternative framework. In this Subpart, I explore the theoretical distinction between coercion and exploitation. I then defend the situational coercion framework against this normative critique.

Wertheimer argues that as long as a proposal maker did not cause the background conditions that placed another individual in a vulnerable position, the proposer is not guilty of coercion.³²⁰ He instead regards agreements made between two unequal bargaining units as exploitive. He also recognizes that the exploited party in these arrangements experiences hard choices.³²¹ Like coercion, hard choices can have a "severe constraining effect" "in which rejecting a proposal means remaining in dire straits, but accepting the proposal is also unpalatable."³²² Nonetheless, Wertheimer maintains that "whatever might be said about B's choice situation itself, it is less wrong for A to take advantage of B's situation than to cause it (or even not wrong at all)."³²³ Thus, coercion enjoys greater moral force than exploitation. What is the importance of the moral force of coercion? Coercion nullifies the morally transformative power of consent. Consent "is an act in which one person alters the normative relations in which others stand with respect to what they may do."³²⁴ Consent may be given subjectively through the consentee's mental state, performatively through

not responsible and rights-violating threats to B's welfare which are specifically attributable to A, or in slightly different terms, between coercive proposals and hard bargaining.").

319. ALAN WERTHEIMER, *EXPLOITATION* 264 (1996).

320. WERTHEIMER, *supra* note 11, at 219.

321. *Id.* at 233; *see also* WERTHEIMER, *supra* note 202, at 172 (noting also that hard choices can be nonexploitive); WERTHEIMER, *supra* note 319, at 269.

322. WERTHEIMER, *supra* note 11, at 233.

323. *Id.* at 40.

324. John Kleinig, *Consent*, in 1 *ENCYCLOPEDIA OF ETHICS* 299, 300 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001); *see also* GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 112 (1996) (explaining that consent can transform harmful conduct into nonharmful conduct).

conduct, utterance, or the like, or a hybrid of both.³²⁵ Whatever its manifestation, when a person consents to another's wishes, the person gives moral or legal permission for the other to act in a way that might not be legitimate without that consent. Coercion reverses this phenomenon, serving to invalidate any consent that may have been given and to render impermissible any actions derived from the consent.

According to Wertheimer, while coercion vitiates consent, exploitation does not. Coercion focuses on the making of agreements. Exploitation centers on the content of the agreement: "Exploitation and coercion appear to have different foci. Whereas coercion refers to the formation of an agreement, exploitation seems to always include reference to the substance or outcome of an agreement."³²⁶ Coercion takes away the coercee's moral responsibility in consenting to the coercer's demands or imposes moral culpability on the coercer for improperly extracting consent from the coercee. Exploitation involves agreements that may be substantively unfair or harmful, but in the absence of coercion, such agreements are presumed consensual. If desperate background conditions pressure an individual to enter into an exploitive situation, Wertheimer argues that this may call for a repair of the background conditions under which it occurs, but does not necessarily nullify the exploitee's consent to the agreement.³²⁷

For example, exploitation may include the impoverished worker who feels constrained to accept substandard wages to avoid starving. Wertheimer suggests that society may want to repair the conditions of poverty that make this worker desperate. However, he would consider the exploiter who gives a subminimum wage less morally culpable than a coercer who actually threatens a worker with harmful consequences that would worsen the worker's already desperate situation. Why? Wertheimer wants to reserve some room for exploitive agreements that confer a benefit to the exploitee. Though the starving worker feels pressure to accept the lower wage, should he not still have an opportunity to improve his condition? Wertheimer explains: "I think that B might well think that if he were to find himself a soldier in the position of being killed or surrendering, he would like A to be able to take him as a POW, and similar things could be said about the offer of life-saving surgery."³²⁸ Holding examples such as these as exploitive, not coercive, preserves the morally transformative power of consent. Though exploitive in substance, we may want to discourage moral or legal interference in these agreements to protect the autonomy of the exploitee who voluntarily consents and who may also reap benefits from the

325. WERTHEIMER, *supra* note 202, at 144.

326. Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 896 (1997).

327. *Id.* at 905.

328. *Id.* at 906.

arrangement.³²⁹ Thus, Wertheimer's theory allows for exploitation that is both consensual and mutually advantageous. On this account, it may be said that exploitation has less moral force than coercion, which demands legal intervention because it restrains freedom and violates the rights of the coerced.³³⁰

Other theorists contend that exploitation necessitates coercion. For example, traditional Marxists consider capitalist employment arrangements as inherently coercive.³³¹ Though workers in a capitalist economy are not directly forced to work by their employers as under chattel slavery, Marxists contend that general background conditions or "the dull compulsion of economic relations" coerce workers to submit to inherently exploitive employment arrangements.³³² In this way, coercion may be thought of as structural and indirect, giving the appearance of voluntariness, but in fact, undermining the workers' freedom.³³³ Some feminist scholars have applied this approach to the law of rape. Catherine MacKinnon, for example, argues that if the law recognized the "underlying structure of constraint and disparity" propagated by social patriarchy, then the range of nonconsensual or coerced sex would be much larger.³³⁴ Even John Stuart Mill recognized structural coercion in the institution of marriage: "When the law makes everything which the wife acquires, the property of the husband, while by compelling her to live with him it forces her to submit to almost any amount of moral and even physical tyranny which he may choose to inflict, there is some ground for regarding every act done by her as done under coercion . . ." ³³⁵ Wertheimer disagrees with these accounts of structural or institutional coercion in discussing the issues of consent and coercion in sexual relations:

329. The legal enforceability of exploitive agreements is controversial. The criminalization of prostitution is based in part on the notion that it is inherently exploitive to treat sex as a commodity. On the other hand, commercial surrogacy is thought of as exploitive, yet is legally legitimate.

330. See 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 176 (1988) (regarding mutually advantageous exploitation as a "free-floating" evil). "In these cases there is no wrongful loss for the exploitee, who can himself have no grievance." *Id.*

331. KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, THE PROCESS OF CAPITALIST PRODUCTION* (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Random House 1906) (1867).

332. *Id.* at 737; see also Nancy Holmstrom, *Exploitation*, 7 CANADIAN J. PHIL. 353, 359 (1977) ("It is the fact that the [capitalist's] income is derived through forced, unpaid, surplus [wage] labor . . . which makes [wage labor] exploitive."); *id.* at 357.

333. WERTHEIMER, *supra* note 319, at 248.

334. MACKINNON, *supra* note 203, at 175 (explaining that the law of rape faultily presumes that consent exists as a "free exercise of sexual choice under conditions of equality of power").

335. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* § 9, at 959 (W.J. Ashley ed., Longmans, Green & Co. 1909) (1848).

[I]t is a mistake to think that difficult circumstances and inequalities should be regarded as invalidating consent in either morality or law. . . . I do not doubt that women sometimes agree to sexual relations that they would reject under different or more just or equal background conditions. But we do not enhance their welfare or their autonomy by denying the transformative power of their consent.³³⁶

Wertheimer also contends that it would be incorrect to consider the women's partners as "culpable of wrongdoing" simply because "the social and economic structure might encourage women to accept sexual relationships that they might otherwise eschew."³³⁷ Again, the moral efficacy of consent presents an obstacle to a more general view of all exploitive arrangements as also coercive.

How does the framework of situational coercion fit within the theoretical debate around the relationship of coercion and exploitation? Situational coercion is best understood as a theory of coercion, thereby vitiating consent, yet incorporating aspects of exploitation. Situational coercion does not replace, but rather, *adds* to the no reasonable alternative framework—both comprising ways in which coercion may be established for a Thirteenth Amendment violation. The no reasonable alternative framework is appropriate for cases involving direct and objectively identifiable threats of morally egregious consequences for failure to work, while the situational coercion framework applies to the "blurry line" cases where trafficked workers experience coercion through subtle and sometimes unspoken ways. Evolving legislation and jurisprudence indicate the situational paradigm, which evaluates the sufficiency of coercion based on all the surrounding circumstances, including the worker's vulnerabilities and the presence of power inequalities. As stated in *Calimlim*, "The evidence showed that the Calimlins intentionally manipulated the situation so that Martinez would feel compelled to remain."³³⁸ The court rejected the defendants' claim that they were "innocent employers who simply bargained for mutual advantage . . . [striking] a fair deal with Martinez for the value of her labor . . . [who] enjoyed a fine lifestyle while she lived with them."³³⁹ The court assessed the circumstances of the case and found that the defendants took advantage of Martinez's undocumented status. The court repudiated the defendants' attempt to place fault on the background conditions of immigration restrictions for Martinez's predicament:

336. WERTHEIMER, *supra* note 202, at 191.

337. *Id.* at 188.

338. *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 935 (2009).

339. *Id.* at 714.

Perhaps, [the defendants] concede, they did take some advantage of the fact that she was present in the country illegally, but they blame the immigration system, not themselves, for that inequity. This was a fair deal, they conclude, from which they reaped no net financial gain.

This argument makes no sense. The Calimlins must have enjoyed some profit, at least on the margin, or else they would not have gone to the trouble of having a live-in housekeeper whom they kept hidden, often through extraordinary measures [H]er labor came at a significantly lower price than a comparable American housekeeper.³⁴⁰

The seriousness of the “harm” confronting noncompliant trafficked workers is determined according to a reasonable evaluation of their vulnerabilities and power imbalances—resembling features of exploitation. This impending harm must then have a coercive effect, compelling the trafficked worker “to continue performing labor or services in order to avoid incurring that harm.”³⁴¹ It is important to note that the language of the TVPA’s coercion standard does not require that the trafficked worker have “no choice” but to perform the labor. This is an implicit element of the no reasonable alternative framework, which requires that the coercer threaten to violate the coercee’s moral baseline, thereby leaving the coercee with “no choice” but to submit to the coercer’s demands.³⁴² The situational coercion framework simply indicates that the trafficked worker’s options are constrained to the extent that his or her consent to the work situation is not fully and freely unimpeded. For example, the workers in *Garcia* continued to labor to avoid eviction, and the domestic worker in *Calimlim* felt “compelled” to work in hopes that her employers would send money home to her family in the Philippines. Thus, situational coercion is distinct from Wertheimer’s account of exploitation, which does not require a “defect in consent.”³⁴³ Situational coercion, instead, finds more in common with hybrid theories, like those advanced by McGregor referenced earlier, which can be

340. *Id.* at 714–15.

341. 18 U.S.C. § 1589(c)(2) (Supp. II 2008).

342. “No choice” is a term of art. It does not mean that the coercee literally has no choice because the coercee may still choose to reject the coercer’s demands and suffer the consequences. The relevance of “no choice” rests on the unreasonableness of the alternatives. If the alternatives the coercer presents to the coercee are unreasonable to the degree of reaching moral wrongfulness, Wertheimer would regard this as coercive: “I have argued elsewhere that the single most important factor in determining when proposals nullify the transformative power of consent on grounds of coercion is whether A proposes to make B worse off than her moralized baseline” WERTHEIMER, *supra* note 202, at 167 (emphasis omitted).

343. WERTHEIMER, *supra* note 319, at 253 (“I have argued that a defect in consent is not a necessary condition of exploitation.”).

understood as combining aspects of coercion and exploitation.³⁴⁴ These theories recognize the coerciveness of an individual's deliberate exploitation of another's vulnerability:

Many theorists make a lot of whether the proposer has created the evil or merely used background circumstances to his advantage. . . . [C]an't they both be methods of coercing another? . . . If offers never coerce, then the least well off in society become the least susceptible to coercion, since their baselines are so terrible to begin with. That implication seems counterintuitive. Certainly the least well off are open to exploitation through their vulnerable circumstances, which leads, at least some of time, to their being coerced.

. . . [W]e may want to leave room for when individuals are in such desperate circumstances that they may be vulnerable to coercion.³⁴⁵

Situational coercion is also distinct from Marxist theories that regard exploitation as a form of structural coercion. It is undeniable that systemic background conditions, such as poverty and immigration restrictions, facilitate the operation of situational coercion. We are reminded of the all-too-typical case of the unscrupulous employer taking advantage of a worker's precarious immigration status to exploit him or her. However, situational coercion as conceived under the TVPA is limited to the dyadic relationship of perpetrator to victim. Situational coercion requires a case-by-case evaluation that considers all the circumstances to determine whether an employer coerced a worker to perform labor by taking advantage of that worker's vulnerabilities.

In contrast, a theory of structural coercion in the context of human trafficking might place great emphasis on the general coerciveness of immigration laws, given that ninety percent of all labor-trafficking cases victimize immigrant workers, and almost invariably, these cases evidence explicit or implicit threats of deportation. A structural coercion analysis would eliminate consideration of the employer's conduct and the employee's possible consent and focus instead on whether the structure of

344. See *supra* notes 298–304 and accompanying text; see also FRANKFURT, *supra* note 95, at 45–46 (emphasizing consideration of background conditions in determining an instance of coercion); John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 258 (1942) (suggesting that when one individual deliberately exploits another's adversity, “the fact that he did not create [it] should be treated as of little importance”); Joel Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201, 208–09 (Rolf Sartorius ed., 1983) (explaining that if an individual utilizes his superior strength over another by manipulating the other's options so that the other accepts the offer, the offer is coercive); Vinit Haksar, *Coercive Proposals [Rawls and Ghandi]*, 4 POL. THEORY 65, 69 (1976) (regarding exploitive offers as coercive because they “involve an attempt to take an unfair advantage of the recipient's vulnerability”).

345. MCGREGOR, *supra* note 292, at 179.

immigration laws coerced immigrant workers into accepting exploitive work arrangements.³⁴⁶ For example, unlawful presence itself can be perceived as coercing undocumented immigrants into compliance with substandard working conditions. As a ground of removability,³⁴⁷ unlawful presence sustains a climate of fear, silencing immigrants and keeping them from speaking out against exploitive labor conditions for fear of discovery by immigration authorities. However, situational coercion, as a theory of dyadic coercion, requires that the employer *intentionally* take advantage of a worker's vulnerabilities to exploit.

Analysis of the implementation of the Immigration Reform and Control Act of 1986 ("IRCA") illuminates the differences between situational coercion, the no reasonable alternative framework, and structural coercion. IRCA made it unlawful for employers to knowingly hire illegal aliens, transferring immigration-enforcement functions to the workplace.³⁴⁸ As a result, some employers have continued to hire undocumented immigrants, only to threaten to report them to immigration authorities once workers begin to assert their rights against unlawful working conditions.³⁴⁹ By wielding the broad "coercive power" conferred to them by IRCA to deliberately take advantage of undocumented workers,³⁵⁰ these employers situationally coerce their workers. In other words, the employers effectuate the situational coercion of these workers by exploiting their vulnerable status to silence them and to gain their compliance with substandard working conditions. Under a no reasonable alternative analysis, the workers are not coerced. The employers may argue that it is within their rights to make such threats since IRCA empowers them to act as immigration screeners.³⁵¹ Furthermore, such threats do not violate the workers' moral baseline as their deportability preceded the employment situation. The employers did not create this background condition. By merely taking

346. See, e.g., Robert Mayer, *Guestworkers and Exploitation*, 67 REV. POL. 311, 318 (2005) ("In guestworker transactions, for example, host employers are able to exploit foreign labor because the host government is using its coercive power to block other options, such as permanent residency with equal rights. The guests are not forced to come by the hosts, but they are forced to choose from a constrained set of options, the best of which may result in others gaining at their expense.").

347. 8 U.S.C. § 1227(a) (Supp. II 2008).

348. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a), 100 Stat. 3359, 3360-65 (codified as amended at 8 U.S.C. § 1324a (2006)).

349. ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 53 (2009); DORIS MEISSNER & DONALD KERWIN, *MIGRATION POLICY INST., DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE* 27-38 (2009); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 211-13.

350. Wishnie, *supra* note 349, at 215.

351. See Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1120-23 (2009); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 779 (2008).

advantage of the workers' vulnerable circumstances to gain a labor benefit, the employers exploit the workers, but do not coerce them.

Under a theory of structural coercion, it may be argued that even when employers do not engage in abusive conduct, IRCA's de facto deputization of employers as immigration enforcers creates an implicit coercive choice set for undocumented workers: comply with exploitation or reject and risk deportation. In this way, undocumented workers may be structurally coerced—our immigration laws maintain a general atmosphere of coercion, causing undocumented workers to submit to unfair labor practices. A structural coercion theory as applied to undocumented-worker exploitation is an important, yet underexplored area, which may provide insight into the multiple ways in which immigrant workers experience coercion.³⁵²

This Article, however, has advanced the theory of situational coercion, which pertains to the dyadic relationship between trafficker and trafficked worker. It is less of a conceptual leap than structural coercion since it retains the individual worker's autonomy, leaving open the possibility that the worker may have freely consented to what would otherwise appear to be an exploitive employment arrangement. In order to determine the existence of coercion, the situational framework asks whether the employer deliberately took advantage of power imbalances and worker vulnerabilities—which may include, but is not limited to, undocumented status—in order to gain a worker's compliance with substandard working conditions.

VII. CONCLUSION

This Article has examined the descriptive and normative scope of coercion in the laws addressing contemporary involuntary labor. In doing so, it has proposed a new framework—situational coercion—which better accommodates the sociological realities of human trafficking. Such a task poses both legal and philosophical challenges. Historically, the use of coercion to gain advantages over individuals has been of significant concern to philosophers and legal theorists. A voluminous discourse has emerged, seeking a normative account of the essential features of coercion that achieve compliance of others yet distinguish it from overt force. These theoretical inquiries into coercion are crucial to provide jurisprudential support for laws that hold coercers culpable and that nullify the consent of coerced. In other words, *what we mean by coercion matters*.

Previous to the TVPA's passage, Thirteenth Amendment doctrine required threats of physical or legal harm for a violation of involuntary servitude. The prevailing conceptual framework for coercion demanded that a coercer make specific threats wrongfully intended to make the coerced

352. Kathleen Kim, *Incoercible* (unpublished manuscript) (on file with author) (examining the various ways in which the structure of immigration laws both cultivates coercion in the undocumented workplace and also prevents legal relief from it).

worse off, leaving the coercee with no reasonable alternative but to perform labor for the coercer. Setting the baseline at this level made sense—threats of physical or legal injury for failure to work constituted objectively blameworthy conduct. The TVPA’s passage expanded the definition of coercion, recognizing that nonviolent and nonphysical coercion could also effectuate forced labor. Yet, in the absence of a new conceptual framework to reflect this descriptive expansion, the no reasonable alternative framework persisted. Consequently, implementation of the TVPA failed to capture the full range of severe cases of worker exploitation that the Act originally intended to address.³⁵³ When faced with an alleged case of trafficking, law-enforcement officials and other adjudicators exhibited divergent views on the types of threats that were morally blameworthy and requiring legal intervention. Further, the no reasonable alternative framework’s emphasis on specific, objectively identifiable threats failed to address human-trafficking cases characterized by the unspoken negative consequences of noncompliance, such as deportation or destitution.

By analyzing various legal developments and drawing from alternative accounts of coercion in philosophy, I have delineated a new paradigm for coercion in the human-trafficking context—situational coercion. Situational coercion requires an examination of all the circumstances of each case, prioritizing evaluation of a victim’s vulnerabilities and power inequalities to determine if an employer deliberately took advantage of a worker to extract labor. This framework does not replace the no reasonable alternative framework, but presents a new way of understanding coercion in cases of human trafficking that do not involve specific threats or clear violations of moral baselines. The situational coercion framework overcomes the previously described implementation difficulties by adapting to the particular circumstances of each case and recognizing that the intentional exploitation of great differentials in power can have a coercive effect, calling for legal intervention.

For example, application of the situational coercion framework to the case of Jose Ligaya, discussed in Part IV, may have rendered a *prima facie* case of forced labor.³⁵⁴ In that case, Ligaya provided hard labor to his employers under ambiguous threats: “The traffickers forced me to do those jobs against my will by telling me that if I will not follow her order I will not have a teaching job.”³⁵⁵ Standing alone, such threats under the no reasonable alternative framework are not clearly morally objectionable. Yet, by evaluating all the circumstances of the case under a situational coercion framework, sharp power imbalances come to light. Ligaya depended on his

353. See Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101(b) (Supp. II 2008).

354. See *supra* notes 211–21 and accompanying text (discussing Ligaya case).

355. Lee, *supra* note 211, at 475 (internal quotation marks omitted).

employers for his H1-B immigration status. He also relied on them for all basic necessities such as food and housing. Ligaya's hope for a teaching job in the United States was exploited by his employers against a background of these vulnerable conditions. As his attorney notes, trafficking victims are subject to "complex power relationships and the specific factual situations that give rise to their victimization."³⁵⁶ The immigration adjudicator's denial of Ligaya's T visa was thus "wholly divorced from the power dynamics and context of this case."³⁵⁷

The situational coercion framework clarifies the meaning of coercion in the context of human trafficking. It presents a launching point for further development and exploration into the concept of coercion under the Thirteenth Amendment, as well as in other areas of the law. More importantly, the identification of this framework will bring greater efficacy and substantive force to the implementation of human-trafficking laws—comprehensively vindicating the rights of all trafficked workers.

356. *Id.* at 467.

357. *Id.* at 474.