

Consent to Labour Exploitation

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ABSTRACT

This article argues there is no one-size-fits-all approach to the role of consent to labour exploitation. However, there is significant value in considering the theoretical underpinnings of different legal interventions addressing labour exploitation. The article first explores different theoretical accounts of exploitation in political philosophy: emphasising taking unfair advantage, violation of dignity or coercion. Following the theoretical analysis, the article maps the different legal interventions in labour law, criminal law and public law. It suggests that the starting point of analysing consent to labour exploitation—fairness, dignity, individual coercion, structural coercion and consent—determines the result of the analysis. This section demonstrates the connection between different areas of law and different theoretical approaches to the role of consent to labour exploitation. The different approaches are then applied to examples based on real-world cases. The article concludes that in the context of labour exploitation, consent is a necessary but insufficient condition for the legitimacy and legality of the labour relations. The fairness of the result and protecting workers' dignity should also be considered.

1. INTRODUCTION

Consent has the power to legitimate interactions that would otherwise be illegal or morally wrong.¹ This is the case for touch, sex, accessing private

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¹Heidi M. Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121.

information, appropriation of another's property and other acts. Labour exploitation is considered morally wrong, and at least in some circumstances, illegal. Could consent legitimise it? If so, what would consent to labour exploitation look like?

Each response to the question of consent as legitimating labour exploitation comes at a cost. Legitimising consensual labour exploitation risks exposing workers to poor and unacceptable conditions. Ignoring consent denies workers' agency, and denies them the choice they identify as the lesser of two evils, inflicting on them an even worse fate.² This article does not propose a one-size-fits-all solution to the conundrum of agency and consent to labour exploitation, as such a solution does not exist.

Instead, the article examines interventions in criminal law, labour law and public law regarding consent to labour exploitation. It explores theoretical understandings of labour exploitation and maps approaches to consent in these areas of law. The article first identifies three understandings of labour exploitation in political philosophy: based on unfairness, dignity and coercion. Second, the article maps the different approaches to consent to labour exploitation in law, exploring the connection between the approach to consent to exploitation in different areas of law and the philosophical understandings of labour exploitation. The section demonstrates the differences between legal rules that start with a substantive analysis of the notions of fairness and dignity, those that start with assessing coercion (individual and structural) and those that focus on consent. This section suggests that the starting point of analysing consent to labour exploitation determines the result of the legal analysis. Finally, real-life examples are analysed to demonstrate how the different approaches may vary in both the questions at the heart of legal proceedings and the outcomes of the case.

Criminal law emphasises coercion and violation of dignity, while labour law and public law focus on structural coercion. Consent is given limited weight in both criminal law and labour law, but for different reasons. The article argues that the understanding of 'labour exploitation' shapes the role of consent in legal interventions. It further argues that in the context of work offering poor conditions, consent should be considered a necessary

²See e.g. Jonathan Wolff, 'Structures of Exploitation' in Hugh Collins, Gillian Lester and Virginia Mantouvalou, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018), 175; Bridget Anderson, 'Precarious Pasts, Precarious Futures' in Cathryn Costello and MR Freedland (eds), *Migrants at work: immigration and vulnerability in labour law* (Oxford: Oxford University Press, 2014), 35; Lisa Berntsen, 'Reworking Labour Practices: On the Agency of Unorganized Mobile Migrant Construction Workers' (2016) 30 *Work, Employment and Society* 472.

but insufficient condition for the legitimacy and legality of the labour relations. An understanding of labour exploitation that is not limited to the extreme cases of slavery and trafficking would clearly distinguish between exploitation and coercion, and assess the fairness and dignity of the labour conditions. My own definition of 'labour exploitation' covers abusing worker's vulnerability to offer labour conditions (including remuneration) that fall significantly below acceptable standards, reflected either in labour laws or in standards required to maintain basic human dignity. I consider below different theories that inform or challenge aspects of this definition.

2. DIFFERENT THEORIES OF EXPLOITATION

Exploitation is defined in different ways for different purposes. The common core of most accounts of exploitation is taking *unfair advantage* of another for gain. Following this common core, I consider two additional concepts critical to certain accounts of exploitation. I summarise these as accounts focused on *dignity*, and accounts focused on *coercion*.³

A. Fairness

Taking *unfair advantage* of one's vulnerability to make a gain is the common element in various philosophical and legal definitions of exploitation.⁴ It can

³Amy Weatherburn proposes a somewhat different division of models of political theory analysis of exploitation, to which she refers as the 'redistribution model' (a Marxist model focusing on structural factors and the relationship between capital and labour), the 'human dignity model' (emphasising moral duties and the notions of dignity and degradation) and the 'basic needs model' (emphasising a benchmark sufficient to adequate standard of living). See Amy Weatherburn, *Labour Exploitation in Human Trafficking Law* (Brussels: Intersentia, 2021), 30-39. This is a helpful analysis, though for concepts that inform legal standards, there is some overlap between the second and the third model and the first combines different elements that are more consistent in political philosophy than in law. I therefore find the emphasis of fairness, dignity and coercion more helpful. In her recent work on migrant workers' rights, Boucher classifies under 'exploitation' various forms of labour rights violations and criminal behaviour against migrant workers (see Anna Boucher *Patterns of Exploitation: Understanding Migrant Worker Rights in Advanced Democracies* (Oxford University Press 2023, 28-34). While I find her work insightful and useful, for analytical purposes I consider this definition as too broad. The definitions of exploitation considered here will not cover, for example, some forms of racial discrimination Boucher discusses (e.g. 42).

⁴Alan Wertheimer, *Exploitation* (Princeton, NJ: Princeton University Press 1996), especially 10, 207-246; Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* 1st edn. (Oxford: Oxford University Press, New York 1990), 178; Robert Mayer, 'What's Wrong with Exploitation?' (2007) 24 *Journal of Applied Philosophy* 137.

be expressed in terms of fairness, as well as in terms of proportionality and disparity of value.⁵ The simplest definition based on fairness can be found in Wertheimer's framing of 'A exploits B when A takes unfair advantage of B'.⁶ The unfairness, according to Wertheimer, could refer to the *outcome* of the transaction (its benefit to A or its effect on B).⁷ Alternatively, the focus of the unfairness analysis could be on the *process*, in a situation where A takes advantage of some vulnerability in B's situation or characteristics.⁸ There are three elements to exploitation under this account: 1) vulnerability; 2) that is abused and 3) for gain.

Exploitation as unfairness considers the exploited party (B)'s position in relation to an alternative situation. B might be worse off following the exploitation than they were before (the *status quo ante*) or experience harmful exploitation. Alternatively, B might be worse off compared with a baseline reflecting how they can expect to be treated by A.⁹ This is a situation of mutually beneficial exploitation, central to various philosophical accounts of exploitation.¹⁰ Here, B is better off than she would have been without the transaction with A. However, she is worse off than she could be had A treated her fairly¹¹ a standard that could be reflected in what a person without B's vulnerability would accept.¹² Alternatively, she does not receive the conditions allowing her to flourish.¹³ For many workers, the situation of labour exploitation would be characterised as mutually advantageous exploitation—Mayer's account, for example, considers the exploitation of workers in a sweatshop as his 'paradigmatic case'.¹⁴ Legally, improvement in the situation of a worker does not deny exploitation took place, and may be identified even in cases of trafficking.¹⁵

Exploitative labour might be better than the unemployment and destitution workers face otherwise,¹⁶ but the fact that the alternative is worse does

⁵Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (London: Routledge 2003), 14

⁶Wertheimer (n 4), 10

⁷*ibid.*, 16, 208; for the centrality of A's gain, see also Feinberg (n 4), 203.

⁸*Ibid.*

⁹Mayer (n 4), 141-142.

¹⁰*ibid.*; Wertheimer (n 4), 251-252.

¹¹*ibid.*

¹²*ibid.*, 145. See also Weatherburn (n 3), 56.

¹³Ruth J Sample, *Exploitation: What It Is and Why It's Wrong* (Rowman & Littlefield 2003), 57; Wolff (n 2), 177. See the discussion of exploitation as violation of dignity in the next section.

¹⁴Mayer (n 4), 141.

¹⁵UNODC, 'The Concept of "Exploitation" in the Trafficking in Persons Protocol' (United Nations 2015).

¹⁶Mayer (n 4); Joan Robinson, *Economic Philosophy* (Routledge 2021), 41. See also Weatherburn (n 4), 255.

not render the lesser of two evils just or fair. A particularly notable context of ‘mutually advantageous’ labour exploitation is that of migrant workers, who face fewer and worse alternatives to exploitative labour,¹⁷ and might therefore be more willing to accept poor and exploitative conditions.¹⁸ The significant costs involved in labour migration might leave migrant workers in debt that cannot be repaid at their home state, and therefore have limited choices but to take exploitative labour in the state of destination.¹⁹ Consent might change over time, and people might find themselves in situations where they initially consented to work or travel that they no longer accept but cannot leave. This might be the case when migration policies deny migrants mobility within the labour market.²⁰ A useful notion for assessing this situation (explored recently in an article co-authored with Guy Davidov) is that of a continuum of consent, between free and enthusiastic choice, and coercion denying any (acceptable) alternative.²¹ On this continuum, coercion is not the opposite of consent, but an element characterising a large section of the continuum, and the stronger the coercion is, the further away one gets from free and voluntary choice.

A specific account of unfairness is reflected in Marxist accounts, focusing on labour exploitation under capitalism, and on the vulnerability of workers resulting from structural conditions. Capitalists own the means of production necessary to make a living. Workers, having no such means, have no choice but to offer their labour power to capitalists, for a wage. This dependency on capitalists creates a vulnerability that can be exploited, as labour creates surplus value for capitalists, and workers receive less than the

¹⁷ Anderson (n 2), 35

¹⁸ *ibid*; see also Wilkinson (n 5), 74; UNODC (n 16), 8

¹⁹ E.g. Philip Martin, ‘Reducing Migration Costs and Maximizing Human Development’ in Irena Omelaniuk (ed), *Global Perspectives on Migration and Development* (Springer 2012), 33; Janet Halley, ‘Anti-Trafficking and the New Indenture’ in Prabha Kotiswaran, *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017), 189.

²⁰ Cathryn Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in Alan Bogg and others, *The Autonomy of Labour Law* (London: Bloomsbury Publishing 2015).

²¹ Maayan Niezna and Guy Davidov, ‘Consent in Contracts of Employment’ (2023) 86 *Modern Law Review* 1468. Compare Eithne Dowds, ‘Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force’ (2020) 83 *Modern Law Review* 35, 36, 41 and references therein. In her discussion of rape (p. 46), Dowds notes the ambiguity in using terms such as free choice, reluctant agreement and submission, and suggests reluctant agreement falls on the continuum of consent, while submission does not.

value they create.²² Exploitation occurs when capitalists appropriate surplus value, created mostly (entirely, if one denies the legitimacy of capitalists' ownership over the means of production)²³ by workers. Importantly, these accounts emphasise that the workers' vulnerability stems from structural factors and is not necessarily the result of individual coercion.²⁴ The lack of individual isolated coercion does not mean the worker is free, as the only available choice is exploitative wage labour.

B. Dignity

A different standard concerns the way B should be treated with respect to their *dignity*, and objection to 'using' people in a certain way. Dignity-based accounts reject defining exploitation solely based on unfair distribution. Instead, they emphasise the degrading and disrespectful use of vulnerabilities for self-interest, or the lack of respect for people's inherent value.²⁵ A Kantian notion of the moral wrong of using people as means rather than ends underlies these accounts.²⁶ Exploitation is seen as degrading or humiliating, particularly when it involves personal and meaningful aspects.²⁷ Zwolinski argues that humans possess a unique characteristic that distinguishes them from mere objects.²⁸ Wolff suggests that certain forms of exploitation, such as sex work or domestic work, might be demeaning or damaging, hinder flourishing and are better explained in terms of 'dignity' rather than 'fairness'.²⁹

²²Karl Marx, *Capital: A Critique of Political Economy* Ben Fowkes and David Fernbach trs. (London: Penguin Books in association with New Left Review, 1981), 272, 293, 301; Gerald A Cohen, 'The Labor Theory of Value and the Concept of Exploitation' [1979] *Philosophy & Public Affairs* 338, 342. See also Allen Wood, 'Unjust Exploitation: Unjust Exploitation' (2016) 54 *Southern Journal of Philosophy* 92, 96.

²³Wertheimer 82, 227-228, and references therein.

²⁴Wertheimer (n 4), 248; Wood (n 22), 102; Matt Zwolinski, 'Structural Exploitation' (2012) 29 *Social Philosophy and Policy* 154, 156.

²⁵Allen W Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136, 147; Sample (n 13), 57.

²⁶E.g. Sample (n 13), 56, 64-65; Allen E Buchanan, *Ethics, Efficiency, and the Market* (Oxford: Clarendon Press, 1985), 87-89.

²⁷E.g. Wood (n 25), 146; Mayer (n 4), 137

²⁸Matt Zwolinski, 'Exploitation and Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (London: Routledge, Taylor & Francis Group, 2020), 153.

²⁹Wolff (n 2), 177. Compare with Weatherburn (n 3) suggesting to define labour exploitation through the use of a standard reflecting 'a decent minimum of well-being that guarantees respect for human dignity' (257)

Cases concerning trafficking for labour exploitation illustrate these notions.³⁰

A related argument is in Mill's analysis of the limits of autonomy. According to Mill, society is not justified in interfering in individual actions that do not harm others, in order to protect individual autonomy. However, consent to be enslaved undermines one's autonomy as it denies any future use of autonomy.³¹ Kleinberg suggests reframing Mill's idea in terms of dignity: 'to give up one's dignitarian status' is inconsistent with dignity.³²

I view exploitation as encompassing both taking unfair advantage of vulnerability and violation of dignity. Unfairness is the primary notion, and the Kantian idea of degrading and disrespectful use provides an additional (or better) explanation in some contexts, such as the violation of basic labour rights. Thus, payment below minimum wage, or exposing workers to health and safety risks may be described as unfair, but they are wrong in violating the dignity of workers treated this way.

C. Coercion

Some definitions of exploitation focus on *coercion*. They include an element of unfairness and disparity of value and may include violation of dignity. However, they also require that the worker has to accept the unfair terms due to coercion and lack of choice. Not all accounts accept this requirement, and some disagree on what qualifies as coercion. According to Wertheimer, A uses coercion when they threaten to make B worse off than B's baseline condition, when A's threat is to do something A does not have a right to do.³³

This position reflects an active role of *creating* vulnerability, as opposed to taking advantage of an *existing* vulnerability.³⁴ Conversely, Wood recognises that a party might lack acceptable alternatives, not because of the exploiter's act, but because background conditions deny the exploited acceptable

³⁰Weatherburn (n 3), 217, 255.

³¹John Stuart Mill 'On Liberty' David Bromwich & George Kateb eds. (New Haven, CT: Yale UP, 2003), 164.

³²John Kleinig, 'Paternalism and Consent' in Müller and Schaber (n 28), 148.

³³Wertheimer, 16, 136-137. Compare with the legal doctrine of 'unlawful act duress', see e.g. *Pakistan International Airline Corporation v Times Travel (UK) Ltd (Rev1)* [2021] UKSC 40 [87].

³⁴On the distinction see e.g. Wolff, Marija Jovanovic, 'The Essence of Slavery: Exploitation in Human Rights Law' (2020) 20 *Human Rights Law Review* 674, 688, Wood (n 26). See also Weatherburn (n 3), 51.

alternatives.³⁵ As opposed to Wertheimer's more restrictive position, rejecting hard choices between poor alternatives as amounting to coercion,³⁶ Wood frames coercion as either having no choice but to comply (coercion), or having choices that are all unacceptable (constraint).³⁷ Wood further rejects the threat of coercion as being 'worse-off-relative to-a-baseline', a model he identifies as reflecting notions of welfare rather than recognising coercion as linked to freedom from domination.³⁸ In the context of legal standards on trafficking in persons, Allain (based on Wertheimer) links exploitation to 'defect in process', a notion encompassing compulsion, coercion, deception and fraud.³⁹

I do not consider coercion essential for the definition of exploitation. Some exploitative situations might involve an element of coercion, which will worsen them.⁴⁰ However, analytically, these are two distinct concepts: one concerned with the creation of a position of vulnerability, the other with taking advantage of vulnerability, irrespective of its source. Yet, the question of whether exploitation implies coercion depends on how one defines coercion. If all background conditions limiting choices (considered in section 2(e) below as 'structures') are considered 'coercion', it becomes challenging to distinguish between coercion and vulnerability abused in situations of consent to exploitation. Conversely, if a threat or act by the exploiter is required, the standard becomes much higher, excluding some instances of exploitation under the basic unfairness definition.

Coercion and consent are closely related. To be valid, consent should be voluntary, informed and given by someone competent to make the decision to consent.⁴¹ As this article focuses on legal analysis, I adopt the 'performative view' to consent, meaning consent publicly communicated (as opposed to consent as a mental state).⁴²

³⁵Wood (n 25).

³⁶Wertheimer (n 4) 131, 135. See also Anne T Gallagher, 'The International Legal Definition of 'Trafficking in Persons': Scope and Application' in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge: Cambridge University Press, 2017), 93-94.

³⁷Wood (n 22), 99.

³⁸ibid.

³⁹Jean Allain, 'Conceptualizing the Exploitation of Human Trafficking' in Jennifer Clark and Sasha Poucki, *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (London: SAGE, 2019)

⁴⁰Wertheimer (n 4), 255.

⁴¹Emma C Bullock, 'Valid Consent' in Müller and Schaber (n 28), 86; Hubert Schnüriger, 'What Is Consent?' in Müller and Schaber (n 28), 22.

⁴²Schnüriger (n 41), 25.

Some consider legal interventions as less legitimate when the exploited party consents and may benefit from the exploitation.⁴³ In the absence of consent, transactions are less likely to be advantageous to the exploited party.⁴⁴ This relates to the notion of mutually beneficial exploitation explored earlier. Consent is generally treated as an indication of fairness rather than as a conclusive factor. For Feinberg, however, consent means rejection of claims of unfairness and wrongful harm to the exploited party.⁴⁵ Without wrongful harm to the individual, Feinberg requires other justifications for criminal law interventions. Consent can also be linked to the dignity approach to exploitation: requiring consent recognises people's dignity and treats them with respect.⁴⁶

3. CONSENT TO LABOUR EXPLOITATION IN LAW: WHERE IS THE FOCUS?

There are attempts in the literature to define exploitation as a theoretically-informed legal concept, especially in the context of trafficking and slavery.⁴⁷ Within this literature, there is a growing recognition of exploitation as a continuum, between some violations of labour law and workers' rights, to the extreme situations of trafficking, forced labour and slavery.⁴⁸ Such concept naturally blurs the lines between the subject matter of labour law and criminal law.

Exploitation as a legal concept might be ambiguous or inconsistent even within a single instrument. This is the case of the Modern Slavery Act 2015 (MSA). The Act is not limited to labour exploitation, and addresses exploitation as an element of the offence of human trafficking, defined as arranging or facilitating the travel of another person with a view to this person being exploited.⁴⁹

The Act defines exploitation in three alternative but related ways. First, exploitation is defined by enumerating specific situations of exploitation: slavery, servitude, forced labour, sexual exploitation and the removal of

⁴³Weatherburn (n 2), 59; Sample (n 13), 5

⁴⁴Wertheimer (n 4), 253

⁴⁵Feinberg (n 4), 205. The assessment that leads Feinberg to this conclusion is based on exploitation of individual circumstances or traits (credulity, bad taste, bigotry, etc.), and is not clearly relevant to situations of labour exploitation.

⁴⁶Zwolinski (n 28), 153.

⁴⁷Allain (n 31); Jovanovic (n 34); Weatherburn (n 4).

⁴⁸Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' [2010] York: Joseph Rowntree Foundation.

⁴⁹MSA S 2(1)

explicitly recognise risks related to migration status.⁵⁵ The criminal framing of exploitation as targeting only people with specific vulnerabilities is too narrow. As the next section shows, in other jurisdictions, criminal law includes a broader concept of exploitation as taking unfair advantage of vulnerability.

The following sections consider legal standards that more clearly and consistently reflect a specific theory of exploitation—as based on fairness, dignity, individual coercion and structural coercion, as well as focus on consent. Each section demonstrates how the legal analysis of consent and the outcomes of the assessment are determined by the theoretical starting point.

A. Focus on Fairness

For legal interventions focusing on the unfairness of labour exploitation, some consent is inherently implied. However, this consent was given in circumstances that question whether it was truly free and informed. A focus on fairness informed the criminalisation of exploitation by different names. Thus, under the Swedish Criminal Code, the offence of ‘usury’ is defined as:

A person who exploits someone else’s distress, lack of understanding, thoughtlessness or position of dependence when entering into an agreement or some other action with legal consequences in order to obtain a benefit that is manifestly disproportionate to the consideration, or for which no consideration is to be paid, is guilty of usury and is sentenced to a fine or imprisonment for at most two years.⁵⁶

Despite the title ‘usury’, this offence clearly captures the core elements of exploitation as unfairness or disparity of value: taking advantage of a person’s vulnerability (distress, lack of understanding, thoughtlessness or position of dependence), to make unfair (‘manifestly disproportionate’) gain at their expense. Similarly, in the Israeli Penal Law, the offence of ‘extortion’ is defined as:

If a person takes advantage of the distress, physical or mental weakness, inexperience or carelessness of another person for one of the following, then he is liable to three years imprisonment:

⁵⁵See e.g. CPS ‘Modern Slavery, Human Trafficking and Smuggling’ <https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling> (updated 6 July 2022); Metropolitan Police ‘Modern Slavery’ <https://www.met.police.uk/advice/advice-and-information/ms/modern-slavery/>; Essex Police ‘Modern Slavery’ <https://www.essex.police.uk/advice/advice-and-information/ms/modern-slavery/> (all accessed 28 April 2023).

⁵⁶The Swedish Criminal Code, Chapter 9—On fraud and other dishonesty, s 5.

Jovanovic suggests the necessary and sufficient conditions for exploitation as a common element of slavery, servitude, forced or compulsory labour and human trafficking are '(a) abuse of vulnerability of an exploitee; (b) excessive (disproportionate) gain acquired through the actions of an exploitee; (c) sustained action (the practice takes place over a period of time)'.⁶¹ This is a clear approach with fewer elements, generally reflecting the theoretical emphasis on unfairness as the core of exploitation. However, as indicated above, I suggest also considering poor conditions (irrespective of excessive gain) as an element of exploitation.

This section demonstrated that fairness could be adopted in legal standards on exploitation, as was the case in some jurisdictions. However, as these standards create criminal offences and rely on vague and open-ended standards, they might be difficult to apply in practice in cases of exploitation.

B. Focus on Dignity

For accounts focusing on dignity, once exploitation is recognised, consent becomes legally irrelevant. This approach may reflect *paternalistic* considerations, aiming to protect the victim from their own irrational choices, as society (or the lawmakers) knows better than the victims what is in their best interest. Alternatively, it may reflect *moralistic* considerations, focusing on the exploitation as an offence to society.⁶²

Extreme forms of exploitation, such as trafficking and slavery, violate societal morals and offend society as a whole, even if the victim, for whatever reason, did not find them offensive. This approach can be framed in terms of public policy, public order or social values. Criminal law, under this approach, protects society as a whole, not just the victim. The victim's consent is insufficient to justify the harm to society.⁶³

The link between exploitation and degradation is most common for the exploitation of prostitution, though it could also be identified in other forms of exploitation.⁶⁴ In a case concerning the abuse and exploitation of homeless men recruited into construction work, the Court of Appeal stated that

⁶¹Jovanovic (n 34), 693.

⁶²Wertheimer (n 4), 307. However, Wertheimer clarifies his position that exploitation is primarily wrong against the exploited and not against society (309). On moralistic and paternalistic rejection of consent due to the wellbeing of the consenting party see Bullock (n 41), 92.

⁶³Compare *R v Brown* [1993] UKHL 19 (11 March 1993), especially Lord Jauncey's judgment.

⁶⁴Bullock (n 41), 91; UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, (2014), https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf ('UNODC Consent'), 23.

‘Exploitation of fellow human beings in any of the ways criminalised by the legislation represents deliberate degrading of a fellow human being or human beings’.⁶⁵

Some practitioners suggest that people ‘cannot’ consent to severe exploitation. In their explanation of ‘modern slavery’, some police units claim that ‘Even if a victim seemingly agrees to the work, we can still prosecute if the work and conditions aren’t acceptable. Nobody can agree to being exploited.’⁶⁶ Similarly, various international actors argued that one cannot consent to the violation of their right to be free from slavery, servitude and forced labour, as human rights and personal freedoms are inalienable.⁶⁷ Whether the claim that one ‘cannot’ consent to exploitation means that such consent is invalid, that there is no right to consent to exploitation, or that society cannot tolerate such exploitation even with consent, is not always clear.⁶⁸ In a case concerning the exploitation of young people as couriers in ‘county drug lines’, the Court of Appeal explained that the prosecution does not need to prove lack of consent due to, among other reasons, ‘the fact that the concept of “choice” assumes the willingness of the chosen. [...] it is clear that the mischief it seeks to address is the very fact that a vulnerable person has consented; the Act is seeking to protect the young and the vulnerable from their own decision making’.⁶⁹

In the past, international law prohibited the procurement for purposes of prostitution or the exploitation of the prostitution of another person even with their consent.⁷⁰ In contemporary cases one can identify the notion that all instances of exploitation of the prostitution of another violate the prohibition on trafficking, unless free, informed and explicit consent to work in prostitution was given in an undisputable manner. According to this

⁶⁵ *R v Connors* (n 54) [10]

⁶⁶ See the Metropolitan Police and Essex Police, n 55.

⁶⁷ UNODC Consent (n 64), 32 and references therein.

⁶⁸ See e.g. the comments of Mr Wells of the Northern Ireland Assembly during the discussion of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: ‘no one has ever the right to consent to be exploited or abused. That is not a human right, be it for labour, sexual services, cannabis growing or whatever; you can never give your consent to be exploited, and society can never allow you to give your consent to be exploited’ (23 September 2013, Volume 87, No 5, 73).

⁶⁹ *R v Karemera* [2018] EWCA Crim 1432, [60]

⁷⁰ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949 entered into force 25 July 1951) 96 UNTS 271, Art. 1.

approach, implied consent, silence or lack of resistance are insufficient.⁷¹ Some reject consent to prostitution due to considerations of human dignity, morality or public order.⁷² The distinction between consent to prostitution and other forms of work (such as domestic work or hospitality) does not reflect the current position of international law as identified, for example, in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Trafficking Protocol').⁷³ Nonetheless, such a distinction could be identified in some states, and in positions adopted by practitioners.⁷⁴ Others, like Cruz, emphasise that degrading and exploitative work can exist in various forms, not just sex work and that workers may consent to work that is exploitative or degrading.⁷⁵

I suggest that rather than claiming one 'cannot' consent to exploitation, respect to workers' dignity means recognising that people can and often do consent to exploitation. Yet, they do so against background conditions of coercion. Attention should be paid to unacceptable conditions and violation of dignity in all sectors, without denying the existence of choice within constraints.

C. Focus on Individual Coercion

Some legal standards adopt as their starting point the identification of means of coercion, such as force or threats. If such means are present, even if consent was expressed, it cannot be seen as voluntary. This position best reflects the philosophical accounts emphasising exploitation as resulting from coercion, and is clearly identified in instruments criminalising trafficking, slavery and forced labour.⁷⁶ The most important international instrument addressing trafficking in persons is the Trafficking Protocol. According to the Protocol:

⁷¹*SM v Croatia* App No 60561/14 (ECtHR Grand Chamber, 25 June 2020) Concurring Opinion of Judge Pastor Vilanova, [7]-[8].

⁷²Gallagher (n 36), 94.

⁷³(adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, 3.

⁷⁴See examples in the positions of lawyers and practitioners from different countries, UNODC Consent (n 64), 38, 51, 62, 65, 72. See also Gallagher (n 36), 90, 94.

⁷⁵Katie Cruz, 'The Work of Sex Work: Prostitution, Unfreedom, and Criminality at Work' in Alan Bogg and others (eds), *Criminality at Work* (Oxford: Oxford University Press, 2020), 197. On agency in poor and degrading work see also Guy Mundlak, 'The Right to Work—the Value of Work' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007), 347.

⁷⁶This section builds on some of the analysis previously developed in an earlier paper: Maayan Niezna 'The Elements of Consent and Coercion in the Offences of Trafficking and Slavery', *Law, Society & Culture: Trafficking in Persons* (Tel-Aviv University, May 2023) [Hebrew].

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.⁷⁷

The Trafficking Protocol links the irrelevance of consent to the use of means of coercion. It clearly states that the victim’s consent is irrelevant when the means mentioned (such as force, coercion, deception) were used. As the ‘means’ element is a necessary part of the definition of trafficking, in any case that demonstrates all three elements of trafficking (actions, means and purpose) consent will be deemed irrelevant. When the victim is a child, consent is irrelevant even without the use of coercive means. This distinction between adults and children reflects the intention to simplify evidentiary requirements in cases of trafficking in minors, and the approach that minors are incapable of consenting to certain acts.⁷⁸

The United Nations Office on Drugs and Crime (UNODC) Model Law clarifies that ‘a person’s awareness of being employed in the sex industry or in prostitution does not exclude such person from becoming a victim of trafficking’, and that consent is ‘logically and legally impossible’ when means of coercion are used. Consent can only be recognised when the person knows all the relevant facts and exercises their free will.⁷⁹ This position denies consent to prostitution not for paternalistic and moralistic reasons, but due to means of coercion used.

⁷⁷Trafficking Protocol (n 73), 3. See also Council of Europe Convention on Action against Trafficking in Human Beings, 2005 (‘ECAT’), Art 4(b); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, art. 2(4).

⁷⁸UNODC Consent (n 64), 21; *ibid* (Convention), Art. 4(c).

⁷⁹UNODC, Model Law against Trafficking in Persons https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf, 26

In several slavery and enslavement cases, the victim's consent was ruled out as a defence or considered irrelevant for proving the elements of crime. This was the decision in one of the first judgments on enslavement in international law, the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac* case. Serbian soldiers enslaved young Bosnian girls by imprisoning the girls, raping them, forcing them to provide domestic work and transferring them to be raped by other soldiers.⁸⁰ In their appeal against their conviction, the defendants claimed that 'the constant and clear lack of consent of the victims during the entire time of the detention or the transfer' is a constitutive element of enslavement that was not met in this case, as the girls were free to move within and outside the apartment but did not escape.⁸¹ The Appeals Chamber rejected this argument, stating that lack of consent is not an element of the crime of enslavement and does not have to be proven. It added that consent might have evidential relevance in demonstrating the exercise of powers attaching to the right of ownership (the defining element of slavery under international law).⁸² In circumstances such as in this case, that render it impossible to express consent, absence of consent may be presumed.⁸³ In another case, concerning forced labour of non-Serb detainees, the Appeals Chamber ruled that lack of consent is to be proven based on the objective evidence of conditions negating free consent, and individuals' statements about their subjective state of mind are insufficient.⁸⁴

In a case concerning the recruitment of Thai women for prostitution in Australia, the defendants raised the women's consent as a defence against conviction of slavery. The Australian High Court adopted the *Kunarac* ruling, and determined that while consent may be relevant in slavery cases, lack of consent is not an element of the crime.⁸⁵ Similarly, the Special Court for Sierra Leone, when discussing the elements of sexual slavery in the *Brima*

⁸⁰ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeals Judgment) IT-96-23-T and IT-96-23/1-T, ICTY 12 June 2002

⁸¹ *Ibid.*, 108.

⁸² Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art. 1.

⁸³ *Ibid.*, at [120]

⁸⁴ *Prosecutor v. Milorad Krnojelac* IT-97-25-A 17 September 2003 [195]

⁸⁵ High Court of Australia—*The Queen v Tang* [2008] HCA 39 (28 August 2008) [35].

case, referred to the *Kunarac* judgment and noted that ‘The consent or free will of the victim is absent under conditions of enslavement.’⁸⁶

In some countries, the irrelevance of consent as a defence is part of the legislative definition of slavery and similar offences. Thus, in Argentina, the law rejects the consent of trafficking victim to exploitation as a defence from criminal, civil and administrative liability.⁸⁷ In Australia, the law states that the victim’s consent or acquiescence to the acts is not a defence against the offences of slavery, slave trade, servitude, forced labour and related offences.⁸⁸ In Azerbaijan, the consent of a victim of trafficking cannot be used to mitigate the perpetrator’s punishment.⁸⁹ In Canada, consent to the activities that form the subject matter of trafficking is not valid.⁹⁰ Indonesia’s definition of trafficking includes a list of various forms of exploitation ‘committed with or without the consent of the victim.’⁹¹ Thailand’s Anti-Trafficking in Persons Act also includes several forms of exploitation ‘regardless of such person’s consent.’⁹²

The UK’s Modern Slavery Act (MSA) reflects a similar approach in how it treats slavery, servitude and forced labour. Section 1 of the Act, defining these offences, states that:

The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person

⁸⁶*Prosecutor v Alex Tamba Brima and others* (Judgment) SCSL-04-16-T (20 June 2007), at [709]. The judgment also cites Special Rapporteur on Contemporary Forms of Slavery, Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict E/CN.4/Sub.2/2000/21, 6 June 2000, [51].

⁸⁷Ley N° N°26.842 que modifica la Ley N° 26.364 de Prevención y Sanción de la Trata de Personas y Asistencia a sus Víctimas, 1. See also UNODC Consent n 64, 37

⁸⁸Australia Criminal Code Act 1995— Schedule, s. 270.11. Offences against Division 270—no defence of victim consent or acquiescence.

⁸⁹*Zoletic and Others V Azerbaijan (Application no 20116/12) [2021]* (ECtHR), [71], citing s 144-1.3. The full paragraph reads ‘Any consent by a victim of human trafficking to being exploited, *his or her lifestyle or immoral behaviour* cannot be considered as a circumstance mitigating the punishment for the person found guilty of trafficking in human beings’ (emphasis added).

⁹⁰Criminal Code RSC 1985 c. C-46, s 279.01(2).

⁹¹Law of The Republic of Indonesia Number 21 Year 2007 on the Eradication of the Criminal Act of Trafficking in Persons, art 1(7). The list of acts includes acts recognised under the Trafficking Protocol, such as prostitution and slavery, as well as others like repression, extortion, physical abuse and ‘the use of another persons’ labour or ability for one’s own material or immaterial profit’. For the latter, on its face any form of labour in a capitalist market will meet this definition, meaning that trafficking for labour (not just for *forced* labour) will be criminalised.

⁹²The Anti-Trafficking in Persons Act (No. 3) B.E. 2560 (2017); Section 4 amending the provision in Section 6 of the Anti-Trafficking in Persons Act of 2008.

to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.⁹³

Regarding Trafficking, the Act defines trafficking as arranging or facilitating the travel of another person with a view to this person being exploited.⁹⁴ Here, the section clarifies that it is irrelevant whether the person consents to the travel, though it does not include a similar provision regarding consent to the exploitation itself. When the Modern Slavery Bill was discussed, the Parliamentary Under-Secretary of State for the Home Department claimed that she had ‘come across very few cases where the victim of trafficking was moved unwillingly. On the whole, the victims of trafficking are coming for a better life ... They travel willingly with consent because that is the nature of the crime of trafficking.’⁹⁵ Her examples focused on cases of deception, without mentioning coercion.

Explaining the approach taken to consent, the Parliamentary Under-Secretary explained the government’s position during the discussions of the Modern Slavery Bill. The government did not intend for the courts to ignore consent, or for consent to be irrelevant—evidence for lack of consent should still be considered as a factor.⁹⁶ Following this explanation, I suggest framing the role of consent in trafficking and slavery law not as ‘consent is irrelevant’ but as ‘lack of consent is not an element of the crime, and consent is not a defence’, as evidence of lack of consent may be relevant. Finding consent irrelevant when means of coercion can be identified reflects an evidentiary consideration. Proving means of coercion is relatively easy, in comparison with proving a subjective state of mind (the existence or lack of consent).⁹⁷ Presumptions against consent make it easier to decide cases where coercion was used.

D. Focus on Consent

The accounts that focus on the perpetrators’ violation of the victim’s dignity and use of means of coercion reject the relevance of consent to labour

⁹³Modern Slavery Act 2015, S 1(5).

⁹⁴Ibid 2(1)

⁹⁵Modern Slavery Bill, Public Bill Committee—*Tuesday 2 September 2014, column 97*

⁹⁶ibid, *column 95*

⁹⁷Compare with Catharine A MacKinnon, ‘Rape Redefined’ (2016) 10 *Harv. L. & Pol’y Rev.* 431, 452; Dowds (n 21), 50.

communicate with his family, had access to money and at least on one occasion seemed to try to ‘secure a job’ with his recruiter to transfer drugs.¹⁰² The court’s consideration of these facts could be explained by assessing his reliability. However, this raises the general question of what is the distinction between evidence of no coercion and evidence of consent, or lack thereof. Trafficking and related forms of exploitation require coercion, and coercion must be proved by the prosecution. However, once coercion is proved, consent is deemed by law irrelevant. This position is logical and practical only if it is possible to distinguish between disproving coercion and demonstrating consent. Put differently, ‘evidence of consent’ cannot be the same as ‘evidence of lack of coercion’, if coercion is an element of the crime and consent cannot be used as a defence.

Assessment of consent to labour exploitation in the context of illegality also arises in labour law. Courts may need to consider whether undocumented migrants consented to be illegally employed, and if so, whether their consent bars them from making certain claims, for example regarding unpaid wages or other violations of their labour rights.

Under English common law’s doctrine of illegality, courts will not provide a remedy when one’s cause of action is based on an illegal act.¹⁰³ Two main policy reasons justify this: first, not let a person profit from their own wrongdoing. Second, to have a coherent legal regime that is not self-defeating or contradictory.¹⁰⁴ The doctrine applies (with some exceptions) to labour relations and contracts of employment, with results that might be hard on vulnerable workers.¹⁰⁵

When migrants without a right to work bring a claim against their employers for unpaid wages or other conditions, the employer might raise the defence of illegality. If successful, even strong claims backed by evidence will be rejected. In a series of cases concerning the exploitation of migrant domestic workers, the courts made an exception for victims of extreme exploitation amounting to trafficking.¹⁰⁶ An important consideration arising from these cases is the willing participation or ‘knowledge plus participation’

¹⁰²[31], [36], [37].

¹⁰³See e.g. *Patel v Mirza* [2016] UKSC 42 at [1] and citations therein.

¹⁰⁴*ibid.*, at [99].

¹⁰⁵See Alan Bogg, ‘Illegality in Labour Law after *Patel v Mirza*: Retrenchment and Restraint’, in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Oxford: Hart Publishing, 2018), 258, 264; Alan Bogg, ‘*Okedina v Chikale* and Contract Illegality: New Dawn or False Dawn?’ (2020) 49 *Industrial Law Journal* 258.

¹⁰⁶*Zarkasi v Anindita*, [2012] I.C.R. 788 [31], [34]; *Hounga v Allen* [2014] UKSC 47 [49], *Okedina v Chikale* [2019] EWCA Civ 1393 [48], [54]

of the worker in making an illegal contract.¹⁰⁷ In other words, the distinction focused on consent. The terminology of ‘participation’ arguably reflects a higher threshold than ‘acquiescence’, similar to the distinction made in some criminal cases between ‘consent’ to work, and between ‘voluntariness’ or ‘free choice’.¹⁰⁸

Starting with consent echoes the notion of mutually beneficial exploitation considered above. However, it does not adopt the conclusion that exploitation might be advantageous to B but still wrong. Here, B’s consent indicates they benefitted from the transaction, and were therefore not wronged. This would imply denying that transactions that improve a person’s state are exploitative, a position generally rejected in the literature.¹⁰⁹ Raising the victim’s consent as a defence is an appeal to the ‘moral magic’ (as Hurd calls it) of consent.¹¹⁰ This position stands in stark contrast with the focus on exploitation as unfairness or violation of dignity considered above. Here, the key is consent rather than the substance of exploitation. Unlike the moralistic or paternalistic arguments against consensual exploitation above, determining the lack of consent or rejecting willing participation, is a precondition to addressing the worker’s exploitation.

Alternative approaches could be identified in the literature. Mantouvalou’s definition of exploitation includes the abuse of another person’s vulnerability for profit, the main elements of the ‘fairness’ accounts of exploitation. However, she adds two elements: that the vulnerability was ‘created or exacerbated by law’, and that the abuse violates labour rights and human rights.¹¹¹ The latter condition could be seen as incorporating the dignity element. The requirement for vulnerability created by law restricts the types of vulnerability that would meet the requirement. Physical or mental disability, social and cultural expectations or lack of proficiency in the local language,¹¹² might not meet this requirement. The definition is further

¹⁰⁷ *Hounga v Allen* [38]-[39]; *Okedina v Chikale* [13], [40], [54].

¹⁰⁸ *R v Nguyen* [2019] EWCA Crim 670 [20]-[22]. Compare Dowds (n 21), 46.

¹⁰⁹ But see Feinberg (n 4).

¹¹⁰ (n 1)

¹¹¹ Virginia Mantouvalou, ‘The Right to Non-Exploitative Work’ in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart Publishing, 2014), 49

¹¹² On the relevance of language skills and social-cultural expectations related to gender roles as factors contributing to precarious employment, see for example A. Gardner and others, ‘Fashioning a Beautiful Future? Supporting Workers and Addressing Labour Exploitation in Leicester’s Textile and Garment Industry’ (University of Nottingham Rights Lab 2022) <<https://www.nottingham.ac.uk/Research/Beacons-of-Excellence/Rights-Lab/resources/reports-and-briefings/2022/June/Fashioning-a-beautiful-future.pdf>>. accessed 6 January 2023

taking advantage of existing vulnerability. In law, it is most likely to be identified in public law cases concerning the state's responsibility, and in labour law standards.

In the case of *PUDR v Union of India*, India's Supreme Court ruled on the conditions of workers recruited from different parts of India to work on construction projects ahead of the Asian Games. Workers were paid below minimum wage, and experienced other violations of labour laws.¹¹⁶ In this public interest litigation to enforce workers' rights, the Court dealt with the question of whether payment of less than minimum wage falls under the constitutional prohibition on traffic in human beings and forced labour. Considering the context and background conditions of the violations, the Court suggested that if workers were aware of their entitlement to minimum wage, they would not willingly accept lower pay. The Court therefore presumed that work remunerated below the minimum wage is forced or compulsory labour.¹¹⁷ The Court further recognised that destitution and 'the compulsion of economic circumstance' should also be considered as a 'force' for the purpose of forced labour.¹¹⁸

Other jurisdictions might hesitate to adopt this conclusion, especially in reference to international standards on forced labour or trafficking. Under the ILO Forced Labour Convention, forced labour is 'work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.¹¹⁹ Menace of penalty includes, of course, physical violence or threats. It also includes threats of denouncing victims to immigration authorities, and 'economic penalties linked to debt'.¹²⁰ The means of coercion emphasised in criminal standards on trafficking are the means employed by individual criminals,

¹¹⁶*People's Union for Democratic Rights v Union of India*, 1982 AIR 1473 ('PUDR case'), 16-17.

¹¹⁷*ibid*, 29

¹¹⁸*ibid*, 30. For a discussion of the case and its significance, see also Kamala Sankaran, 'Bonded Labour and the Courts' in Jan Breman, Isabelle Guérin and Aseem Prakash (eds), *India's unfree workforce: of bondage old and new* (Oxford: Oxford University Press, 2009), 337; Prabha Kotiswaran, 'Trafficking: A Development Approach' (2019) 72 *Current Legal Problems* 375, 401.

¹¹⁹Convention concerning Forced or Compulsory Labour (ILO No. 29), (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, s 2(1).

¹²⁰International Labour Office, *The Cost of Coercion: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work; International Labour Conference*, 98th Session 2009, Report I (B) (ILO 2009), [24].

explicitly rejecting ‘economic coercion of circumstances’ as vitiating consent.¹²¹ Vulnerable workers facing a choice between destitution and poor working conditions are deemed as voluntarily taking the work, as far as anti-trafficking law is concerned.

In the case of *Chowdury*, concerning undocumented Bangladeshi migrants working in strawberry fields in Greece, living in extremely poor conditions and working for twelve hours a day for no pay, hoping to be paid eventually,¹²² the European Court of Human Rights (ECtHR) noted their undocumented status and fear of detention and deportation as relevant factors for determining they did not offer themselves to work voluntarily (a key element of the definition of forced labour). These are clearly structural factors, reflecting what Mantouvalou defined as vulnerability created or exacerbated by law.¹²³ However, in this case, the employer also made threats against the workers and surrounded them with armed guards, so it is hard to separate the structural and individual coercion leading to the Court’s conclusion.

Under labour law, the unequal bargaining power between workers and employers leading to structural coercion is more clearly recognised. Workers might be unable to negotiate freely, and their consent may not be considered as free and voluntary, as they depend on their employers.¹²⁴

Consent to labour exploitation differs from other contexts where consent is legally relevant. Assessment of consent in many contexts focuses on consent to a specific act, taking place in a certain time and place, and involving specific people. In the case of work, evaluating consent in the labour context primarily focuses on the worker’s agreement to establish labour relations in their entirety, including the surrender of some autonomy and choice.

An important principle of labour law is the managerial prerogative, the employer’s right to control and direct the workplace and take unilateral

¹²¹ Jessica Elliott, *The Role of Consent in Human Trafficking* (London: Routledge, 2015), 66; Gallagher (n 37), 93. For a different approach see e.g. Shamir (n 114), 113; Natalia Ollus, ‘Regulating Forced Labour and Combating Human Trafficking: The Relevance of Historical Definitions in a Contemporary Perspective’ (2015) 63 *Crime, Law and Social Change* 221, 240.

¹²² *Chowdury and Others v Greece* (App No 21884/15) [2017] [7], [8].

¹²³ n 111, 49.

¹²⁴ See e.g. Article 29 Data Protection Working Party opinion 15/2011 on the definition of consent, 01197/11/EN WP187, adopted 13 July 2011 [13]; Steven L Willborn, ‘Consenting Employees: Workplace Privacy and the Role of Consent’ (2005) 66 *La. L. Rev.* 975, 976; Mundlak (n 73), 351. The dependency of labour on capital is not limited to situations of employer-employee relations, see e.g. Zoe Adams, *The Legal Concept of Work* (Oxford: Oxford University Press, 2022), 76.

actions as part of this prerogative.¹²⁵ The managerial prerogative includes the power to change various aspects of the employment pattern, shifts and hours of work.¹²⁶ Labour law may require consent to specific aspects of the labour relations, such as variation of contractual terms or waiver of certain rights,¹²⁷ but when assessing consent to labour exploitation, the focus is on consent to the work relations as a whole—including the tasks required, working conditions, remuneration and benefits—rather than to a specific aspect. Contracts of employment are often rigid. Terms such as wages, working hours and promotions may be negotiated, but workers are often presented with a set contract and conditions. Once employment relations were established, remaining at work and complying with job requirements, even under protest, might be seen as consent.¹²⁸

On the other hand, when labour rights are violated, consent will normally be considered insufficient to legitimate labour relations. Statutory labour standards generally preclude workers from consenting to poor conditions, working without time to rest or remuneration below an acceptable standard. Labour law gives limited weight to consent not just due to concern for the autonomy and wellbeing of the individual worker. Consensual labour exploitation might create negative externalities and harm other workers in similar situations and undermine their bargaining position. For instance, protecting a worker's right to consent to work for less than the minimum wage might result in increased pressure on other workers to accept lower pay, harming a class of vulnerable workers.¹²⁹ Requiring certain minimum labour rights irrespective of consent may also benefit employers who value and safeguard their workers' rights, shielding them from unfair competition with exploitative employers.¹³⁰

In the typical cases where consent has a 'moral magic' (such as consent to touch or sex), consent is often seen as a necessary and sufficient condition as the wrong of the act consented to (or refused) is directly linked to

¹²⁵ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016), 172; Zoe Adams, Catherine Barnard, Simon Deakin and Sarah Fraser Butlin, *Deakin and Morris' Labour Law* 7th. edition (Oxford: Hart, 2021) [3.26].

¹²⁶ *Ibid.*, 178;

¹²⁷ Niezna and Davidov (n 21).

¹²⁸ *Robinson v Tescom Corporation* [2008] IRLR 408 (EAT).

¹²⁹ Wertheimer (n 3), 300; Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40 *Oxford Journal of Legal Studies* 482, 495.

¹³⁰ E.g. Catherine Barnard and Sarah Fraser Butlin, 'Where Criminal Law Meets Labour Law: The Effectiveness of Criminal Sanctions to Enforce Labour Rights', in Alan Bogg et al. (eds.) *Criminality at Work* (Oxford: Oxford University Press, 2020), 85 and references therein.

autonomy.¹³¹ The moral assessment of labour exploitation, as well as the assessment of consent, combine ‘autonomy’ considerations (whether the worker voluntarily chose their situation) and ‘wellbeing’ considerations (whether the situation reflects the worker’s best interests).¹³² The treatment workers consent to is not neutral—it is bad, though possibly better from their perspective than the worse alternative of unemployment and destitution.

In the context of work, consent should be seen as a *necessary* but *insufficient* condition for legitimacy.¹³³ Consent is *necessary*, as lack of consent, irrespective of the working conditions, means that the labour is forced. Yet, consent is *insufficient* to justify certain labour arrangements. It might harm the worker’s welfare if the conditions offered are poor and inadequate: if the pay falls below minimum wage, the hours are long, there is no adequate time for rest, and the worker’s health and safety are at risk. The worker’s wellbeing might also be harmed by treatment that violates their dignity.

3. APPLICATION

I suggested above that different legal standards reflect different theories of exploitation (focus on fairness, dignity, individual coercion or structural coercion), and may therefore vary in their analysis of the role of consent. To demonstrate the significance in practice, it would be helpful to apply them to concrete situations.

Nadine works in a strip club in London. The club charges her various fees and fines that take a significant part of her pay.¹³⁴ Loka found a job in construction in Kent. He was promised a higher salary than he could make in his native Albania, but he works 12 hours a day and lives in a makeshift shack. Loka gets £50 a week in cash. His employer promised to send the rest of his salary to Loka’s family in Albania, but Loka is not sure they received all the money. Thang was recruited by a man from his town in Vietnam to work in agriculture in the UK. He was smuggled into the UK in a lorry and

¹³¹For a requirement for justification in addition to consent, see Jonathan Herring and Michelle Madden Dempsey, ‘Rethinking the Criminal Law’s Response to Sexual Offences: On Theory and Context’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking rape law: international and comparative perspectives* (London: Routledge 2011). See also MacKinnon (n 97).

¹³²Bullock (n 41), 85.

¹³³Compare with e.g. Zwolinski (n 28), 154.

¹³⁴Drawing from the facts of *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 [19]

brought to a cannabis farm in Scotland. Thang sleeps in a small room on site. The building is kept locked to avoid detection, and he does not have the key.

From a fairness perspective, Nadine's situation raises some factual questions. If Nadine is more vulnerable than others (for example, due to her migration status or family situation), the fees charged to other workers in the club or workers in other clubs may be used as a benchmark to assess fairness. However, some sectors are characterised by poor conditions in general. When all workers are treated poorly, a comparison with other workers in the sector is not helpful, as exploitation might be normalised by those observing it.¹³⁵ Whether Nadine is exploited depends a lot on whether the fees and fines paid fairly reflect the services the club provides and their value. From a dignity perspective, some would consider all work in a strip club degrading and therefore exploitative, and some would doubt whether Nadine can freely choose this work. This doubt is the result of the inherent exploitation attributed to sex work, not to individual circumstances in Nadine's situation, such as threats made by the club owners. For the individual coercion approach the focus would be on whether individual threat or other means of coercion were used against her. For the club owners to be charged with trafficking, for example, they would have to do something beyond taking advantage of Nadine's lack of options. Attention to structures, on the other hand, will expose Nadine's dependency on the club owners due to market conditions, leading her to 'self-exploit'.¹³⁶

Loka's situation seems to be one of mutually beneficial exploitation. His migration status makes him more vulnerable. Even if his salary is higher than he made before it will still be unfair if it falls below UK minimum wage or what British workers of similar skill would be paid for the same job. The benchmark for unfairness in this case is straightforward. The only facts of this example suggesting a violation of dignity are his poor living conditions, but this alone would likely be insufficient for paternalistic or moralistic determination rejecting consent. If Loka's remaining wages were not sent in full to his family, his situation might be considered as one of individual coercion as he was deceived about his salary. If Loka has no work permit in the UK, without evidence of trafficking, he might be unable to claim his unpaid fees, and might even face criminal charges.¹³⁷

¹³⁵UNODC (n 17), 11-12.

¹³⁶Adams (n 124), 76.

¹³⁷Compare *R v Carter* [2006] EWCA Crim 416 [6], [33].

If Loka is not paid at all, his exploitation is harmful rather than mutually beneficial. Such was the case of Chowdury discussed above.¹³⁸ In this case, the European Court of Human Rights recognised lack of pay as evidence that the migrant workers' work was no longer voluntary,¹³⁹ and the unpaid salaries amounted to economic coercion. This was also the case of internal migrant workers in Brazil, promised attractive salaries but held in haciendas in situations of debt bondage, accumulating debt and never getting paid for their work.¹⁴⁰ In both situations, the workers were worse off than their starting point: they worked hard for long hours, but still had no money.

Thang will be treated differently by the courts if he is seen as a victim (of trafficking and forced labour) or perpetrator (of drug offences).¹⁴¹ If the case is against the perpetrators, the court would face no trouble rejecting a criminal defence based on Thang's alleged consent. The court might determine that even if Thang consented to work, he might still be a victim of forced labour.¹⁴² Yet if Thang himself is charged for his illegal acts, evidence for his consent to travel and work might be introduced and considered relevant, as was the case in *Brecani* and other court cases.¹⁴³ Thang's debt to the perpetrators (if he had one) is likely to be used as evidence of coercion in a case against them, though likely to be considered insufficient if he faces charges himself. The violation of his dignity is not likely to be considered in either case.

¹³⁸ *Chowdury* (n 122) [7],[8].

¹³⁹ *ibid.*, [97].

¹⁴⁰ *The Hacienda Brasil Verde Workers v Brazil* (Inter-American Court of Human Rights).

¹⁴¹ See e.g. 'Dramatic raid uncovers £728k eight-room drug farm with two men hiding inside' *Stoke-on-Trent Live* 14 October 2021 <https://www.stokesentinel.co.uk/news/stoke-on-trent-news/dramatic-raid-uncovers-728k-eight-6043909>; 'Arnside cannabis farm gardener sentenced' *The Westmoreland Gazette*, 17 October 2021 <https://www.thewestmorlandgazette.co.uk/news/19650715.arnside-cannabis-farm-gardener-sentenced/>; Michael McQuaid 'Cannabis gang who ran £300k farm may have been human trafficking victims' *Daily Record* 17 June 2019 <https://www.dailyrecord.co.uk/news/scottish-news/cannabis-gang-who-ran-300k-16527467>, all accessed 2 May 2023

¹⁴² *R v Nguyen* (n 108) [20]. See also Weatherburn (n 2), 218.

¹⁴³ e.g. Kristo Kote 'Albanian jailed after being caught in Oldham raid on cannabis farm' <https://albaniandailynews.com/news/albanian-jailed-after-being-caught-in-oldham-raid-on-cannabis-farm> *Albanian Daily News* 5 Jan 2023; Jonathan Bamber 'Albanian man who came to UK in lorry says he was forced to live in cannabis farm' *Stoke-on-Trent Live* 18 Nov 2022 <https://www.stokesentinel.co.uk/news/stoke-on-trent-news/man-who-came-uk-back-7820431>, both accessed 5 June 2023.

4. CONCLUSION

This article considered three theoretical approaches to exploitation: those based on the common core of taking *unfair advantage* of another for gain, those focused on *dignity* and those that add or emphasise *coercion*. The article then mapped the different approaches to consent to labour exploitation in criminal law, labour law and public law, in light of the key concepts identified in theoretical literature.

The article demonstrated that there is no ‘one size fits all’ for the role of consent to labour exploitation, and different areas of law approach the assessment of consent differently. The directionality of the assessment—whether one begins with unfairness, violation of dignity, individual coercion, structural coercion or consent—determines the result of the assessment, and changes between different areas of law. Accounts that focus on the substance of exploitation, meaning unfair treatment, degradation or denial of conditions enabling human flourishing, are less likely to consider consent as relevant. Accounts that emphasise individual coercion will not provide a justification for intervention in some cases of exploitation as long as there were no perpetrators using means such as force and threats. If such means were used, the individual coercion approach would consider consent irrelevant.

I suggest that the position that starts with individual coercion is reasonable for criminal cases against the employer or recruiter. However, it is problematic when the focus of the proceedings is the exploited worker claiming their labour rights, as here the focus should be on the outcome and whether it respects workers’ rights and dignity, rather than on attributing responsibility or blame. Starting from structures is a necessary background understanding but applying it in cases concerning individual responsibility might require analysing the behaviour against the background of economic, social and other factors, be hard to predict and apply consistently, and face such significant challenges it would be impractical. In criminal cases, the state cannot prosecute individuals for taking advantage of circumstances it created (for example, through its migration policy) or failed to address, unless the individual’s behaviour is by itself illegal.

Labour law, however, prohibits treatment that violates certain minimum standards (protecting wage, hours and conditions). It recognises workers’ vulnerability as a class without needing to prove it in each individual case. In individual cases concerning worker’s illegality, the weight attributed to consent is inappropriate, given the limited and often unacceptable choices workers face. A key principle for cases of labour exploitation is that consent

should be recognised as a *necessary but insufficient* condition for acceptable work. Workers cannot be denied labour law's protection on grounds of consenting to accept conditions below the minimum or working illegally. The recognition of consent as necessary but insufficient further highlights that people can consent to exploitation. However, consent to exploitation is given against background conditions of coercion: destitution and lack of options, debt, coercive migration policies or other constraints. Exploitation accepted under such conditions should be rejected not because one 'could not' consent, but because the resulting outcome ignores structural coercion, abuses their vulnerability and violates their dignity.