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# SEXUAL LABOR AND HUMAN RIGHTS

Berta E. Hernández-Truyol and Jane E. Larson*

## I. INTRODUCTION

In this Article, we engage the current human rights debate that dichotomizes prostitution either as a modern form of slavery or as the exercise of the right to work. This framework effectively sets up a coercion/consent polarity. These poles raise fundamental human rights issues; both the prohibition against slavery and the right to work are matters addressed by and central to the international human rights paradigm. Yet we argue in this Article that the human rights issues raised by prostitution cannot properly be studied nor moved towards meaningful resolution in the context of the prevailing polarity. Prostitution in its current forms rightfully can be understood as having aspects *both* of work and of servitude.

We propose instead that a labor paradigm is the proper human rights model for the study of prostitution. Prostitution can be analyzed by applying internationally-embraced labor rights outside of the coercion/consent binary without denying women agency or moralistically condemning all commercial sex. A labor analysis permits deconstruction of the practice of prostitution and unearths its component elements. Such practice, when scrutinized through the lens of the labor framework, leads us to conclude that prostitution

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should be decriminalized.

However, this conclusion brings little new to the existing debate. Decriminalization, and even legalization, has been endorsed by participants in the human rights debate for years.[1] This new perspective allows us to explore a set of questions that are difficult to address when approached from the combined focus on consent or coercion. A key question that the new perspective allows us to explore is whether even voluntary prostitution is a derogation of human dignity and capability. That is, does even voluntary prostitution impair the fundamental activities that provide a person the reason to value her life, such as rest and restoration, practical reason and learning, or intimacy? Such a focus on human development and capability has taken hold in the consideration of children's labor rights as human rights. Certain categories of work are absolutely prohibited for children as "the worst forms of exploitation," including sex work. We propose a similar inquiry into adult prostitution framed around the question of exploitative labor and measured by a standard of human capability.

This project began with our frustration that the debate in human rights venues over prostitution is so stunted. In the present and the past, feminists and other human rights activists have analyzed prostitution as an act either of deviation or coercion in order to resist the legitimation of a market in sex. The prostitute is a bad woman, or she is a tool exploited by others through duress and violence.[2] By either version, she is not working in the sex industry by reason of free choices that warrant respect grounded in her personhood. The countering reaction from those who advocate legalization or legitimation of sex work has been an effort to restore normalcy, agency, and choice to the sex worker, insisting that she is acting from rational economic motives. Like most others, she

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1. *See infra* text accompanying notes 32–42.

2. Terminology is a place of conflict in this debate. There are those who argue that one should never be called a "prostitute" as if one's identity is encompassed by this status, but rather a "prostituted" person, that is, someone subject to an act of violence or dispossession by another. Likewise, there is resistance to using the terms "patron" or "customer" instead of "john," or the terms "sex trade" or "sex workers," because using them means taking the position that prostitution is a job rather than an act of dispossession. For examples of these arguments over language, compare Sheila Jeffreys, The Idea of Prostitution 3–5 (1998), with Global Sex Workers: Rights, Resistance, and Redefinition 3 (Kamala Kempadoo & Jo Doezema eds., 1998). We appreciate the importance of these distinctions, but because our position embraces aspects of both sides of these disputes, we use all of these terms interchangeably throughout this article.

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(assuming an adult, not a child) must labor for her sustenance, and sexual labor is as good a work as most others available to the laboring class, particularly women. As these poles of coercion and consent have worked to structure the prevailing discourse, these are mutually exclusive positions.

This polarization misrepresents the social realities of prostitution. But more important for our purposes, these staked-out positions create no space for critical or transformative politics. Thus, in Part II, we propose a paradigmatic transition to a labor paradigm that transcends the polarity. It creates space for dialogue, but also for political and policy innovation.

Part II(A) sets out the history of prostitution, the so-called "world's oldest occupation," which long has been a contested issue in domestic law. But globalization has transformed the market in sex just as it has other markets. Sex tourism and trafficking are only the most evident effects of a globalized sexual commerce. Internal migration from rural to urban areas with disruption of traditional household structures, the movement of women into waged labor in free-trade zones, and the pressures on developing country economies from international trading and financial structures all contribute to more women and girls moving into sex work throughout the world.

In Part II(B), we thus question the dichotomy of the current human rights debate in which prostitution must be seen either as a condition of bondage, to which only first generation civil and political rights apply,[3] or as work, to which only second generation social and economic rights apply.[4] In Part II(C), "Reframing the Debate," we begin with the crucial insight that sexual labor, like other forms of work, can be exploited. Arguing from such a perspective, we propose that even where prostitution is chosen by an adult woman as a form of work, it may be an intolerably exploitative form of labor analogous to sweatshop, child, or bonded labor, and subject to the same legal and political pressures for extinction or transformation. Such exploitative abuses of workers demonstrate that labor rights are human rights, and should be enforced as such.

As Part III, "The Right to Work v. Human Rights—A False Dichotomy," shows, this dichotomy is inconsistent as a structure of analysis with established norms that treat labor as part of the human rights framework, and that treat economic and social rights

3. *See infra* text accompanying notes 30, 31, 56.
4. *See infra* text accompanying notes 32–42, 55.

as indivisible from and interdependent with civil and political rights. Further, it ignores the powerful fusion of human and labor rights concerns in emergent political movements around the world to oppose sweatshops, child labor, and various forms of enslaved, bonded, and indentured labor. That labor is an indivisible part of the fabric of fundamental human rights is already a political and legal fact; yet the implications of this fusion have been little explored in the debate over sexual labor.

In Part IV, "How Is Work Different from Bondage?—Deconstructing the Voluntariness/Consent Idea," we examine the genealogy of the consent/coercion polarity, locating it within classical liberal political theory, but see it applied with peculiar force in the foundational political struggle in the West against race-based slavery. The abolitionist movement criticized the labor relation of slavery by counterposing free labor grounded in the wage labor contract. By this rhetorical juxtaposition, the presence of the wage labor contract, which manifests the worker's consent, obscures any reality of exploitation or bondage. Contract (that is, consent) came to negate bondage.

Following emancipation, nineteenth-century labor radicals and feminists used slavery as the metaphor by which to describe conditions of bondage imposed by that supposed instrument of freedom, the contract. Not only wage labor, but also marriage and prostitution, were suspect relations by this analysis.[5] Although created by contract, these relations, as actually experienced, seemed to reconstruct the dispossession and exploitation associated with chattel slavery. From this political heritage, we have taken an idea of "voluntary bondage." We extend the idea into the present to describe relations within which an individual consents to conditions of labor that cannot be reconciled with human dignity.

The nineteenth- and twentieth-century responses in the United States to these critiques of "wage slavery" and "white (meaning sexual) slavery" was, on the one hand, the criminalization of prostitution as an unfree relation marked off from the wage labor contract. The other response was the creation of an elaborate body of labor law that made the wage labor contract different from any other

5. *See generally* Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation (1998) (exploring the problem of contracts for wage labor, marriage, and prostitution, as well as the role of contracts in the debates over freedom and slavery in nineteenth-century America).

contract for the sale of goods in the market. That distinction remains true today. The wage labor contract is subject to baseline rules below which no worker, however disempowered, should fall. Each check on contract freedom reflects the conviction that labor is not just another good circulating in commerce, and is also an implicit recognition that contract alone cannot prevent bondage. In short, labor law is a repository of the critical view of contract as one means of establishing relations of bondage.

From within the labor perspective, as Part V, "Beyond Consent: Substantively Just Labor Standards," explains, our analysis makes several key theoretical moves. First, we can recognize the economic motivation/compulsion that leads women to prostitution while continuing to critically examine the labor relation of prostitution. This also allows us to acknowledge how *similar* rather than *dissimilar* sex work is to the labor performed by other exploited workers. Second, the labor "eye" restores agency to women and, at the same time, frees us from the claim that consent necessarily creates legitimacy. A sex worker's consent does not legitimate conditions of work that are otherwise incompatible with her human dignity. We may accept that a laborer is making the best choice she can and still acknowledge that she lacks the bargaining power to insist upon standards of decent work.

By clearing away these prior issues, we can finally begin to ask the question at the heart of emerging global political movements and nascent human rights standards addressing exploitative labor. Labor measures the legitimacy of work not by the presence of contract or worker consent, but rather by substantive ethical and moral standards of what conditions of work accord with the dignity, health, and liberty of the worker. Workers have the right as well as the need to labor for their sustenance, but they may not be asked to do so in conditions that strip them of basic human rights.

Within the United States, the criminalization of prostitution took sex work out of the debate over voluntary versus involuntary labor. Prostitutes, like others who labor in the illegal and informal economies, are instead blamed for the conditions of their labor. As blameworthy, they may be targeted for moral condemnation, social exclusion, and legal penalty. As reframed within a labor discourse, and as our call for empiricism (Part VI) reveals, the right political debate should not be around the "essential nature" either of sex work or of the prostitute, but instead around what constitutes just and humane conditions of labor. We conclude that it is time for renewed vigor in the debate over the substantive question of what makes

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labor a just relation. This Article cannot answer this question, but aims to point to the questions that must be asked and answered, using sexual labor as our frame.

## II. TOWARDS A PARADIGMATIC TRANSITION

The legal status of prostitution is an unsettled issue in nations throughout the world, particularly those of the West. Before the mid-nineteenth century, in both common and civil law systems, prostitution was regarded as immoral but not consistently treated as a serious offense against law.[6] In the era of slave emancipation in the West, however, the moral debate over prostitution shifted to the legal arena. All aspects of prostitution became the subject of legal reform in western countries, and that debate was carried from domestic politics to the emerging arena of international law.[7] This resulted in the adoption of international agreements and conventions aimed at eradicating the cross-boundary trade in human sexual labor (known as trafficking) and condemning prostitution as a practice akin to slavery and violence.[8] These international agreements rested upon at

6. Prostitution was originally identified in U.S. law as a type of sexual promiscuity and prosecuted as a species of vagrancy. *See* Gary Dunin & Richard Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y. L. Rev. 102, 110 (1962). There was no requirement that money change hands. For example, in 1908, the Supreme Court decided in *Bitty*, and stated *in dictum*, that prostitution "refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men." United States v. Bitty, 208 U.S. 393, 401 (1908). However, beginning in the 1910s and 1920s, U.S. states consistently began to require pecuniary gains for prosecution as a prostitute. Linda R. Hirshman & Jane E. Larson, Hard Bargains: The Politics of Sex 176–77 (1998).

7. On early international anti-prostitution activism, see Jeffreys, *supra* note 2; David J. Pivar, Purity Crusade: Sexual Morality and Social Control, 1868–1900 (1973).

8. Two international instruments concerning the trade in women were created early in the twentieth century, the International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 1 L.N.T.S. 83, 97 B.F.S.P. 95, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244. The first focused on the trafficking of women and girls across international borders without their consent for the purposes of prostitution. The second imposed an obligation on state parties to punish anyone who recruits into prostitution a woman who has not reached the age of majority notwithstanding her consent. The League of Nations adopted two conventions dealing with the traffic in women and children, the International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, 116 B.F.S.P. 547, and the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11,

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least a symbolic global consensus that prostitution and trafficking were human rights violations to be abolished.

## A. Historical Background of International Regulation of Prostitution

The 1949 Convention for the Suppression of the Traffic in Persons (1949 Convention),[9] the international agreement that represents the victory of this abolitionist position, states "prostitution and . . . traffic in persons for the purposes of prostitution are incompatible with the dignity and worth of the human person."[10] This convention consolidated the view that any form of prostitution is a human rights violation. Its prohibitions include enticing, procuring, and leading away another person for the purposes of prostitution, even with the consent of that person.[11] It sets aside consent or other expressions of voluntariness as a defensible measure of the legitimacy of practices of commercial sex.

In the last part of the twentieth century, the United Nations (U.N.) again ratified abolitionist language. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[12] uses the abolitionist language of the 1949 Convention, and calls upon states parties to "take all appropriate measures to suppress all forms of traffic in women and the exploitation of prostitution of women."[13] Ten years later, the 1989 Convention on the Rights of the Child (Children's Convention)[14] committed state parties to protect children from all forms of sexual exploitation and sexual

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1933, 150 L.N.T.S. 431. These instruments prohibited trafficking in women even if the woman was an adult and had consented to the practice. In 1949, the United Nations adopted the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, which combined and superseded the earlier agreements. G.A. Res. 317(IV), Dec. 2, 1949, art. 20 [hereinafter 1949 Convention]. The 1949 Convention is interpreted to treat all forms of prostitution as a human rights violation and deems all prostitution to be compelled.

9. 1949 Convention, *supra* note 8, Preamble.

10. *Id.*, art. 1.

11. *Id.*

12. Convention on the Elimination of All Forms of Discrimination against Women, U.N.G.A. Res. 280, 19 I.L.M. 33 (1980) (adopted by the U.N.G.A. on Dec. 18, 1979, entered into force Sept. 3, 1981) (CEDAW). The United States is a signatory to CEDAW, but has not ratified this convention.

13. *Id.*, art. 6.

14. Convention on the Rights of the Child, 28 I.L.M. 1448 (1989) (adopted Nov. 28, 1989, entered into force Sept. 2, 1990) (Children's Convention). The United States has not ratified this convention.

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abuse, and prohibited the abduction or sale of, or traffic in, children for any purpose, including prostitution.[15]

Yet after decades in which the abolitionist position prevailed, arguments for legitimation of adult, voluntary prostitution, as well as voluntary migration for sex work, are newly alive in international fora, as well as within some national legal systems. The U.N. has shown growing acceptance of a distinction between voluntary and forced prostitution, which obviously implies that some forms of prostitution and trafficking are acceptable by human rights standards.

Notwithstanding CEDAW's abolitionist language[16] and the 1949 Convention's position that all prostitution is compelled,[17] the Platform for Action[18] adopted at Beijing in 1995 condemns only forced prostitution.[19] Similarly, the Declaration on Violence against Women[20] approved in 1993 speaks only of "trafficking in women and forced prostitution."[21] The U.N. Special Rapporteur on Violence Against Women[22] observed in 1994 that "[s]ome women become

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15. *Id.*, art. 34 (providing "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.") and art. 35 (providing "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."). *See also id.,* art. 36 (generally prohibiting the exploitation of children: "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."). These views are confirmed, developed, and expanded in more recent instruments that treat trafficking in women as a form of violence against women. *See* Vienna Declaration and Programme of Action Art. 2 Vienna Declaration and Programme of Action, June 14–25, 1993, U.N. Doc. A/CONF.157/23, art. 2 (1993 Vienna Declaration); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003).

16. CEDAW, *supra* note 12, art. 6.

17. 1949 Convention, *supra* note 8.

18. Beijing Declaration and Platform for Action, 35 I.L.M. 405 (1995).

19. *Id.*, ¶ 123, 131d, 224.

20. Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (1993).

21. *Id.*, art. 2(b).

22. United Nations Human Rights Commission, Report of the Special Rapporteur on Violence Against Women, It's Causes and Consequences, Ms.

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prostitutes through the exercise of 'rational choice'[,] others become prostitutes as a result of coercion, deception or economic enslavement."[23] This is a departure from the 1983 report of the U.N. Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others,[24] which not only recognized all prostitution as inconsistent with human dignity, but expressly provided that even when prostitution seems to have been chosen freely, it is actually the result of coercion.[25]

Most recently, the U.N. Crimes Commission in Vienna negotiated a new international protocol on trafficking in women,[26] a process accompanied by intense lobbying by feminist nongovernmental organizations at odds with one another. Consistent with the view that sex work is legitimate labor, the Network of Sex Work Projects argued that voluntary, noncoerced participation by adults in migration for sexual labor is "trafficking" only if it amounts to the already-recognized human rights violations of forced labor, slavery, or servitude.[27] The abolitionist position, consistently represented by the Coalition Against Trafficking in Women (CATW), seeks to retain the commitment that all prostitution and migration for sex work are human rights violations, irrespective of voluntariness or involuntariness.[28] The resulting Trafficking Protocol

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Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, U.N. Doc. E/CN.4/1995/42 (1994).

23. *Id.*, ¶ 205.

24. United Nations Human Rights Commission, Report of the Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, U.N. Doc. E/1983/7, (1983).

25. *Id.*, ¶ 23.

26. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, *adopted* Dec. 15, 2000, U.N. Doc. A/55/383, 40 I.L.M. 335 (entry into force Dec. 25, 2003) [hereinafter Trafficking Protocol].

27. Network of Sex Work Projects, Commentary on the Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the Draft Convention on Transnational Organized Crime, A/AC.254/4/add.3 (Jan. 1999), http://www.nswp.org/mobility/untoc-comment.html (last visited October 30, 2005); Ann D. Jordan, International Human Rights Law Group, The Annotated Guide to the Complete U.N. Trafficking Protocol, (May 2002, updated Aug. 2002), *available at* http://www.walnet.org/csis/papers/U.N.-TRAFFICK.PDF.

28. The Coalition Against Trafficking in Women (CATW) proposes instead that the U.N. Commission on Human Rights "state clearly and unequivocally that prostitution and trafficking in women for the purposes of prostitution and sexual exploitation violate the human rights of any women. This, regardless of whether women were forced by traffickers or driven into prostitution as a result of prior sexual abuse, poverty, and oppression/inequality[.]" CATW, Written

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continues the trend of distinguishing between voluntary and involuntary prostitution and migration for sex work.

## B. The Current Debate

There is thus a struggle underway within human rights institutions and discourses about whether to retain the historical commitment to pursue abolition of prostitution and trafficking or, alternatively, to change course toward recognition/acceptance of the possible voluntary nature of these practices and the legitimation of such voluntary practices. The debate about prostitution invokes many perspectives, notably libertarian and feminist as well as the blend of the two.

This article principally addresses the feminist positions both in support of and in opposition to abolition, acknowledging the libertarian strain in some feminist stances. We focus on feminist arguments because these are the animating ideas within the international human rights debate. Feminist activism around the sex trade, whether in the domestic or international context, has always used the prostitute to symbolize broader desires for the inclusion of women and children in the body politic.[29]

### 1. The Abolitionist Position

The abolitionist position treats all prostitution as a problem of civil and political human rights, specifically a form of bondage akin to slavery and/or an institutionalized practice of sexual violence and gender inequality. In support of this position, abolitionists invoke the international conventions against trafficking in human beings and

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Statement to the U.N. Commission on Human Rights, 57th Session, http://action.web.ca/home/catw/readingroom.shtml?x=16042 (last visited October 30, 2005).

29. Jo Doezema makes this point about the anti-prostitution position, with its emphasis on the suffering of prostitution, and particularly the "Third World prostitute." Jo Doezema, *Ouch! Western Feminists' "Wounded Attachment" to the "Third World Prostitute,"* 67 Feminist Rev. 16–38 (Spring 2001) (citing Antoinette Burton, *States of Injury: Josephine Butler on Slavery, Citizenship, and the Boer War*, 1998 Soc. Pol. 338, 339). Doezema thus seeks to ally the modern abolitionist position with discredited colonialist discourses. Yet the powerful reliance on rights language by the autonomy position, especially when used by the nonprostitute academics and advocates who head the relevant organizations, also symbolically uses the sex worker to speak about rights of women and of workers in the broadest sense.

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against slavery, the conventions for the protection of the rights of women and children, evolving standards concerning violence against women, and basic human rights instruments.[30]

Although there is nothing in the abolitionist position that necessarily opposes amelioration of working conditions in the sex trade, abolitionists historically have been wary of any compromise that might suggest the legitimation of prostitution or trafficking. Their position is that prostitution must be condemned uncompromisingly like slavery, and never equated with acceptable practices like work or with legitimating ideas like consent or equality. Legally and politically, this translates into a refusal to distinguish voluntary prostitution and immigration for sex work from forced prostitution and trafficking, as well as resistance to any regulatory framework.

Most feminists who advocate international abolition do support partial decriminalization at the level of national law. This recognizes the burdens that criminalization places on the prostitute. Partial decriminalization removes the criminal sanction directed at the prostitute for sale or solicitation, but leaves in place the prohibitions directed at patrons/johns, pimps, and other business interests. But abolitionists do not translate this position into any accommodation or legitimation of the sex trade. Laurie Shrage asserts "[a]rguments for decriminalizing prostitution can be made by appealing to notions of workers' rights and the dignity of low-status work; they need not appeal to the libertarian ideal of total freedom from governmental intrusion into the lives of presumably independent individuals."[31] Thus even those who favor decriminalization may still wish to eradicate commercial sex, and hope to do so by allowing the weight of legal condemnation to fall on

30. Among the human rights obligations pertinent to the debate as currently framed are those cited in *supra* notes 8–28, and also the Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, S. Exec. Doc E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States June 8, 1992) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, (entered into force Jan. 3, 1976) [hereinafter ICESCR]; and International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 1, S. Exec. Doc. C, 95-2, 660 U.N.T.S. 195, (entered into force Jan. 4, 1969).

31. Laurie Shrage, *Prostitution and the Case for Decriminalization*, 43 Dissent 41, 41 (Spring 1996).

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patrons/johns, pimps, and the business structure of the sex industry.

2. The Autonomy Position

The argument opposing abolition, seeking tolerance or legitimation, is that some prostitution and trafficking, typically adult, voluntary sex work and migration, is a free choice by an autonomous individual, and one often made out of economic necessity. We term this stance the "autonomy" position, which holds that respect for self-determination requires respect for women's choices about sex and survival.[32] Advocates of this position invoke the rights to work and to self-determination guaranteed by basic human rights instruments, as well as internationally-guaranteed labor rights.[33] They also argue that sex workers are harmed by limits on freedom to market their resources and urge that women be allowed to use their bodies and labor to greatest personal advantage, especially when women around the globe have few other economic opportunities and their need is great.[34] This economic need argument grows more compelling in a globalizing economy as modernization, urbanization, structural reform, and international trading systems disrupt traditional household and social organizations, diminish governmental investment in social welfare, and drive down wages. A globalized economy presses more women into waged work for the support of themselves and their children, with few other viable economic opportunities and less household and familial support.[35]

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32. On the "sex work as legitimate employment" position, a basic document is International Committee for Prostitutes' Rights, *World Charter for Prostitutes' Rights* (Feb. 1985), *reprinted in* A Vindication of the Rights of Whores 40 (Gail Pheterson ed., 1989), *available at* http://www.walnet.org/csis/groups/icpr_charter.html (last visited Oct. 30, 2005).

33. *See* Lin Lean Lim, *The Economic and Social Bases of Prostitution in Southeast Asia, in* The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia 1, 14–15 (Lin Lean Lim ed., 1998).

34. *See* United Nations Development Program, Human Development Report 1995, 29 (1995), http://www.hdr.undp.org/reports/global/1995/en (last visited October 30, 2005) ("a widespread pattern of inequality between women and men persists . . . even more in their participation in the economic . . . sphere[]").

35. U.N. Dep't of Economic and Social Affairs, *1999 World Survey on the Role of Women in Development: Globalization, Gender & Work* ¶ 128, U.N. Doc. A/54/227 (1999) (programs "have contributed to the sudden surge of women seeking paid work. By reducing male employment and levels of family income, these policies effectively drove women into the labour market in large numbers" (citation omitted)). Globalization has affected women's participation in the

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The policy position that flows from the autonomy position is full legalization and legitimation of prostitution as a job like any other, appropriately subjected to the labor protections offered to all workers but to no other special rules.[36] Jo Bindman and Jo Doezema, for example, argue that "we first need to identify prostitution as work, as an occupation susceptible like the others to exploitation. Then sex workers can be included and protected under the existing instruments that aim to protect all workers from exploitation, and women from discrimination."[37] Even some antitrafficking organizations have adopted the distinction between voluntary and forced prostitution. The Global Alliance Against Trafficking in Women, for example, demands that international anti-trafficking instruments distinguish between forced prostitution, which is "[a] manifestation[] of violence against women . . . [and] a violation of the right to self determination," and voluntary prostitution, which demands "respect for the self determination of adult persons."[38]

The European Court of Human Rights recently ruled in a case raising the issue of prostitution as work, concluding that sex work is a protected economic activity.[39] However, the Court's ruling

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economy, especially noteworthy because of the high proportion of households headed by female parents and their increasing need to both care for their children and provide for them.

36. For example, a report recently issued under the imprint of the International Labour Organization (ILO), a U.N. institution, argues that adult prostitution can be a freely chosen employment and, as such, should be covered under the standard labor regulations of a nation and the international labor standards established by the ILO. *See* Lim, *supra* note 33. Citing the expanding reach of the industry and its unrecognized contribution to the gross domestic product of four countries in Southeast Asia, Lim urges official recognition of "the sex sector." Recognition includes extending "labor rights and benefits to sex workers," improving "working conditions" in the industry, and "extending the taxation net to cover many of the lucrative activities connected with it." *Id.* at 212–13. Lim is careful not to speak for the ILO. Although clearly "advocat[ing] the elimination of child prostitution," she writes, "[the ILO] does not commit itself to a particular legal position on adult prostitution." *Id.* at vi.

37. Jo Bindman, with the participation of Jo Doezema, Redefining Prostitution as Sex Work on the International Agenda (1997) http://www.walnet.org/csis/papers/redefining.html (last visited October 30, 2005).

38. Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Debate*, *in* Global Sex Workers, *supra* note 2, at 34, 38 (describing the Global Alliance Against Trafficking in Women position).

39. Case C-268/99, Aldona Malgorzata Jany v. Staatssecretaris van Justitie, 2001 ECR I-8615 (case brought by Polish and Czech nationals against the Netherlands Secretary of State for Justice for his refusal of residence permits to enable them to work as self-employed prostitutes).

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shows that it is seeking to reconcile (or perhaps straddle) the work versus servitude debate. The Court found that "[t]he activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration."[40] The Court stated that

> [P]rostitution is an economic activity [when] pursued by a self-employed person . . ., where it is established that it is being carried on by the person providing the service:
> - outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
> - under that person's own responsibility; and
> - in return for remuneration paid to that person directly and in full.[41]

Finally, the Court concluded that "[i]t is for the national court to determine in each case, in the light of the evidence adduced before it, whether those conditions are satisfied."[42]

### C. Reframing the Debate

Thus mutually exclusive feminist frameworks for understanding prostitution—one that characterizes it as bondage, and the other that treats it as work—dominate the current human rights debate. In earlier work, we explored these dominant frameworks as played out within feminism's internal debate over prostitution.[43] Mary Louise Fellows and Sherene Razack call these two positions "irreconcilable,"[44] but Jane Larson argued in earlier work with Linda Hirshman that these seemingly irreconcilable positions could be negotiated in new ways to create common ground among feminists for formulating law and policy.[45] Consistent with our earlier work, together and with others, we argue here that accepting prostitution as a choice and a means of economic sustenance does not necessarily lead to the conclusion that the policy

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40. *Id.*, ¶ 4 of ruling (finding based on European Treaty and agreements between Republic of Poland and Czech Republic).

41. *Id.*, ¶ 5 of ruling.

42. *Id.*

43. *See* Berta E. Hernández-Truyol & Jane E. Larson, *Both Work and Violence: Prostitution and Human Rights, in* Moral Imperialism: A Critical Anthology 183 (Berta E. Hernández-Truyol ed., 2002).

44. Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. Gender Race & Justice 335, 350 (1998).

45. *See* Larson & Hirshman, *supra* note 6, at 286–94.

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response must be legalization and legitimation, either at the national or international level. To the contrary, if we look to the intersection of civil/political and economic/social rights as they apply to the issue of labor, we find moral frameworks and legal tools for resisting forms of work that endanger or exploit the worker, that recreate relationships of bondage, or that endanger the interests of women and workers as political, social, and civil classes. Core labor rights are human rights, and should be enforced as such.

The development of this argument connects to and strengthens growing political movements to address the substantive conditions of labor as a matter of concern for international law and human rights. Although the mechanisms for enforcement of labor rights are weaker than those for civil and political rights, a deepening of the recognition of labor as part of the fabric of fundamental human rights will strengthen the legal force of labor rights in every realm. With this article, we hope to make the problems of prostitution and the related issue of trafficking important locations for the development of such law. As law develops, labor rights as human rights will become a stronger tool for intervention in the range of abusive and exploitative labor practices driven by and newly visible within the globalizing economy. The debate over sexual labor is thus a laboratory within which we can substantively begin to define just conditions of labor.

## III. THE RIGHT TO WORK V. HUMAN RIGHTS—A FALSE DICHOTOMY

The human rights system originates in the classical liberal tradition. Like the philosophy itself, it must continue to "develop, expand and transform" its justifications to remain consistent with that core.[46] Here we argue that the dominant frameworks of the current human rights debate over prostitution are falsely polarized, hindering that process. As discussed above, one side maintains that the rights to work and to self-determination include the right to sell sexual access to one's body for a limited period of time, as parallel to wage labor. The other side equates sex work with slavery, a sale of so much of one's self that it denies humanness to and strips dignity from the seller, affronting fundamental goals of the human rights system. We believe this dichotomization closes off the analysis

46. Berta E. Hernández-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal*, 17 Wisc. Women's L.J. 111, 135 (2002).

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necessary to understand prostitution's complex social reality, each pole denying some part of the meaning and experience of the practice. In turn, that simplification means that this complex social reality cannot engage the theory underlying the human rights principles invoked, preventing human rights understandings from deepening and expanding. In this section, we review the major international agreements conferring human rights, emphasizing the interrelatedness and interdependence of the human rights system.

### A. The Universal Declaration; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social, and Cultural Rights

As a structure of analysis, the coercion/consent dichotomy is inconsistent with and, indeed, contrary to established human rights principles that establish labor rights as human rights. The Universal Declaration of Human Rights (the Universal Declaration),[47] specifically provides that "[e]veryone has the right to work [and] to free choice of employment."[48] Further, it provides that "[e]veryone has the right to just and favorable conditions of work,"[49] and, "[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."[50] These aspirational sentiments were rendered binding by the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[51] recognizing "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts."[52] The ICESCR also embraces "the right of everyone to the enjoyment of just and favourable conditions of work,"[53] including "safe and healthy working conditions."[54]

Economic and social rights conferred by the Universal Declaration and the ICESCR are referred to as second-generation rights.[55] These rights reject the exploitation of persons and require

47. Universal Declaration, *supra* note 30.
48. *Id.*, art. 23(1).
49. *Id.*
50. *Id.*, art. 23(3).
51. ICESCR, *supra* note 30. The United States has not ratified this agreement.
52. *Id.*, art. 6(1).
53. *Id.*, art. 7.
54. *Id.*, art. 7(b).
55. Berta E. Hernández-Truyol, *Human Rights Through a Gendered Lens:*

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affirmative state action in order to effectuate them. Economic and social rights are often juxtaposed to civil and political rights, referred to as first generation rights.[56] The first generation is made up of negative rights, freeing individuals from governmental interference. These generally do not require positive state action for their effectuation. In spite of this distinction, economic and social rights are indivisible from and interdependent with civil and political rights, together comprising the fundamental guarantees of essential rights inherent in human existence.

Some historical contextualization of these agreements is needed. The U.N. adopted the Universal Declaration,[57] the first major human rights document of the modern era, in 1948. It recognizes "the inherent dignity and . . . the equal and inalienable rights . . . [of persons as] the foundation of freedom, justice and peace in the world."[58] The preamble lists freedom of speech and belief and freedom from fear and want as the "highest aspiration[s]" of persons.[59] From the outset, then, the Universal Declaration focused on both civil and political rights (speech and belief),[60] as well as social and economic rights (freedom from fear and want),[61] recognizing a plethora of both

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*Emergence, Evolution, Revolution, in* 1 Women and International Human Rights Law 3, 25 (Kelly D. Askin & Dorean M. Koenig, eds., 1999) (explaining the different "generations" of human rights).

56. *See id.* at 25–28.

57. Universal Declaration, *supra* note 30.

58. *Id.*, Preamble.

59. *Id.*

60. *Id.* The civil and political rights enumerated include freedom, equality, dignity (art. 1); nondiscrimination (art. 2); life, liberty and security of the person (art. 3); prohibition of slavery (art. 4); prohibition of torture, cruel, inhuman or degrading treatment or punishment (art. 5); recognition as a person (art. 6); equal protection (art. 7); due process (arts. 8–11); privacy (art. 12); freedom of movement (art. 13); asylum (art. 14); nationality (art. 15); marriage (art. 16); freedom of thought, conscience, and religion (art. 18); freedom of opinion and expression (art. 19); freedom of peaceful assembly and association (art. 20); right to participate in government of country (art. 21). *Id.* For protections of civil and political rights, see ICCPR, *supra* note 30, and discussion thereof, *infra* notes 66–97 and accompanying text.

61. Universal Declaration, *supra* note 30. The economic rights include the right to own property and not be arbitrarily deprived thereof (art. 17); social security and realization "of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (art. 22); work, including "just and favorable work conditions, protection against unemployment, equal pay for equal work, just pay ensuring to the worker and his/her family an existence worthy of human dignity, and form and join trade unions" (art. 23); rest and leisure including "reasonable limitation of working hours" (art. 24),

categories of rights. The Universal Declaration was originally intended to be the blueprint for a single, legally binding human rights treaty embracing civil and political, as well as economic and social, rights. Ideological divisions between the developing and developed nations, however, resulted in the bifurcation of the Universal Declaration's contemplated unitary approach.[62] Thus, the U.N. in 1951 adopted two separate covenants that became the normative bedrock of the human rights regime: the International Covenant on Civil and Political Rights (ICCPR)[63] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[64] These documents made the Universal Declaration's international norms into binding obligations for signatory nations.[65]

Why two separate treaties? One explanation is that the two sets of rights are of a different nature. Civil and political rights are absolute, enforceable, and immediately applicable;[66] economic, social, and cultural rights are hortatory and can only be progressively realized.[67] The ICESCR itself reflects this gradualist approach, stating that the rights provided may be limited, but "only in so far as this may be compatible with the nature of these rights and solely for

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"standard of living adequate for health and well-being" of the worker and his/her family "including food, clothing, housing and medical care and necessary social services" (art. 25); education (art. 26); participation in cultural life (art. 27). *Id.* For protections of economic, social, and cultural rights, *see also* ICESCR, *supra* note 30, and discussion thereof, *infra* notes 66–97 and accompanying text.

62. Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 55; *see also* Asbjorn Eide, *Economic, Cultural and Social Rights as Human Rights*, *in* Economic, Social and Cultural Rights: A Textbook 9 (Asbjorn Eide et al., eds., 2001) (stating that the Universal Declaration, adopted in 1948, contained a whole range of human rights within one consolidated text. This was subsequently divided into two main categories, in 1951, during the drafting of the International Bill of Human Rights. The General Assembly decided that two separate human rights covenants should be prepared. One of the covenants would focus on civil and political rights; the other would focus on economic, social and cultural rights.).

63. ICCPR, *supra* note 30.

64. ICESCR, *supra* note 30.

65. *See* Henri J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals 244 (2000).

66. *See id.* at 245 (quoting Annotations on the Text of the Draft International Covenants on Human Rights, U.N. Doc. A/2929 (1955), at 7).

67. *See id.* ("economic, social and cultural rights were not or might not be [enforceable, justiciable, or of an 'absolute' character]"); Eide, *supra* note 62, at 10 (quoting E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 Netherlands Yearbook of International Law 69, 103 (1978)).

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the purpose of promoting the general welfare in a democratic society."[68] There is no parallel acceptance of gradualism in the ICCPR.

Another explanation is that civil and political rights are justiciable and thus easily applied by national courts.[69] Economic, social, and cultural rights, on the other hand, are of a more political than legal nature,[70] and are therefore not immediately applicable by judges nor easily invoked in courts of law.[71] They require state support of programs involving the efforts of various branches of government, including those that control the budget.

The international community has challenged the coherence of the "justiciability" and "immediate applicability" arguments as bases for distinguishing economic and social rights from civil and political rights. The Limburg Principles,[72] adopted in 1986 by a meeting of authoritative experts on international law, state that although a full realization of the rights in the ICESCR is to be progressively attained, "the application of some rights can be made justiciable immediately while other rights can become justiciable over time."[73] More specifically, the Limburg Principles observe that "[s]ome obligations under the ICESCR require immediate implementation in full by all States parties, such as the prohibition of discrimination in Article 2(2) of the Covenant."[74]

Another, more pragmatic explanation for the adoption of two separate documents is the price tag of implementation for signatory nations.[75] It does not cost a government much to implement individual rights to be free from state intervention. Civil and political

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68. ICESCR, *supra* note 30, art. 4.
69. *See* Eide, *supra* note 62, at 10.
70. *See id.*
71. *See* Martin Scheinin, *Economic and Social Rights as Legal Rights, in* Economic, Social and Cultural Rights, *supra* note 62, at 29.
72. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/17, Maastricht, June 2–6, 1986 [hereinafter Limburg Principles].
73. *Id.*, Principle No. 8.
74. *Id.*, Principle No. 22.
75. *See* Steiner & Alston, *supra* note 65, at 245; *see also* Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 Colum. Hum. Rts. L. Rev. 363, 379 (2002) (stating that under the ICCPR, states parties incur the obligation to immediately secure most of the rights enumerated in the agreement, whereas states parties to the ICESCR generally commit themselves only to working toward the realization of the rights enumerated in the agreement).

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rights are such rights. By contrast, rights that require the state to take positive action and that create obligations to provide welfare to the individual cost much more.[76] Social and economic rights are of the latter variety.

Yet the negative/positive distinction is less than consistent. For example, beyond the substantive rights to vote, of free association, and other individual freedoms, the ICCPR includes process rights of fair trial and representation.[77] For the implementation of such rights, there must be legislatures, police, courts, and attorneys. Due process requires both state resources and positive state action for realization. The obligation to create the structures and processes necessary to implement process rights does not substantially differ from the state's obligations under the ICESCR concerning health,[78] education,[79] social security,[80] fair working conditions,[81] or an adequate standard of living.[82]

The fact that economic and social rights can be achieved progressively does not "alter the nature of the legal obligation of States . . . to demonstrate that [they are] making measurable progress toward the full realization of the rights in question."[83]

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76. *See* Eide, *supra* note 62, at 10. The Limburg Principles recognize these costs as they acknowledge that the ICESCR requires state parties to ensure respect for minimum subsistence rights for all regardless of the state's level of economic development. *See* Limburg Principles, *supra* note 72, Principle No. 25.

77. *See e.g.*, ICCPR, *supra* note 30, arts. 9 (freedom from arbitrary arrest, right to prompt trial, right to trial), 14 (right to fair and public hearing, presumption of innocence, right to counsel, right to appeal), and 15 (protection from retroactive criminal laws).

78. ICESCR, *supra* note 30, art. 12.

79. *Id.*, art. 13.

80. *Id.*, art. 9.

81. *Id.*, art. 7.

82. *Id.*, art. 11.

83. *See* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan. 22–26, 1997, Principle No. 8 [hereinafter Maastricht Guidelines]. A group of more than thirty experts convened in Maastricht in January 1997 to discuss the ICESCR. They noted that the Covenant states that all human rights are equal, and that civil and political rights, as well as economic, social, and cultural rights are indivisible, interrelated, and interdependent. *See id.*, Principle No. 4 ("It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."). All states, therefore, are "responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights." *Id.* As both treaties are subject to international law, states must comply with their treaty obligations under the ICESCR, just as they must with the ICCPR. Thus a violation of the ICESCR constitutes a violation of

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States should not use the excuse that Article 2 of the ICESCR allows states to use progressive means to fully achieve economic and social rights either as a pretext for noncompliance or as a rationale to claim lack of obligation.[84]

At bottom, the supposed differences in the nature of the two sets of rights can be overstated.[85] Both covenants state that the two

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international law. *See id.*, Principle No. 5 ("As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty.").

Moreover, contrary to the suggestion that the ICESCR's provisions are only hortatory, the Maastricht Guidelines urge that the ICESCR imposes three different types of obligations on states: (1) to respect the existing resources and not prevent individuals from access to those resources; (2) to provide measures to ensure that enterprises and individuals do not deprive other individuals of their access to rights and resources; and (3) to fulfill (facilitate) pro-active means that would strengthen people's access to, and the utilization of, available resources and the means to ensure their livelihood. *See* U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 12* (1999), E/C.12/1999/5, May 12, 1999 (discussing that the right to adequate food, like any other human right, imposes three types or levels of obligations on State parties: the obligations *to respect, to protect* and *to fulfill*. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide.). *See also* Maastricht Guidelines, *supra*, Principle No. 6 (stating that the "obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the States engage in arbitrary forced evictions. . . . [T]he failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favorable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.").

*See also* ICESCR, *supra* note 30, art. 16 ("State Parties . . . undertake to submit . . . reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.").

84. *See* Maastricht Guidelines, *supra* note 83, Principle No. 8 ("The State cannot use the 'progressive realization' provisions in article 2 of the Covenant as a pretext for noncompliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.").

85. Both the ICCPR and the ICESCR have key provisions that are almost identical. The preambles for both treaties espouse the obligation of states under the U.N. Charter to promote human rights. ICCPR, *supra* note 30, Preamble; ICESCR, *supra* note 30, Preamble. Both treaties recognize the need for all individuals to strive for the promotion and observance of rights that "derive from the inherent dignity of the human person." ICCPR, *supra* note 30, Preamble; ICESCR, *supra* note 30, Preamble. Further, Article 1 of each instrument states

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sets of rights are interrelated. The preambles to both the ICCPR and the ICESCR recognize that "freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."[86] This articulation expressly acknowledges the interdependence and indivisibility of both sets of rights to the attainment of human dignity.

The interdependence and indivisibility of the two Covenants reflect the fact that "the two sets of rights can neither logically nor practically be separated in watertight compartments."[87] The ICCPR,

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that "[a]ll peoples have the right to self-determination." ICCPR, *supra* note 30, art. 1; ICESCR, *supra* note 30, art. 1. And accordingly, states must freely allow their citizens to determine their social status and freely pursue their economic, social, and cultural development. Similarly, Article 2 of both treaties sets out principles of nondiscrimination. ICCPR, *supra* note 30, art. 2; ICESCR, *supra* note 30, art. 2. Art. 3 of both conventions reaffirms the equal right of men and women to enjoy all human rights. The ICESCR states that "State Parties . . . undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights." ICESCR, *supra* note 30, art 3. The ICCPR states that "State Parties . . . undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights." ICCPR, *supra* note 30, art. 3.

86. ICCPR, *supra* note 30, Preamble. In the ICESCR, the last phrase reads "whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." ICESCR, *supra* note 30, Preamble.

87. Steiner & Alston, *supra* note 65, at 247. Recent court decisions affirm that economic rights are crucial to the fulfillment of the personhood that is the foundational concern of the human rights structure. In a case involving the right to work, although decided under the Indian Constitution, the Supreme Court of India directly linked first and second generation rights. The Court expressly held that:

> [t]he sweep of the right to life conferred by Article 21 [of the Indian Constitution] is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away . . . . That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. . . .

Olga Tellis v. Bombay Municipal Corp., AIR 1986 Supreme Ct. 18, (Supreme Ct. of India, 1985), *available at* http://www.elaw.org/resources/text.asp?id=1104 (last visited May 9, 2005) (pavement and slum dwellers' protection from eviction from their shelters without alternative accommodation).

In October 2000, the Constitutional Court of South Africa similarly found that civil rights are inexorably intertwined with social and economic rights. Specifically, it ruled that:

> [t]he right of access to adequate housing is entrenched because we value human beings and want to ensure that they are

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for example, contains some provisions that constitute the condition for, and thus are implicit in, economic and social rights.[88] Although the right to form trade unions is contained in Art. 8 of the ICESCR,[89] the right to freedom of association (so foundational to labor organizing), is recognized in Art. 22 of the ICCPR.[90] Similarly, the prohibition against discrimination can be derived from Art. 2 of the ICESCR,[91] as well as from Arts. 2 and 26 of the ICCPR.[92]

The most likely interpretation of the bifurcation is that opposition by developed industrial states to granting economic and social rights resulted in the adoption of two separate treaties.[93] As a result of the bifurcation, states had the opportunity to refuse to undertake obligations under the ICESCR, and instead opt to ratify

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> afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.

Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169, ¶ 44 (CC), *available at* http://www.communitylawcentre.org.za/children/cases/grootboom1.pdf (last visited December 9, 2005) (constitutional protection for the homeless from eviction while waiting in informal homes situated on private land earmarked for formal low-cost housing without consent of the owner).)

In another instance, the Constitutional Court of South Africa recognized that state resources play a role in the state's obligation regarding social and economic rights—in this case, the right to health when it regretfully dismissed an appeal for provision of renal dialysis treatment, finding that "the obligations imposed on the state by [the Constitution] are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources." The Court concluded, "[t]he state has to manage its limited resources in order to address all [its citizens'] claims [for access to housing, food and water, employment opportunities, and social security]. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society." Soobramoney v. Minister of Health, 1998 (1) SA 765, ¶ 31 (CC), *available at* http://www.constitutionalcourt.org.za/Archimages/1617.PDF (state provision of nonemergent, renal dialysis health care treatment to indigent patient).

88. *See, e.g., supra* notes 77–82 and *infra* notes 89–92.

89. ICESCR, *supra* note 30, art. 8.

90. ICCPR, *supra* note 30, art. 22. For a nonlabor rights example, compare Article 13 of the ICESCR, *supra* note 30, art. 13, addressing the right to an education and the parental liberty to choose a child's school, with Art. 18 of the ICCPR, *supra* note 30, art. 18, addressing the liberty of parents to choose their child's religious and moral education.

91. ICESCR, *supra* note 30, art. 2.

92. ICCPR, *supra* note 30, arts. 2, 26.

93. Hernández-Truyol, *supra* note 55.

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only the ICCPR. Significantly, however, of the 152 states that have ratified the ICCPR, only five states—Botswana, Haiti, Mozambique, South Africa, and the United States—have failed also to ratify the ICESCR.

More recently, the World Conference on Human Rights, in July 1993, adopted the Vienna Declaration and Programme of Action (Vienna Declaration).[94] The preamble of the Vienna Declaration, which representatives of 171 States adopted by consensus, affirms that "all human rights derive from the dignity and worth inherent in the human person, and . . . the human person is the central subject of human rights and fundamental freedoms."[95] The Vienna Declaration itself states that all human rights are universal, indivisible, interdependent, and interrelated, and calls on the international community to treat all human rights in a fair and equal manner, on the same footing, and with the same emphasis.[96] Therefore, every state should promote and protect all human rights and fundamental freedoms, regardless of whether the rights are civil, political, economic, social, or cultural.

As we have seen, states enjoy a margin of discretion in selecting the means for implementing their obligations under both the ICCPR and the ICESCR. Most states tend to enforce the ICCPR with greater fidelity than the ICESCR, which sometimes is simply ignored. As a result, economic and social conditions have declined at an alarming rate for over 1.6 billion people worldwide.[97] The following discussion of labor rights specifically reveals the interconnection between civil and political rights and social and

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94. 1993 Vienna Declaration, *supra* note 15.

95. *Id.*, Preamble, ¶ 2.

96. *Id.*, Part I, ¶ 5.

97. *See* Maastricht Guidelines, *supra* note 83, Principle No. 1. The document further states in Principle No. 1 that the impact of the disparities among rich and poor countries on the lives of people is dramatic, and "renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity." *Id. See also* U.N. Committee on Economic, Social and Cultural Rights, *United Nations High Comm'r for Human Rights Fact Sheet No. 16* (Rev. 1), http://shr.aaas.org/thesaurus/instrument.php?insid=79 (last visited Oct. 30, 2005) (discusses the need to recognize economic, social, and cultural rights as indivisible and interdependent of civil and political rights. It further notes that more than 1.5 billion people lack clean drinking water and sanitation, and some 500 million children do not have access to primary education. More than one billion children cannot read and write. The ICESCR provides the most important international legal framework for protecting these rights to health, education, and food.). *See* ICESCR, *supra* note 30, arts. 12, 13, 11, respectively.

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economic rights.

B. The International Labour Organization

The primary international organization for human rights as they pertain to work is the International Labour Organization (ILO). The ILO's predecessor, the International Labour Office, was established in the post-World War I drive to protect individual rights in the world sphere. The Treaty of Versailles[98] established the organization in 1919 "to abolish the 'injustice, hardship and privation' which workers suffered and to guarantee 'fair and humane conditions of labour.'"[99] The ILO established numerous programs to promote the well-being of workers and safety in the workplace. These initiatives included a series of treaties that set labor standards for minimum working conditions,[100] including minimum age,[101] hours of work,[102] and similar matters, as well as agreements protecting the rights to association and to organize[103] and dealing with forced labor.[104]

98. The Peace Treaty of Versailles, June 28, 1919 (peace settlement signed between Germany and the Allies after World War I had ended in 1918 and in the shadow of the Russian Revolution and other events in Russia) [hereinafter Treaty of Versailles].

99. Virginia Leary, *Lessons from the Experience of the International Labour Organisation*, *in* The United Nations and Human Rights: A Critical Appraisal 580, 582 (Philip Alston ed., 1992); *see also* Treaty of Versailles, *supra* note 98, Part XIII, art. 393 (setting out guidelines for the governance and operation of the ILO).

100. For a comprehensive list of labor subject matters covered by ILO conventions, *see* http://www.ilo.org/ilolex/english/subjectE.htm (last visited Oct. 30, 2005).

101. ILO Minimum Age Convention, No. 138, concerning the Minimum Age for Admission to Employment, art. 2(3), 1015 U.N.T.S. 297 (adopted June 26, 1973, entered into force June 19, 1976).

102. The up-to-date ILO instruments on hours of work, weekly rest, and paid leave are the following: Weekly Rest (Industry) Convention, 1921 (No. 14); Weekly Rest (Commerce and Offices) Convention (No. 106) and Recommendation (No. 103), 1957; Part-Time Work Convention (No. 175) and Recommendation (No. 182), 1994; Reduction of Hours of Work Recommendation, 1962 (No. 116). The following are Instruments with interim status: Forty-Hour Week Convention, 1935 (No. 47); Holidays with Pay Convention (Revised), 1970 (No. 132); and Holidays with Pay Recommendation, 1954 (No. 98).

103. The following are the ILO instruments on the right to association and the right to organize: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

104. The up-to-date ILO instruments that comprise the Fundamental

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In recent years, the ILO has moved to link labor rights explicitly to the broader human rights structure. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work[105] identifies four "core" human rights related to labor: (1) the freedom of association, (2) the prohibition of forced or compulsory labor, (3) the elimination of exploitative forms of child labor, and (4) the elimination of discrimination.[106] Each of these core rights pertains to the work of commercial sex as we analyze it below.

The ILO does not compel or enforce its conventions on either nation states or employers; ILO conventions bind only signatories that have ratified the treaties. The organization lacks the vertical authority to enforce sanctions. Instead, the ILO relies upon the power of horizontal monitoring, publicity, and behind-the-scenes pressure to induce voluntary compliance.[107] The ILO provides standards for review and promotes cooperation between labor rights groups, employers, and governments.[108]

Despite the lack of enforcement power, the ILO has affected governments that rely upon ILO conventions when adopting, modifying, or interpreting their own national labor legislation. For example, even though the United States has not ratified certain key ILO conventions, the U.S. Department of State Office of International Labor Affairs echoes the ILO's goals, stating:

> The Office of International Labor Affairs promotes the rights of workers throughout the world. The Office seeks to

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Conventions on Forced Labour (and Related Recommendations) are the following: Convention Concerning Forced or Compulsory Labor, ILO Conv. No. 29, 39 U.N.T.S. 55, art. 2 (adopted on June 28, 1930, entered into force May 1, 1932) [hereinafter Forced Labour Convention]; Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35); Convention Concerning Abolition of Forced Labour, ILO Conv. No. 105, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959) [hereinafter Abolition of Forced Labour Convention].

105. ILO Declaration on Fundamental Principles and Rights at Work, Document CIT/1998/PR20A (June 1998) [hereinafter ILO Declaration], http://www.logos–net.net/ilo/150_base/en/instr/decla.htm (last visited Oct. 30, 2005) [hereinafter ILO Declaration].

106. *Id.*, art. 2.

107. For a description of the ILO's compliance powers, *see* Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, *in* Human Rights, Labor Rights, and International Trade 22, 41–42 (Lance A. Compa & Stephen F. Diamond eds., 1996).

108. The governing body is the executive body of the ILO and is composed of members who are governments, employers, and workers. *See* http://www.ilo.org/public/english/standards/relm/gb/index.htm (last visited Oct. 30, 2005).

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> ensure that all workers can exercise their rights in the workplace and thus share in the prosperity of the global economy . . ..Such economic progress, coupled with respect for the fundamental rights of workers, will strengthen democratic development, foster the growth of consumer markets, and provide a more stable environment for civil society and the promotion of human rights.[109]

The office's goals include "seek[ing] to ensure that all workers can exercise their rights in the workplace . . . [and p]romot[ing] universal recognition and implementation of internationally recognized core labor standards,"[110] and specifically lists the four core principles contained in the ILO's Declaration of Fundamental Principles and Rights at Work.[111]

Through this articulation of core rights, the ILO has defined free and just labor conditions by negation. In other words, although the ILO does not clearly specify what free labor is, it *does* directly state what it is not. These negative boundaries fence out certain relationships and labor practices as impermissible. Other ILO instruments establish affirmative rights related to work, but within broad parameters that allow many interpretations. Like the Universal Declaration[112] and the ICESCR,[113] the ILO affirms that everyone has the right to work, is entitled "to just and favorable conditions of work," and is entitled to fair wages for his/her work that enable the worker and his/her family to live with dignity.[114]

The right to work as well as the substantive conditions of work are basic human rights. The dichotomy that juxtaposes work to human rights in the debate over prostitution misunderstands,

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109. Office of International Labor Affairs, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, http://www.state.gov/g/drl/lbr (last visited Oct. 30, 2005).

110. *Id.*

111. *Id.* (construing ILO Declaration, *supra* note 105, art. 2) (specifically, "(a) freedom of association and the effective recognition of the right to organize and bargain collectively; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation").

112. Universal Declaration, *supra* note 30, art. 23(3).

113. ICESCR, *supra* note 30, arts. 6, 7.

114. *See* ILO, The ILO: What It Is. What It Does (2004), *available at* http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf; *supra* notes 100–103 and accompanying text; *see also* Universal Declaration, *supra* note 30, art. 23 (expressing employment rights such as equal opportunity and unionization).

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misrepresents, and thus violates fundamental principles of the very international norms that advocates of each position invoke.

## IV. HOW IS WORK DISTINCT FROM BONDAGE?—DECONSTRUCTING THE VOLUNTARINESS/CONSENT IDEA

The idea of intolerable labor is not new to the human rights system, as we discuss above.[115] The commitment to abolish some labor relations derives from the classical liberal political theory that drove the creation of modern western states, as well as the human rights system. Part A below explores the historical distinctions between work and bondage; Part B deconstructs the voluntariness/consent idea.

### A. Of Work or Bondage?

Consistent with the core liberal belief that human dignity requires autonomy, the premise of labor rights is that consent or voluntariness alone cannot guarantee freedom from bondage. For example, classical liberal political thinkers consistently rejected the idea that one could sell oneself into slavery.[116] One may not alienate the entirety of one's own body and personality through enslavement, even if the enslaved consents freely to the subjection.

Yet from the outset, liberal theory contained an internal ambiguity on this crucial question of the voluntary alienation of the self. Locke, most notably, asserted that although one could not consent to slavery, each man owned his own labor and the fruits thereof: "[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work*

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115. *See supra* at text accompanying notes 47–56.

116. *See, e.g.*, John Locke, Two Treatises of Government II, ch.7, § 135 (Peter Laslett, ed. 1988) ("no Body has an absolute Arbitrary Power over himself, or over any other. . . ."). Hegel perhaps best explains this powerful exception to the defining liberal commitment to individual autonomy. Because the moral personality requires a physical embodiment in this world, the body comes to stand for the self. Hegel writes: "Therefore, these goods, or rather substantive characteristics, which constitute my own private personality, and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible." Georg Wilhelm Friedrich Hegel, Philosophy of Right 52–53 (T. M. Knox, trans., Clarendon Press, 1949) (1821). The important exception to this consensus is Hobbes. Thomas Hobbes, Leviathan 138–39 (Richard Tuck ed., Cambridge Univ. Press, 1996) (1651).

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of his Hands, we may say, are properly his."[117] The individual possesses himself, and his freedom is exercised through his ability to dispose of himself as he chooses.

This property in labor is essential if wage labor contracts are to be possible; the worker must own what he offers for sale. In the liberal regime, property is not only the right to use and enjoy; it is crucially the right to alienate.[118] Yet this alienability of property in labor leads to the commodification of labor: a man's labor can be sold even if his person cannot. Owning his own labor, the worker brings it to market as a good to be exchanged for a wage.

> If a single criterion of the possessive market society is wanted it is that man's labour is a commodity, i.e. that a man's energy and skill are his own, yet are regarded not as integral parts of his personality, but as possessions, the use and disposal of which he is free to hand over to others for a price.[119]

As a commodity, labor is sold in markets that, absent political intervention, do not differentiate between human and nonhuman goods. The boundary between bondage and free labor thus depends importantly upon the possibility of separating "services" or "labour power" from the person such that the sale of labor is not a sale of the person.[120]

Liberalism makes three conventional distinctions to delineate the sale of labor from the sale of the person.[121] First, work is not slavery because the worker consents to the arrangement that includes the right to leave and work for another. Second, work is a reciprocal relationship requiring an exchange of value, embodied in the wage bargain. Finally, there is a temporal limit on the sale of labor; labor in waged employment is not perpetual, as it is for the slave. Locke summarizes:

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117. Locke, *supra* note 116, at II, ch.5, § 27. Locke's use of the term "man" does not stand in for "human." He made clear that women and children were not owners of their own bodies and labors, or of the fruits thereof. Rather, they were in a relationship of natural rather than political or contractual submission to their superiors. *See id.* at I, ch.5, § 47; II, ch.5, § 82. *See generally* Carol Pateman, The Sexual Contract 25–41, 25 (1988) (discussing the historical view of the patriarchal family as the "original and natural social form" from which civil or political society develops).

118. C. B. MacPherson, The Political Theory of Possessive Individualism 215 (1962).

119. *Id.* at 48.

120. *See* Pateman, *supra* note 117, at 72.

121. For a critical review of the literature, *see id.* at 39–76.

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> [A free man becomes a worker by] selling . . . for a certain time, the Service he undertakes to do, in exchange for wages he is to receive: . . . The Master [has] but a Temporary Power over him, and no greater, than what is contracted in the Contract between 'em.[122]

By each of these three measures, the worker as owner of himself is distinguished from the slave as the property of another.

Critics have questioned whether these distinctions sufficiently mitigate the negation of self-ownership inherent in the sale of labor. From this critical position arose the argument of "wage slavery." Labor radicals in nineteenth-century America made these arguments in the struggle to define free labor in opposition to chattel slavery.[123] First, they argued, labor is not an alienable commodity that can be separated from its original owner in the ways that the fruits of labor can be. What the wage laborer sells is control over the body, energy, will, and time. When the right to command one's body and time is transferred to another, so too is the person to whom these attributes are attached, which veers disturbingly close to slavery. Second, even if any one wage bargain is limited by time, given unequal resources, the worker must continuously repeat the transaction throughout life. Thus, even though the free laborer may not sell himself for the entirety of his life, by selling himself over and over, the wage laborer confronts a bondage as permanent as chattel status. Finally, where wages fall below the level required for a dignified life or even of survival, the exchange of value is so unbalanced as to negate reciprocity.[124] Even owners of slaves, after all, tried to keep their laborers alive enough to work and reproduce.

Although the claim of "wage slavery" was never literally accepted, these critiques developed to challenge deeply the concurrently emerging ideological principle of free contract, also closely tied to liberalism.[125] The response was significant government

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122. Locke, *supra* note 116, at II, ch. 5, § 85.

123. *See generally* Stanley, *supra* note 5 (examining different ways, all rooted in the principles of contract, in which individuals can be considered "slaves" to other individuals or to institutions).

124. *See id.* at 138.

125. Lea VanderVelde, for example, documents the extent to which the legislative debates surrounding the passage of the Thirteenth Amendment abolishing slavery in the United States did much more than repudiate the particular antebellum southern institution that subjugated black persons as laboring slaves. These debates defined bondage against the backdrop of an extensive and impassioned exploration of what constitutes fair and just labor relations. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*,

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intervention in the labor market. By the twentieth century, law in the United States and other countries had made the employment contract unlike any other contract for the sale of goods. This was further enshrined as the idea of labor rights migrated from the national to the international setting.[126] Despite recent erosions at the national level and a continuing weakness of enforcement at the international level, the substance of the labor relation as defined by wages, hours, and conditions remains subject to baseline rules below which no worker, no matter how disempowered, should fall. The law provides additional protections to those with the least amount of bargaining power, including children and workers subject to exclusion or abuse based on social status. And although neither equivalence of exchange in the wage bargain nor parity of bargaining power is required, national labor laws and international labor rights encourage workers to aggregate their bargaining power through collective action.[127] But even if they bargain collectively, workers cannot consent to working conditions deemed too exploitative to be compatible with human freedom. This is the goal of all nations that enact labor regimes and of the international labor rights system. Each of these checks on contract freedom reflects the conviction that the labor exchange is more than just another sale, and also an implicit recognition that consent or contract alone cannot prevent bondage in labor.

Not coincidentally, we would argue, during the historical period when the liberal states were struggling to define "free labor" as something more than "free contract," prostitution became an important issue in both the national and international arenas. The United States and Britain, those western nations most implicated in

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138 U. Pa. L. Rev. 437, 437 (1989). By this reading, the amendment embodied "a principle of universal free labor, not just one of racial equality." *Id.* at 471. *See also id.* at 438–39 ("Many members of Congress envisioned the amendment as a charter for labor freedom, and they defined that ideal in extensive debates. For these members, free labor was not just the absence of slavery and its vestiges; it was the guarantee of an affirmative state of labor autonomy.").

126. Significantly, the ICESCR contemplates fair wages (art. 7), as well as an adequate standard of living including food, clothing, and housing (art. 11), both of which premises would support labor's argument of non-reciprocity if these standards are not met. ICESCR, *supra* note 30.

127. *See* Nat'l Labor Rel. Act, 29 U.S.C. Ch.7.II (explicitly granting employees the right to collectively bargain and form trade unions); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (providing child labor requirements). The International Labour Organization also protects freedom of association for workers. ILO Declaration, *supra* note 105.

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chattel slavery, found the issue uniquely problematic. Where other western nations experimented with regulated prostitution, the United States and Britain confronted strong domestic opposition to such proposals from feminists and other social reformers. In 1875, after defeating regulated prostitution at home in Britain, Josephine Butler helped form the British, Continental, and General Federation for the Abolition of State Regulated Prostitution.[128] This organization marked the beginning of an international anti-prostitution movement.[129]

In the United States, the leading activists of the emerging international movement to abolish prostitution came from antislavery abolitionism.[130] They used the term "white slave" to communicate their belief that prostitution was a new form of slavery. Consistent with these views, the governments of the United States and Britain criminalized prostitution. Prostitution came to be defined as a relation outside the realm of legitimate contract, a sale of services categorically marked off from the wage labor bargain. As Amy Dru Stanley puts it, in the division between freedom and bondage, if wage labor stood for emancipation, sexual labor came to stand for the descent into new forms of slavery.[131] It is this history that underlies the adoption of the abolitionist position in the initial international agreements concerning prostitution and trafficking in

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128. *See generally* Pivar, *supra* note 7 (discussing the transformation of anti-prostitution efforts from a social dignity movement to a clinical effort to stop the spread of disease).

129. Scholars are just beginning to trace the ancestry of the international human rights process, especially the role and strategies of nongovernmental organizations in early transnational reform movements. *See* Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics 43–44 (1998) The political strategy of pressuring the nation states by mobilizing international moral condemnation was pioneered by several early international women's campaigns, including those for women's suffrage, against foot-binding, and against female genital excision. On the anti-prostitution front, international activism resulted in, among other legal reforms, domestic laws in the United States to combat prostitution and trafficking such as the Mann Act, 36 Stat. 825, 1911, 18 U.S.C. Ch. 395 (An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes, June 25, 1910), as well as international agreements to which the nation is a signatory that treat prostitution as a prohibited trade in human beings subject to abolition. *See supra* note 7.

130. *See* Pivar, *supra* note 7, at 255 (arguing that both the abolition and anti-prostitution movements were a part of a larger "purity reform" movement).

131. Stanley, *supra* note 5, at 240–42, 263.

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the early twentieth century.[132]

The reappearance of the issue of prostitution on the international stage in our own time is usually attributed to the concurrent rise of the women's movement and the expansion of the human rights system. As a matter of politics and culture, this explanation is obviously correct. But at a meta-level, our renewed attention to prostitution also coincides with a crisis of moral legitimacy of the market system, captured by this complex phenomenon we call "globalization." As was true in the postbellum period's struggle to differentiate free labor from chattel slavery, today's debate over whether prostitution is free or unfree labor goes to the very heart of the legitimacy of the market. Interestingly, it is again those nations with slave and abolitionist pasts that are caught up in the current debate over prostitution's legitimacy. This suggests a resurgence of the historical skepticism about the ideology of contract as freedom, as well as the reemergence of the prostitute as the symbol of that uneasiness.

The popular understanding of globalization emphasizes its economic impact, literally translating globalization as the worldwide ascendancy and intensification of capitalism. Yet globalization also has political, moral, social, and cultural dimensions. It is unclear whether civic, political, and emotional relationships provide sufficient balance to the norms of market relations. Specifically, sex has never been the haven of intimacy and altruism that could fight off market norms, but its mythology makes it a useful symbol for relationships that exist outside the market. So, once again, sex in the market (and, in this new global context, trafficking of sexual labor) stands as a defining issue for these broader cultural fears.

To the extent that global market norms accept sex work as just another form of wage labor, it justifies the dominance of capitalist relations under globalization. To the extent that prostitution remains problematic in the global expansion of the labor market, the moral legitimacy of transfer of human goods, including service, continues to be debatable. If debatable, then feminists, like abolitionists and labor radicals of an earlier era, must find arguments other than consent to distinguish free from unfree social relations. As Don Herzog puts it, "consent theory is inevitably entangled in substantive concerns, not purely procedural ones about

132. *Id.*

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when choice is voluntary, when not."[133] The presence of consent or voluntariness alone is not enough to fend off the dispossession, exploitation, and alienation of human bondage: "Mere exemption from servitude is a miserable idea of freedom."[134]

B. Deconstructing the Voluntariness/Consent Idea

The most persuasive arguments in support of the view that selling sexual service can be a form of work rest on the paired observations that women mostly take up this work out of economic need, and that it is voluntary, at least to the extent that the effort to make a livelihood is any kind of "choice" for poor women anywhere. At this level of description, the claim of voluntary work is hard to dispute. In the debate over prostitution policy, however, the descriptive question tends to be conflated with the tougher normative questions of whether prostitution *should* be treated as a form of work like any other, and whether it is fair that poor women have such limited economic options. We simply argue in this Article that one may make an economic analysis of prostitution that relates it to women's comparative poverty and yet not automatically embrace legitimating sexual labor.

Although saying that selling sex is an employment or profession may be disputed, few dispute that prostitutes do not perform this work out of pleasure or love, but rather for economic gain. Like any other job, if they did not get paid, they would not be there. Former sex worker Amber Hollibaugh writes,

> [T]he bottom line for any woman in the sex trade is economics. However a woman feels when she finally gets into the life, it always begins as survival; —the rent, the kids, the drugs, pregnancy, financing an abortion, running away from home, being undocumented, having a "bad" reputation, incest—it always starts at trying to get by.[135]

Even sex workers who say they enjoy their work still acknowledge it is a livelihood. Peggy Miller, a member of the Canadian Organization for the Rights of Prostitutes, said in a public discussion, "What is so terrible about fucking for a living? I like it, I

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133. Don Herzog, Happy Slaves: A Critique of Consent Theory 246 (1989).

134. Rep. Holman of Indiana, Cong. Globe, 38th Cong., 1st Sess. 2962 (1864), speaking in the debate over the enactment of the Thirteenth Amendment, *cited in* VanderVelde, *supra* note 125, at n.37.

135. Amber Hollibaugh, *On the Street Where We Live*, Women's Review of Books 1, 1 (1988) (book review).

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can live out my fantasies."[136] Another sex worker challenged her claim: "I don't know how you can possibly say . . . that you like every sexual act, that you work out your fantasies! Come on, get serious . . .. Can you count how many tricks you have had? You mean you have that many fantasies? Isn't it about having money to survive?[137]

Yet with the exception of only a privileged few, as Martha Nussbaum observes, all adults in the world economy must sell their labor power for some part of its value in order to obtain the means to support themselves and those dependent on them.[138] The press of economic survival falls especially hard on women who increasingly are the sole support for a household, and yet face declining real wages, a lower wage structure than men, and job segregation that concentrates female labor into market sectors and industries with little job security, uncertain hours, and few or no benefits. At the same time, the global spread of neoliberal economics means states are withdrawing the public welfare support that once aided women in caring for families outside of the wage economy. Regarding prostitution's relationship to the limited range of employment options for poor women, Nussbaum invokes Joseph Raz's powerful image of the "hounded woman," a woman on a desert island who is constantly pursued by a flesh-eating animal.[139] This woman is free to go anywhere on the island and do anything she pleases, but she is also quite unfree. If she wants not to be eaten, she must devote all her talents and material resources to avoiding the beast. She exercises the outer forms of human agency, but she has no real choices.

Many poor people's lives are nonautonomous in just this way. They possess autonomy in that they are capable of making bargains and of reflecting about what to do. But this matters little if the struggle for survival gives them just one or a very few miserable options. Yet society remains willing to accept the "choices" that poor people make to survive under these conditions as good enough to be deemed "consensual."[140] For example, although labor mandated by

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136. *From the Floor, in* Good Girls, Bad Girls: Sex Trade Workers and Feminists Face to Face 48, 48 (Laurie Bell ed., 1987) (quoting Peggy Miller).

137. *Id.* at 49–50.

138. Martha C. Nussbaum, *"Whether From Reason or Prejudice": Taking Money for Bodily Services*, 27 J. Legal Stud. 693, 693–94 (1998).

139. *Id.* at 721 (citing Joseph Raz, The Morality of Freedom 374 (1986)).

140. María Lugones's observations about agency are illuminating. She refers to the liberal idea of individual agency as a "fiction . . . that fits both the strategist [and] the powerful," those charged with upholding the "institutional

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the state as a condition for continued public assistance has been called a form of slavery, these claims have failed as a matter of law in U.S. courts.[141] The enforcement of the universal obligation to work associated with welfare reform suggests, in fact, that we are growing more, rather than less, inured to this impoverished vision of autonomy, at least as regards poor women and men. This argument recurs in the current debate over prostitution. Autonomy advocates contend that any prohibition or regulation of prostitution denies agency to the prostitute. Yet without access to other economic strategies for survival, is her individual agency an illusion?[142]

Nonetheless, Thanh-Dam Trúóng, in her study of Southeast Asian prostitution, defines "work" precisely at this basic level of survival—she sees human work as a means towards meeting basic

'apparatus.'" María Lugones, Pilgrimates/Peregrinajes 210 (2003). By veiling the particular and specific cogency of individual agency only for the structures and holders of power, the fiction creates an enticement for the illusion that all actors possess such individual agency. Instead, in reality, the fiction permits the entrenchment of the status quo by valorizing the atomistic and atomized individual who is a holder of power in powerful structures. Thus agency (or "intentionality" to use Lugones's term), generally defined and understood to be possessed by all individuals, is truly owned only by those with power who control the dominant power structures. As such, ideas of individual agency are both rhetorical and "conceptual devices that pervade or constitute the underpinnings of dominant moral and legal discourse and they are used in vicious and contradictory ways against those who are the subjects of strategic control." *Id.* at 210–11.

In this dissection of the concept of individual agency, only the acts of the powerful are consonant with the social, economic, and political structures that both define agency and support its exercise. The compatibility of desire between agent and structure enables the will of power—the hegemon, the patriarch. On the other hand, as Lugones notes, the subordinate, the oppressed, the subaltern "cannot exercise agency since they either enact a subordinate or a resistant intentionality." *Id.* at 211. Intentionality is coherent only when both the actors are in the structures of power. Thus the qualified intentionality of the subjugated "disqualifies [them] from agency in the first case." *Id.*

141. *See, e.g*, Brogan v. San Mateo County, 901 F.2d 762 (9th Cir. 1990); Dublino v. New York State Dep't of Soc Services, 348 F. Supp. 290 (W.D.N.Y. 1972).

142. Sylvia Law describes the opposition of her indigent female clients to the legalization of prostitution in Nevada when it was being debated there in the early 1970s. These women recognized that if sex work was lawful, such labor might be required of them as a condition of public assistance. These women's social location allowed them to cast into doubt any notion that calling prostitution "work" strips the practice of compulsion. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. Cal. L. Rev. 523, 600–01 (2000).

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needs and reproducing human life.[143] Sexuality is a productive life force available to women and men as a valuable asset to trade with or a resource to be strategically employed. Trúóng argues that the purely sexual elements of the body and the sexual energies of the personality can be used for survival and sustenance, just as they may be used for pleasure.[144]

This linking of sexual service with economic livelihood conflicts with culturally-valued ideals of sexuality as grounded in intimacy. By this ideal, sexual services are acts of social production and reproduction, and thus may meet Trúóng's definition of work. But they are rightly to be exchanged only in relationships of altruism and reciprocity on a noncommodified basis. Yet there are elements of bargain and exchange even in marriage, and also in many other sexual interactions that the law permits.[145] Additionally, all the other work of social production and reproduction that traditionally has been exchanged on the basis of altruism and reciprocity is now routinely bought and sold as a commodity in labor markets. We regularly hire cleaning women, cooks, nannies, babysitters, and even mail-order brides.

Even for those who reject the "sex work" characterization, there might be reason to treat adult, voluntary prostitution as work if this characterization would open avenues by which to ameliorate some of its misery. One perverse outcome, however, of getting caught up in the distinction between voluntary and forced prostitution is the implicit suggestion that society need concern itself only with the "innocent" subjected to coercion and not the "guilty" woman who chooses her path. This has the pernicious effect of overlooking those already working in the sex industry.[146] Although violence, coercion, duress, and deceit bring some into prostitution (the victims of "forced" prostitution), abuse, confinement, debt-bondage, and slavery-like conditions are also problems faced by those already working in the trade (the "voluntary" prostitutes). Feminist concerns for prostitution must address not just the means of entry into the trade, but also the conditions of life and work for those already there.

143. Than-Dam Trúóng, Sex, Money and Morality: The Political Economy of Prostitution and Tourism in South East Asia 73–75 (1990).

144. *Id.* at 67–92.

145. *See generally* Larson & Hirshman, *supra* note 6 (examining the elements of bargain and exchange that are present in the sexual community and suggesting a new structure of sexual regulation that recognizes the inherent political relationships between partners).

146. *See* Doezema, *supra* note 38, at 42.

Our bottom line, however, is that even if prostitution is regarded as work, which for the moment we will not dispute, it does not automatically become an acceptable form of freely chosen labor. If prostitution is forced or compulsory labor, exploitative labor, or discriminatory labor, its voluntary nature will not insulate the practice from challenge under human rights principles.[147]

## V. BEYOND CONSENT: SUBSTANTIVELY JUST LABOR STANDARDS

Anne McClintock observes that "[h]istorically the international labor movement has argued for the radical transformation of labor, not its abolition."[148] Advocates for the autonomy perspective seem to assume that once labor law steps in, prostitution would be legitimated because these laws represent power to regulate but not to abolish. Yet McClintock's history is only partially accurate. This account cannot explain, for example, the role of free labor advocates in defeating slavery.[149] One of the labor movement's approaches to "radical transformation" has been the effort to eliminate work deemed inhumane or irremediably dangerous to the worker.

Accordingly, international law protects all workers from bondage, forced, or discriminatory labor, and protects child workers from categories of work deemed unduly exploitative.[150] These kinds of work are subject to abolition in the name of labor rights as human rights. As we have argued, the conception of labor rights as human rights means that consent does not insulate a labor practice from critique or abolition. Rather, respecting the human rights of the worker requires a definition in substance rather than form of what is free as opposed to unfree labor. Having said this, we want to acknowledge the difficulty of defining substantive standards of just labor conditions, even in only one sector of the labor market, such as sexual labor. We find some resources in existing international standards addressing slavery, as well as practices similar to slavery[151] and forced or compulsory labor.[152] But the leading edge of

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147. These are three of the core labor rights as human rights recognized by the ILO. The fourth is the right of free association. *See supra* note 105 and accompanying text.

148. Anne McClintock, *Sex Workers and Sex Work: Introduction*, 37 Social Text 1, 8 (1993).

149. *See* Stanley, *supra* note 5, at 60–97.

150. *See* international declarations and conventions *en passim*.

151. Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253 (entered into

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labor rights thinking is the recent effort to define what labor is so exploitative as to impair human dignity and full personhood.[153] We discuss each of these in turn.

### A. Slavery and Practices Similar to Slavery

The term "slavery" is defined in international law as "the status or condition of a person over whom any or all of the powers of ownership are exercised."[154] The ILO conventions prohibit this labor relation.[155] Voluntariness is not an issue. We ask instead whether working conditions short of slavery satisfy human rights standards. Because the legal prohibition of slavery and similar practices is well established in international law,[156] these labor relations are not the principal focus of this Article.

Illegal practices "similar to slavery" include the following:

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force Mar. 9, 1927) [hereinafter Slavery Convention]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1957, 226 U.N.T.S. 3 (entered into force Apr. 30, 1957) [hereinafter Supplementary Slavery Convention].

152. Forced Labour Convention, *supra* note 104; *see also* Abolition of Forced Labour Convention, *supra* note 104.

153. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, ILO No. 182 [hereinafter Convention on the Worst Forms of Child Labour].

154. Slavery Convention, *supra* note 151, art. 1(1). The Supplementary Slavery Convention defines '[a] person of servile status" as "a person in the condition or status resulting from any of the institutions or practices mentioned in article I of this Convention. . . . " Supplementary Slavery Convention, *supra* note 151, art. 7(b). Article 1 of the Convention provides that

> Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention. . . .

*Id.*, art. 1.

"Servitude," although expressly prohibited, is not specifically defined in international law; but where the term is used, it is understood that the practices defined as "similar to slavery" are servitude. *See, e.g.*, International Law Dictionary and Directory, http://raymondaugust.com/pubs/dict/s.htm (last visited Oct. 30, 2005) (defining servitude as "(From Latin *servitudo*: 'slavery'.) A right to the use of another's property.").

155. Slavery Convention, *supra* note 151, art. 2; Supplementary Slavery Convention, *supra* note 151.

156. Supplementary Slavery Convention, *supra* note 151.

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.[157]

Activist/advocates and scholars have documented many practices of the sex industry worldwide that meet these existing definitions of slavery and practices similar to slavery. Women and children are openly bought and sold for prostitution. Children are pledged to sexual labor by their parents in order to satisfy family debt. Prostitutes are subjected to forms of strategic violence and coercion intended to restrain liberty, including the right to choose or reject sexual labor. Pimps may abduct, beat, or rape a prostitute in order to force her to return when she seeks to leave the life or chooses to work for another. She may be threatened regarding custody of a child or immigration status. Some prostitutes are held in a condition of debt bondage by which pimps or brothel owners lend money, goods, or credit, or require women to purchase food and supplies at

157. *Id.*,at art. 1(a)–(d).

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exorbitant rates, and then hold them to work off the debt. Where women enter prostitution in order to work and send money home to their families, this debt bondage may be perpetual. These conditions of labor parallel the prohibited relations of slavery and similar practices.[158]

In addition, pimps often seek broad control over the prostitute and her labor in more subtle and indirect ways. For example, the pimp may instigate and encourage substance abuse, may sexually and romantically involve himself with the prostitute, or may exploit a condition of previous sexual abuse. Such forms of emotional and addictive servitude, like debt bondage, may be voluntary, but nonetheless are coercive.[159] Although not currently treated as such, we believe these, too, should be regarded as a form of servitude under existing human rights standards.

### B. Forced or Compulsory Labor

The ILO conventions also prohibit forced labor, defined as "all 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."[160] As we have argued above, this is an impoverished understanding of forced labor, one that focuses solely on either violence or voluntarism.[161] The liberal distinction between free and unfree labor demands not just the worker's consent, but also substantive conditions of labor that assure both the worker's liberty and dignity.[162] The thickly protective structure of labor and employment law, adopted in many nations in accordance with these ideals, indicates that broadly equitable conditions of work—established directly through baseline rules and indirectly through enhanced bargaining power—are essential for the wage labor

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158. Hernández-Truyol & Larson, *supra* note 43.

159. Beverly Balos and Mary Louise Fellows drafted a statute to create a civil cause of action for women pressed into prostitution by these forms of coercion not currently recognized as such under law. Beverly Balos & Mary L. Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. Rev. 1220, 1223 (1999) (enacted as Minn. Stat. Ann. § 611A.81(1)(a), 611A.80(2)(5), (11), (12), (14), (17) (West Supp. 1999), but later repealed).

160. Forced Labour Convention, *supra* note 104, art. 2.1; *see also* ILO Declaration, *supra* note 105 (providing that all ILO members have an obligation to respect, promote, and realize the fundamental rights of the Conventions, including "the elimination of all forms of forced or compulsory labour").

161. *See supra* note 2 and accompanying text.

162. *See supra* note 125 and accompanying text.

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contract to be legitimated. Thus, we believe the analyses of forced and exploitative labor, to which we turn next, collapse: the best evidence of lack of force or compulsion is not voluntarism, but rather whether workers enjoy minimally reasonable and just conditions of work.

There are aspects of the new Trafficking Protocol[163] that indicate potential areas of expansion of ideas of "force" or "compulsion" as applied to commercial sex. The definition of trafficking in Article 3 of the Protocol includes the movement of persons by means of threat, force, or other forms of coercion including: abduction, fraud, deception, abuse of power or a position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.[164] The definition extends beyond conventional criminal law notions of coercion and duress, or even of fraud and deception, to include exploitation by abuse of social or cultural authority or of a position of vulnerability. For example, the situation of an immigrant, a woman, or an ethnic or racial minority (or someone who is all three) could be included.[165] The *travaux préparatoires*[166] —preparatory works that assist in the interpretation of the Trafficking Protocol – indicate that this "reference to the abuse of a position of vulnerability is understood to refer to any situation in

163. Trafficking Protocol, *supra* note 26.

164. *Id.*, art. 3(a).

165. In the negotiations over the Trafficking Protocol, the Network of Sex Work Projects urged nations not to adopt the Protocol on the grounds that the broad definition of trafficking contained therein exceeded existing definitions of forced or compulsory labor. *See* Network of Sex Work Projects, *supra* note 27. The International Human Rights Law Group (IHRL), a member of the coalition, objected to the definition of trafficking on the grounds that it "ha[d] too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult." Jordan, *supra* note 27, at 7. IHRL also described the trafficking definition as "ambiguous," objecting fundamentally that the terms used therein are new to the international rights field and thus not already defined in other human rights instruments. *Id.* The group proposed instead a narrower criminal law definition that limits trafficking to the movement of persons "for forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." *Id.*

166. Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of Its First to Eleventh Session, Addendum: Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Nov. 3, 2000 [hereinafter *Travaux Préparatoires*], *available at* http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf.

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which the person involved has no real and acceptable alternative but to submit to the abuse involved."[167] It is important to remember that the Trafficking Protocol applies only to cross-border trafficking and not to the domestic sex industry. A similarly broad definition applied to domestic sex work would broaden the kinds of sexual labor that would fall within existing international agreements against forced or compulsory labor.

The Trafficking Protocol also opens the door to consideration of the fundamental question of economic compulsion, which also exceeds conventional criminal law definitions of force or coercion. Unacceptable practices may include "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."[168] Note that giving payment is not alone enough; the payment must be made by a person "having control over another person."[169] If the explication given by the *travaux préparatoires* to the "abuse of authority or position of vulnerability" language also applies to the "payment" language, then the idea of economic compulsion applies only in the instance where "the person involved has no real and acceptable alternative but to submit."[170] This would be a comparatively narrow extension of conventional ideas of involuntariness, but nonetheless would prevent the payment of a wage alone to disguise and thus legitimate the worker's lack of real choices.

## C. Exploitative Labor

The category of "exploitative" labor practice is still mostly undefined in international law, although it holds tremendous promise as a labor rights standard. The most forthright human rights intervention has addressed the worst forms of exploitative child labor.[171] The Convention on the Worst Forms of Child Labour

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167. *Id.*, art. 3(a)(63).
168. Trafficking Protocol, *supra* note 26, art. 3(a).
169. *Id.*
170. *Travaux Préparatoires*, *supra* note 166, art. 3(a)(63).
171. *See* Convention of the Worst Forms of Child Labour, *supra* note 153; *see also* Juan Somavia, Director-General of the International Labour Office, Special Dialogue on Child Rights at the Office of the High Commissioner for Human Rights: Child Marginalization, Child Labour and the ILO's Response to It (Apr. 14, 1999), http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/child.htm (last visited Oct. 30, 2005) (noting that "[c]hild labor" is, according to the ILO, "the single most important source of child exploitation and abuse in the world today").

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defines the "worst forms of labor" as follows:

> (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
> (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
> (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
> (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[172]

To generalize from these principles, four factors characterize exploitative labor for children: (1) work that meets existing standards of slavery or forced labor, (2) culturally stigmatized or degrading work, (3) the illegality of the work itself, and (4) harmful or dangerous conditions that interfere with human development and capacity. By these definitions, unacceptable work may be paid or unpaid; significantly, the presence of a wage does not determine the work's exploitative character.

Even with children, not all forms of work are deemed harmful or exploitative. Under the Convention on Worst Forms of Child Labour, work is exploitative for children if it violates established international law standards.[173] A second factor in identifying exploitation is the child's relegation to culturally stigmatized or degrading work.[174] Naturally, cultural values shape how children

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172. Convention on the Worst Forms of Child Labour, *supra* note 153, art. 3(a)–(d).

173. For specific prohibitions of the worst forms of child labor, see Convention on the Worst Forms of Child Labour, *supra* note 153, art. 3(a)–(d).

174. *See id.*, art. 4(1) (providing that "[t]he types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999").
Recommendation 1999 provides, at paragraph 3, that:

> in identifying where the [worst forms of child labor] exist, consideration should be given, inter alia, to: (a) work which exposes children to physical, psychological or sexual abuse; (b)

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work throughout the world.[175] Children have human rights along economic, social, and cultural dimensions from which they should be able to benefit in lasting, active, and nondiscriminatory ways.[176] The Convention on the Worst Forms of Child Labour determines that the

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> work underground, under water, at dangerous heights or in confined spaces; (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

International Labor Organization, Worst Forms of Child Labour Recommendation (R190), 1999, at ¶ 3, http://www.logosnet.net/ilo/150_base/en/instr/r_190.htm (last visited Oct. 30, 2005). At paragraph 4, it further explains that

> [f]or the types of work referred to under Article 3(d) of the Convention and Paragraph 3 above, national laws or regulations or the competent authority could, after consultation with the workers' and employers' organizations concerned, authorize employment or work as from the age of 16 on condition that the health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity.

*Id.*, ¶ 4.

175. The ILO recognizes and respects, but does not defer to, the cultural factor in children's labor:

> Since child labour often leads to a violation of these rights, the industrialized countries as a whole recognize the need to combat this problem as it interferes with the normal physical and mental development of the child. In many developing countries this perception of the child—and it is worth noting that this is a recent perception even in Europe—is still in total contradiction with age-old traditions and social conventions which see the child as being a member of its community or clan and not as an "individual being" having the right of expression. Therefore children are obliged to bend to the code of conduct implicit in their group and to the prevailing division of labour which complies with parameters of age and sex—even if these are dangerous for a child's normal development.

Statement by Mr. Michel Hansenne, Director-General, International Labour Office, Child Labour: Refusing the Intolerable (Feb. 16, 1998), http://www-ilo-mirror.cornell.edu/public/english/bureau/dgo/speeches/hansenne/1998/ottigni.htm (last visited Oct. 30, 2005).

176. *See* Children's Convention, *supra* note 14, Preamble, arts. 2, 4.

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child's human rights should prevail over family, culture, or nation.[177] The child worker, like the adult worker, enjoys the ILO's core labor rights as human rights, which includes the right to benefit from nondiscrimination.[178]

Children are often put to labor that degrades and diminishes their status, such as begging, below-wage farm labor, drug-running and -spotting, pornography, and prostitution. This segmentation of the labor market manifests the child's powerlessness and constitutes a form of discrimination. As with children, for adults some forms of discrimination involve excluding a group from employment; another form assigns degrading or stigmatizing work to a particular group.[179] Such designations can meet the standard of culturally stigmatizing or degrading work in an adult context.

A third reason that child exploitation occurs is illegality. In countries where the child's work is illegal, the child has no legal protection for his or her working conditions. The ILO regards workers outside of the scope of protected legislation as unprotected workers. A child prohibited from work in many settings and conditions may still be working in the informal sector, where general conditions of work are often degrading and social services and benefits incident either to childhood or work are absent.[180] This suggests that appropriate regulation, rather than absolute

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177. *See* Convention on the Worst Forms of Child Labour, *supra* note 153.

178. *See, e.g.,* ILO Declaration, *supra* note 105. The Declaration embodies the principle that: "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." International Labor Organization, ILO Declarations, International Labour Conventions and Recommendations, *at* http://www.ilo.org/public/english/comp/civil/standards/ilodcr.htm (last modified Mar. 15, 2001).

179. Just as some work is reserved for children, we note here that some work in the commercial sex industry is predominantly reserved for women and those gendered "female," including gay youth and transsexuals.

180. Children working in illegal conditions "are unaware of their legal rights." Valentina Forastieri, Children at Work: Health and Safety Risks 131 (2d ed., 2002), http://www.ilo.org/public/english/support/publ/chilwork.pdf (last visited Dec. 9, 2005). If it is illegal to hire children for particular jobs, it is difficult to identify children working there and to provide them with any legal protection. On the other hand, "[i]n the case of the informal sector, exploitation and child abuse are more widespread, have different levels and can lead to extreme situations such as exposing children to criminality and prostitution, where they are completely unprotected." *Id.* at 90–91. "As children are not supposed to be employed, there is no legislation protecting them even from the most dangerous and arduous work." *Id.* at 4.

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prohibition, may well improve the well-being of some of these child laborers.

A final factor in children's exploitation is work that interferes with the human development or capacity of the child worker. Children have the right to develop along the many dimensions of human capacity: mental, physical, social, moral, and spiritual.[181] Any work preventing this development exploits a child. By contrast, work that does not detract from a child's essential activities (*e.g.*, play and education) is not necessarily exploitative. Focusing on the development of a child's human capacities rather than voluntariness has allowed the international community to conclude, in one specific example, that prostitution under any conditions is an unacceptably exploitative practice for children.[182]

Can we apply the exploitation paradigm to the labor of adults? The Trafficking Protocol[183] applies to adult workers and uses the term "exploitation," but meaningfully fails to define the term other than to observe that it includes "the exploitation of the prostitution of others or other forms of sexual exploitation."[184] This definition remains tautological due to unresolvable conflicts among the states negotiating about the effect the agreement might have on national laws regarding domestic prostitution. The *travaux préparatoires* provide that the agreement is to have no impact on the purely domestic sex trade:

> [T]he Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.[185]

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181. The goal is to eradicate "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." Convention on the Worst Forms of Child Labour, *supra* note 153, art 3(d). *See also* Art. 32 of the Children's Convention providing that children are entitled "to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." Children's Convention, *supra* note 14, art 32(1).

182. *See* Convention on the Worst Forms of Child Labour, *supra* note 153, art. 3.

183. Trafficking Protocol, *supra* note 26.

184. *Id.*, art. 3(a).

185. *Travaux Préparatoires, supra* note 166, art. 3(a)(64).

The more developed standards of child exploitation thus remain the most explicit labor standards available for considering the issue of exploitation in adult sexual labor or adult labor in any sector.

Measured against and generalizing from the standards of exploitative labor developed in the child labor setting, we suggest that voluntary adult prostitution would violate the core labor rights as human rights if it (1) interferes with the human capacities of adult persons; (2) is racially- and gender-subordinating, hence discriminatory; or (3) is illegal in ways that leave workers unprotected. We use these principles in our analysis by example and analogy. We do not intend to infantilize adult women by the analogy, nor to suggest that women of age be denied agency as is regularly done with minors.[186] But children and youth, like adult women and men, share common human characteristics. To the extent that these basic human qualities are affected by working conditions, the labor rules that suit the young may have adaptations appropriate to adults.

## VI. A CALL FOR EMPIRICISM AND A PROPOSED STANDARD FOR EXPLOITATIVE LABOR

If we applied the discussed indicia of exploitative child labor to adult, voluntary prostitution, what would we conclude? Until locally-grounded empirical work is done to paint for us detailed pictures of the conditions of sexual labor in the various parts of the world, we cannot make definitive conclusions about the nature of sexual labor. Once depth of knowledge has been established, all sides in the debate will have at least a common factual basis for theoretical generalization and policy development. Our project aims to spur this work. With the incompleteness of existing knowledge at hand, especially in cross-cultural contexts, we can only suggest the kind of questions researchers might ask. Our overarching goal is to open these inquiries, not to definitively conclude them.

### A. Illegality

Only the latter condition—illegality—can be mitigated by a

186. But *see supra* note 140 for a discussion of the constraints on the agency of subordinated persons.

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move either to decriminalization or legalization,[187] the policy options supported (sometimes reluctantly) by advocates of both abolition and autonomy.[188] Criminalization prevents the exercise of core labor rights, notably the right to organize and freedom of association; decriminalization or legalization would allow the enjoyment of these rights.[189] Sexual labor—like other low-status labor—would likely still be underpaid and exploited even if it were not illegal. But the prostitute's almost complete isolation from the law's protections—civil, criminal, and constitutional—would end. Especially from the perspective of nations that have criminalized prostitution (the United States among them), it is essential to consider whether decriminalization/legalization would meaningfully change working conditions in the sex industry.

Some aspects of the working conditions of prostitutes are directly related to its illegality by virtue of criminalization, and so could be partially addressed by decriminalization or legalization. Illegality drives much of the industry into the shadows, shielding business practices from scrutiny under ordinary legal standards. Because children and prostitutes often work outside the law's limits, they are both subject to the exploitation that follows from being criminalized and marginalized by living in an informal sector.

Criminalization has led to widespread police corruption and sexual abuse of prostitutes. In many countries, sex workers are *de facto* (if not *de jure*) denied the protection of the laws against sexual assault, battery, fraud, and even murder:

> [W]omen who work as prostitutes . . . are frequently harassed, manipulated, and exploited by police officers and others who have power over them. Criminalization contributes to the stigma that prostitutes bear, making them more vulnerable to hate crimes, housing and employment discrimination, and other violations of their basic rights.[190]

But does experience with legalization indicate that this policy will solve these abuses? This is a crucial question for researchers to explore, building towards comparative work that can synthesize the

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187. There is no official definition of decriminalization or legalization, but decriminalization usually implies repealing all laws against commercial sex, whereas legalization often implies more than simple decriminalization—it may include laws put in place to control prostitution, such as licensing.

188. *See supra* Section II.A.1, II.A.2.

189. *Id.*

190. Shrage, *supra* note 31, at 42.

relevant factors in living under a legal regime of decriminalization as opposed to a regime of legalization. We are somewhat skeptical that legalization will resolve the problems of criminalization because it is not law alone that leads to the degradation and disregard of prostitutes; it is also the nature of the work itself and the social relations it creates that make sex workers vulnerable to coercion, abuse, and exploitation. If it is the work of commercial sex and the relations it creates, and not just its legal status, that proves to be harmful, bringing adult prostitution out of the informal sector of the labor market might alter, but perhaps would not fundamentally transform, underlying conditions. Therefore, we believe that the case can be made now for partial decriminalization as a mandate of international law in order to protect the fundamental labor and human rights of sex workers to organize and freely associate. The alternative of legalization, however, requires careful empirical study.

### B. Race- and Gender-Subordination

Freedom from discrimination is one of the ILO's core labor rights as human rights.[191] Some of the limited available empirical evidence suggests that the market for commercial sexual services is strongly marked by gender, age, and race/ethnic disparities, although the pattern varies from country to country. The market in sex almost everywhere consists of mostly adult, male patrons of adult female sex workers, but also of child prostitutes of both sexes. In many countries, there are also marked racial and ethnic disparities.

Sex-discriminatory aspects of the broader labor market may in part explain the existence of prostitution. But if discrimination is an underlying cause of women's disproportionate presence as sexual laborers, this undermines the legitimacy of the practice vis-à-vis human rights norms. In many settings, sex work is one of women's best economic options. This follows a history in which women were prohibited from engaging in many forms of work, and labored under discriminatory conditions because of gender norms. Set against the human rights guarantees of nondiscrimination and equality,[192] these cultural values cannot justify differential treatment in domestic law.[193] Further, if prostitution persists because cultural norms

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191. *See supra* note 105.

192. *See* U.N. Charter, art. 1(3); Universal Declaration, *supra* note 30, arts. 2, 7; ICCPR, *supra* note 30, arts. 2, 26; ICESCR, *supra* note 30, art. 2; CEDAW, *supra* note 12, *passim* (provisions on nondiscrimination and equality).

193. Even differences drawn from cultural stereotypes or traditional

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identify women as good for little besides sex, these beliefs promote prostitution and, at the same time, discourage other economic opportunities for women. From this perspective, prostitution appears to be an obstacle to women's nondiscriminatory access to work in violation of their fundamental rights.

Mostly female prostitutes sell access to their intimate body, sexual service, time, and intellectual and emotional labor for mostly male profit and consumption. This commodification of female characteristics in accord with sexualized gender roles stigmatizes women as objects and reaffirms women's subordinated status. If such commodification is based on cultural debasement or social marginality, it conflicts with women's basic human right to equality and dignity, and their freedom from discrimination in accord with the idea of core labor rights as human rights.

### C. Work that Impairs Human Development and Capability

There is a consensus that exploitative work for children involves: too many hours spent working; work that exerts undue physical, social, or psychological stress; inadequate pay; and impairment of normal development and expression of human capacities.[194] These judgments are grounded in a valuation of child development and a child's expanding expression of human capacities.

Some human tasks and capacities of adults differ from those of children. Yet this way of asking the question of exploitative labor applies equally to both. We propose a "human capability" standard as

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images of women are affected by this guarantee of equality and nondiscrimination. *See* CEDAW, *supra* note 12, arts. 3, 5, 10(c), 13(c). *See also* ICCPR, *supra* note 30, art. 27; Universal Declaration, *supra* note 30, art. 27 (provisions on culture).

194. UNICEF stipulates a number of criteria to further specify work that "by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children," a criterion in the Convention on Worst Forms of Child Labour, *supra* note 153, art. 3(d). These criteria include:

- full-time work at too early an age;
- too many hours spent working;
- work that exerts undue physical, social or psychological stress;
- inadequate pay; . . .
- work that hampers access to education. . . .

UNICEF, *What Is Child Labour*, *in* The State of the World's Children 1997 (1997), *available in part at* http://www.unicef.org/sowc97/report/what.htm (last visited Oct. 30, 2005).

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the measure against which we should judge exploitation in labor practices, and weigh these practices against human rights norms.

Amartya Sen argues that a state that respects full personhood must embrace the maximization of human capability:

> [T]he literature on human capital tends to concentrate on the agency of human beings in augmenting production possibilities. The perspective of human capability focuses, on the other hand, on the ability—the substantive freedom—of people to lead the lives they have reason to value and to enhance the real choices they have. The two perspectives cannot but be related.[195]

Work that does not exploit must allow people to live a life they have reason to value and, at the least, not impair the real choices they have. Thus work that harms or exhausts the body or spirit, that diminishes the person, or that impairs fundamental human activities, such as rest/restoration, practical reason/learning, or intimacy, is work that is as dangerous to the adult as to the child.

Here, more than with respect to any of the other measures of exploitativeness, we need serious empirical investigation in broadly cross-cultural settings. For example, in a recently released report, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*,[196] Human Rights Watch (HRW) contends that the "conditions, vulnerabilities, and abuses" that the workers face in the meat and poultry industry constitute human rights violations.[197] These conditions include "dangerous jobs in difficult conditions . . . [which constitute] hazardous and exhausting labor,"[198] work under "constant fear and risk . . .[with] high rates of injury,"[199] and fear of loss of job if "they exercise their rights to organize and bargain collectively in an attempt to improve working conditions."[200] Significantly, simply

195. Amartya Sen, Development as Freedom 293 (1999). *See also* Martha Nussbaum's work on women and development *in* Women, Culture, and Development (Martha C. Nussbaum & Jonathan Glover eds., 1995) (advocating for a capabilities-focused philosophy, which is superior to a utilitarian-economic philosophy, when analyzing the problems of women in developing countries).

196. Human Rights Watch, Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants (2005), *available at* http://hrw.org/reports/2005/usa0105/usa0105.pdf.

197. *Id.*, at 1.

198. *Id.*

199. *Id.*

200. *Id.* at 1. The report specifies that "[w]orking in the meatpacking or poultry industry is notoriously dangerous . . . [and common injuries include:] scars, swellings, rashes, amputations, blindness, or other afflictions." *Id.* at 29.

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because work is physically demanding does not render the type of work a *per se* human rights violation. Such work only violates human rights norms when the responsible party does not take any preventative measures and practices result in injury or death, and where the hazards have been scientifically established and "are preventable with economically feasible health and safety precautions and practices."[201]

The HRW report utilizes the same international human rights referenced in this article to identify working conditions that constitute human rights violations. Specifically, the report cites the Universal Declaration's mandate of "just and favourable conditions of work";[202] the ICESCR requirement that every person has a right "to the enjoyment of just and favourable conditions of work which ensure, in particular . . . safe and healthy working conditions";[203] ILO Convention No. 155 on Occupational Safety and Health calling for policies "to prevent accidents and injuries to health . . . by minimizing . . . the causes of hazards inherent in the working environment";[204] and the U.N.'s Committee on Economic, Social and Cultural Rights General Comment No. 3 which advocates "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[205]

In its use of sources, the HRW report suggests a framework for studying sexual labor as a human rights violation.[206] The working conditions detailed in the report, like the working conditions in much of prostitution, impair the workers' human capabilities, thus eroding

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Many injuries are what the medical profession labels as "traumatic injuries, distinct from the endemic phenomenon in the industry of repetitive stress or musculoskeletal injury." *Id.* at 31. The report details the dangerous conditions as due to line speed (*id.* at 33–38), close-quarters cutting (*id.* at 38–39), heavy lifting (*id.* at 39–40), sullied work conditions (*id.* at 40–43), and inadequate training and equipment (*id.* at 43–47). These risks and fears are heightened, in particular, for immigrant workers whose language skills hinder them from understanding existing work hazards and from knowing their legal rights. *Id.* at 1, 101–17. Moreover, those who lack of documentation also face the risk of deportation if they seek to exercise their labor rights to improve their working conditions. *Id.* at 1.

201. *Id.* at 47.

202. *Id.* at 25 (quoting Universal Declaration, *supra* note 30, art. 23).

203. *Id.* (quoting ICESCR, *supra* note 30, art. 7).

204. *Id.* (quoting ILO Occupational Health and Safety Convention, No. 155, 1981).

205. *Id.* (quoting U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 3, U.N. ESCOR, 1990, U.N. Doc. E/1991/23, ¶ 10).

206. *Id.* at 25–28.

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their human dignity. Limited available empirical evidence suggests that the market for commercial sexual services, like the market for labor in the meat and poultry industry, is marked by: abusive working conditions; serious impairment of worker health and wellbeing; indignities; and unfair exchanges of either money or value. Thus, there may be intrinsic qualities of sexual labor that violate human rights norms, notwithstanding governing national law or its legitimacy as an economic practice.

## VII. CONCLUSION

We conclude that the labor rights framework enables negotiations of seemingly irreconcilable conceptions of sexual labor, as either coercion or as work, to create common ground for law and policy. Accepting that prostitution can be a choice and a means for economic sustenance does not necessarily lead to the conclusion that the response must be legalization and legitimization. To the contrary, if we look to the intersection of human and labor rights, we find moral frameworks, political understandings, and legal tools for resisting forms of work that endanger or exploit the worker, that recreate relationships of bondage, and that endanger the interests of labor and of women as a political class.

If, by these standards, sexual labor is a form of exploitative labor, it is properly subject to pressures for abolition based on human rights norms. Karl Marx considered every employment contract a contract of prostitution because of the exploitative nature of the sale of labor power: "prostitution is only a *specific* expression of the *general* prostitution of the *labourer*."[207] Thus, Marx suggests, as have other participants in the current debate over sex work, that there is nothing wrong with prostitution that is not also wrong with other forms of work.

Here we have limited ourselves to the question of sexual labor as a commodity in the market. But we hope our inquiry spurs parallel consideration of the issue of exploitative labor for adults working in other labor settings under conditions that degrade dignity and harm the individual. The prostitute served in the past as a symbol of workers' degradation; in the future she may stand as the

207. Karl Marx, *Private Property and Communism*, *in* The Economic and Philosophic Manuscripts of 1844, at v (Martin Milligan trans., 1959) (1932), *available at* http://www.marxists.org/archive/marx/works/1844/manuscripts/comm.htm.

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worker whose conditions spurred ambitious developments of the idea of labor rights as human rights.

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