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**BRIGITTE M. BODENHEIMER  
MEMORIAL LECTURE ON THE  
FAMILY**

**Prostitution, Labor, and Human Rights**

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<sup>1</sup> Early insights about the idea of “sexual labor” originate in collaborative work with Linda R. Hirshman. See generally LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998) [hereinafter *HARD BARGAINS*]. I have explored the international human rights framework as it pertains to prostitution in further collaborative work with Berta E. Hernández-Truyol. 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. Hernandez-Truyol ed., 2002) [hereinafter *MORAL IMPERIALISM*]; Berta E. Hernández-Truyol & Jane E. Larson, *Sexual Labor and Human Rights* (2003) (unpublished manuscript, on file with author).

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## INTRODUCTION

The legal status of prostitution is an unsettled issue in nations throughout the world, particularly in 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 under law.<sup>2</sup> In the era of slave emancipation in the West, however, the moral debate over prostitution shifted to the legal arena.<sup>3</sup> All aspects of prostitution became the subject of legal reform in Western countries.

When the debate reached the arena of international law, two conflicting positions emerged: the abolitionist position and the tolerance position. Historically, the abolitionist view argued that any form of prostitution is a human rights violation and, as such, should be abolished outright. That position has remained constant to the present day. The tolerance position historically rested on the belief that prostitution was part of the male sex right and that, therefore, prostitution could never be eradicated. In more modern times, however, the tolerance position has shifted to an economic analysis of prostitution that views women as autonomous individuals who freely choose to use their bodies for economic gain. The modern argument is thus more fairly termed the "autonomy" position. This position argues for

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<sup>2</sup> In earlier periods of history, the law had defined prostitution loosely as sexual promiscuity, treating prostitutes as a class of vagrants. See Gary V. Dubin and Richard C. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 109-11 (1962).

<sup>3</sup> See HARD BARGAINS, *supra* note 1, at 124-25, and sources cited at 145-51. It was not until 1908, in fact, that the U.S. Supreme Court required a financial transaction or pecuniary gain as part of the definition of prostitution. *United States v. Bitty*, 208 U.S. 393, 401 (1908).

legalization and legitimization of prostitution as a means of economic survival, no better and no worse than other means of livelihood. The premise of this Lecture is that these mutually exclusive positions can be negotiated in new ways that create common ground for law and policy between advocates of abolition and autonomy. I have argued elsewhere that this reconciliation is possible within the context of U.S. law.<sup>4</sup> I argue here that the human rights framework provides rich resources for thinking about freedom and bondage in the context of labor. My claim is that accepting prostitution as a necessary economic choice for some, as modern autonomy advocates argue, does not necessarily lead to the conclusion that the policy response must be legalization and legitimization. To the contrary, if we look to the intersection of human and labor rights, we find moral frameworks and legal tools for resisting forms of livelihood that endanger or exploit the worker, that recreate relationships of bondage, and that endanger the equality interests of women and the dignity interests of individuals.

I begin my discussion with a history of the development of the abolitionist and autonomy positions in international law. Then, the argument follows two related tracks of analysis. The first track is an examination of the crucial distinction between contract and bondage in labor. I uncover and challenge the philosophical underpinnings of the claim that consent or contract, by definition, vitiates a worker's exploitation or bondage. The belief that contract negates bondage is rooted in classical liberal theory. It was established as an article of political faith in the West in the struggle against race-based slavery in the United States and Britain, two nations whose political ideas powerfully shaped the basic human rights instruments that would emerge in the twentieth century. As I tell the story, the categorical opposition of contract and bondage became the dominant ideology of the West during the era of slave emancipation.

This dominance, however, did not go unchallenged. Even as it was rising, the dichotomy of contract and bondage was countered by radical traditions native to the regime of free contract. Following the abolition of the slave trade and slave emancipation in Britain and the United States, labor radicals and feminists began to use slavery as a metaphor to describe the conditions of bondage imposed by that intended instrument of freedom, the contract. Not only wage labor and marriage, but also prostitution, were suspect relations by this analysis. Although created by contract, these relations shared the attributes of dispossession,

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<sup>4</sup> See *HARD BARGAINS*, *supra* note 1, at 286-94.

exploitation, and alienation that the long debate over chattel slavery had identified as intrinsic to the institution. From this nineteenth-century critical tradition, I take the idea of "voluntary bondage" and extend it into the present to examine relations within which an individual consents to (or "contracts for") conditions of labor that cannot be reconciled with her human dignity.

In the second track of analysis, I question the propriety of the current dichotomy of the human rights debate, in which prostitution must be seen either as "work," to which only labor rights apply, or as a condition of "bondage," to which only human rights apply.<sup>5</sup> As a structure of analysis, this dichotomy is inconsistent with established principles that treat labor as part of the human rights framework.<sup>6</sup> Further, it ignores the emergence of a powerful fusion of labor and human rights concerns in political movements growing throughout the world, which oppose sweatshops, child labor, and various forms of bonded and indentured labor. That labor is an indivisible part of the fabric of fundamental rights is already a political and legal fact.

Finally, I will argue that the case of prostitution is a powerful laboratory in which to begin to articulate what is still largely unformed in this "labor rights as human rights" movement: what makes certain voluntary labor so dangerous or so exploitative as to violate the worker's human rights? These are not just rhetorical questions designed to spur political outrage and activism; these are potentially enforceable legal standards by which labor may be transformed in the spirit of human rights.

### I. THE ABOLITIONIST AND AUTONOMY POSITIONS

When the moral debate over prostitution shifted to the legal arena in the nineteenth century, it moved from domestic politics to the emerging arena of international law. This change resulted in the adoption of international agreements and conventions aimed at eradicating the cross-boundary trade in human sexual labor, known as trafficking, and at condemning prostitution as a practice akin to slavery and violence.<sup>7</sup> The earliest of these agreements, the International Agreement for the Suppression of the White Slave Traffic, was enacted in 1905 as the result

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<sup>5</sup> See MORAL IMPERIALISM, *supra* note 1, at 185.

<sup>6</sup> See *infra* Part III.A.

<sup>7</sup> On early international antiprostitution activism, see generally SHEILA JEFFREYS, THE IDEA OF PROSTITUTION (1997); DAVID J. PIVAR, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900 (1973).

of internationally organized feminism.<sup>8</sup> The movement culminated in the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.<sup>9</sup> These international agreements rested at least upon a symbolic global consensus that prostitution and trafficking in sexual laborers are human rights violations to be abolished outright.<sup>10</sup> Because of its origins in and affinity to the antislavery cause, this position may rightly be called "abolitionist."<sup>11</sup>

The 1949 Convention states, "prostitution and . . . traffic in persons for the purposes of prostitution are incompatible with the dignity and worth of the human person."<sup>12</sup> This convention consolidated the view that any form of prostitution is a human rights violation. Its prohibitions include enticing, procuring, or leading away another person for the purposes of prostitution, even with the consent of that person. It stands for the view that all prostitution is coerced, even if it appears to be freely chosen. The United Nations ("U.N.") again ratified abolitionist language in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW)<sup>13</sup> and in the 1989 Convention on the Rights of the Child.<sup>14</sup>

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<sup>8</sup> International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 92 U.N.T.S. 19. The 1904 agreement focused on the trafficking of women and girls across international borders without their consent for the purposes of prostitution. A second agreement, International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101, 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 to Combat the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39, and the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49. These were prohibited trafficking even if the woman was of full age and had consented to the practice.

<sup>9</sup> In 1949, the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which combined and superseded the earlier agreements. G.A. Res. 317(IV), U.N. GAOR, 4th Sess., 264th Plen. Mtg. at 33, U.N. Doc A/RES/317(IV) (1949) [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.

<sup>10</sup> See conventions cited *supra* note 8; 1949 Convention *supra* note 9.

<sup>11</sup> See PIVAR, *supra* note 7, at 6-7.

<sup>12</sup> 1949 Convention, *supra* note 9, at 33.

<sup>13</sup> 1249 U.N.T.S. 14 [hereinafter CEDAW]. The United States has not ratified this Convention.

<sup>14</sup> G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989) [hereinafter Children's Convention]. The United States has not ratified this Convention.

After decades in which the abolitionist position prevailed, however, arguments for legitimization of adult, voluntary prostitution and voluntary migration for sex work are today newly alive in international fora, as well as within national legal systems. U.N. processes have recently accepted some distinction between voluntary and forced prostitution, at least in the case of adults, which implies that some forms of prostitution and trafficking may be acceptable by human rights standards. For example, the Platform for Action concerning the human rights of women, adopted at Beijing in 1995, condemns only forced prostitution.<sup>15</sup> Similarly, the Declaration on the Elimination of Violence Against Women, approved by the U.N. in 1993, includes only "trafficking in women and forced prostitution."<sup>16</sup> Consistent with this position, the U.N. Special Rapporteur on Violence Against Women observed in 1994 that "some women become prostitutes through 'rational choice,' others become prostitutes as a result of coercion, deception or economic enslavement."<sup>17</sup>

Most recently, the U.N. Crimes Commission in Vienna negotiated a new international protocol on trafficking in women, the Protocol to Prevent, Suppress and Punish Trafficking in Persons,<sup>18</sup> which continues the trend of distinguishing between voluntary and involuntary prostitution and migration.<sup>19</sup> The definition of trafficking in the protocol

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<sup>15</sup> See Beijing Declaration and Platform for Action, 35 I.L.M. 405, ¶¶ 123, 133, 225 (1995).

<sup>16</sup> G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/25 (1989).

<sup>17</sup> United Nations Economic and Social Council, Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, E/CN.4/1995/42, Nov. 22, 1994. This is a change from the 1983 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, ¶ 9 (1983), which expressly provided that even when prostitution seems to have been chosen freely it is actually the result of coercion.

<sup>18</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 104, U.N. GAOR, 55th Sess., Annex 3, Agenda Item 23, U.N. Doc. A/RES/55/25 (2002) [hereinafter Trafficking Protocol].

<sup>19</sup> Children and adults are treated differently in the Trafficking Protocol. The protocol explicitly states that there should be no inquiry into voluntariness where a child is moved across borders for the purpose of sexual exploitation. *Id.*, art. 3(c). Elsewhere, the U.N., in conjunction with its International Labour Initiative, already has deemed prostitution and other forms of sex work intolerable forms of labor for children, without any inquiry into either the presence of force and compulsion, or the absence of voluntariness. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, ILO Convention No. 182, available at <http://www.ilo.org/public/english/standards/ipecc/ratification/convention/text.htm> (last visited Oct. 15, 2003) [hereinafter Convention on the Worst Forms of Child Labor].

covers the movement of persons “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”<sup>20</sup> Although maintaining a focus on forms of compulsion, the protocol’s definition of the conditions that create involuntariness is broad, going beyond existing definitions of enslaved, forced, or compelled labor under international standards,<sup>21</sup> and beyond conventional criminal law notions of coercion, duress, fraud, and deception. In very general terms, the definition reaches out to encompass abuses of social or cultural authority over the vulnerable as might occur, for example, with regard to an immigrant, a woman, or an ethnic or racial minority.

Yet the Trafficking Protocol fails to define key terms in its protections, reflecting the lack of agreement among both nations and advocates about the human rights questions of prostitution and migration for it. To fall within the Trafficking Protocol’s provisions, trafficking must be “for the purpose of exploitation.”<sup>22</sup> The Trafficking Protocol fails, however, meaningfully to define “exploitation” other than to observe that it includes “the exploitation of the prostitution of others or other forms of sexual exploitation,”<sup>23</sup> thus avoiding the core question in the current debate of whether prostitution and trafficking are or are not intrinsically exploitative.<sup>24</sup> There is thus a struggle underway within human rights institutions and discourses about whether to retain the international commitment to abolition of all prostitution and trafficking or,

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<sup>20</sup> See Trafficking Protocol, *supra* note 18, at art. 3(a).

<sup>21</sup> Slavery Convention, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3 (entered into force Apr. 30, 1957) [hereinafter Supplementary Convention]; 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 Labor Convention]. See also Convention Concerning Abolition of Forced Labour, ILO Conv. No. 105, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959).

<sup>22</sup> Trafficking Protocol, *supra* note 18, at art. 3(a).

<sup>23</sup> *Id.*

<sup>24</sup> This sidestep is apparently due to the inability of state parties to the negotiations to agree on what effects the agreement might have on national laws concerning domestic prostitution. The *travaux préparatoires* — preparatory works that assist in the interpretation of the Trafficking Protocol — explicitly provide that the agreement is to have no impact on the purely domestic sex trade. Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, U.N. GAOR, 56th Sess., P 63, U.N. Doc. A/55/383/Add.1 (2000) (source on file with author.)

alternatively, to change course towards tolerance, indeed, legitimization, of voluntary practices, limiting human rights condemnation only for practices of forced or nonconsensual sexual labor and migration.

The abolitionist position treats all prostitution as a problem of human rights, to be condemned uncompromisingly, like slavery, and never to be equated with acceptable practices like work, or with legitimating ideas like consent and contract.<sup>25</sup> Specifically, the abolitionists understand prostitution to be either a form of bondage akin to slavery or an institutionalized practice of sexual violence and gender inequality akin to rape, genital cutting, incest and battering.<sup>26</sup> Legally and politically, the abolitionist position has engaged in a refusal to distinguish voluntary prostitution and immigration for sex work from forced prostitution and trafficking. Abolitionists today invoke the international conventions against trafficking in human beings and slavery, the conventions for the protection of the rights of women and children, evolving standards concerning violence against women, and basic human rights instruments.<sup>27</sup>

Nonetheless, most modern advocates of abolition in the human rights context also support partial decriminalization of prostitution at the level of national law, recognizing the burdens that criminalization places on

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<sup>25</sup> The principal advocate of the abolitionist position in current international debates is the Coalition Against Trafficking in Women (CATW). See <http://www.catwinternational.org> (last visited Oct. 15, 2003). CATW proposes a Convention on the Elimination of All Forms of Sexual Exploitation of Women, intended to replace the 1949 Convention. *Id.* See also 1949 Convention, *supra* note 9; CATW: (Draft) Convention on the Elimination of All Forms of Sexual Exploitation of Women, rev. 1995, available at <http://www.catwinternational.org/about/UNconv.html> (last visited Oct. 15, 2003) [hereinafter CATW Draft Convention]. Sexual exploitation is defined so as to avoid the voluntary-forced distinction as "a practice by which women are sexually subjugated through abuse of women's sexuality and/or violation of physical integrity as a means of achieving power and domination including gratification, financial gain, advancement." CATW Draft Convention. Prostitution is specifically named as a violation of women's human rights and also a practice of inequality that subordinates women as a group.

<sup>26</sup> The CATW Draft Convention defines prostitution as a form of sexual exploitation like rape, genital mutilation, incest and battering. See <http://www.catwinternational.org> (last visited Oct. 15, 2003).

<sup>27</sup> See generally sources cited *supra* notes 9, 13; Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71-73 (1948) [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights, G.A. Res. 2200, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, entered into force Jan. 4, 1969, 5 I.L.M. 352 (1966), 660 U.N.T.S. 195 [hereinafter Race Convention]; Judith R. Walkowitz, *Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 419 (Ann Snitow et al. eds., 1983).

the prostitute.<sup>28</sup> 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, procurers, and other business interests. But abolitionists do not understand their partial decriminalization position to be an accommodation or legitimization of the practice. Deborah Rhode writes, for example, “[s]uch a compromise [partial decriminalization] would do much to avert the degradation and dangers of current approaches, but offer some safeguards against entrepreneurial initiatives . . . . If our ultimate goal is to reduce sexual objectification, we cannot tolerate unrestricted commercial sex as a provisional strategy.”<sup>29</sup>

The argument for tolerance or legitimization, newly alive at the U.N., is that some prostitution and trafficking — typically, adult, voluntary sex work and migration — is a free choice made by an autonomous individual often resulting from economic necessity. Respect for women’s self-determination requires respect for female choices about sex and survival.<sup>30</sup> This autonomy position has an economic rather than power analysis of prostitution and specifically invokes the parallels between sexual labor and wage labor.<sup>31</sup> Autonomy advocates invoke the human right to work and to self-determination guaranteed by basic human rights instruments, such as the Universal Declaration.<sup>32</sup> They also invoke antidiscrimination principles to argue that prostitutes are harmed by limits on freedom to market their resources and urge that women be allowed to use their bodies and labor to their greatest personal advantage, especially when women around the globe have few other economic opportunities and their need is great.<sup>33</sup> This economic need argument grows more compelling in a globalizing economy as modernization, competition, structural reform, and international trading rules disrupt traditional household and social organization, diminish

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<sup>28</sup> See Kate DeCou, *Women in Prison: U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 451 (1998).

<sup>29</sup> DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 262 (1989). The National Organization for Women (NOW) has formally endorsed decriminalization. See also Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993).

<sup>30</sup> See RHODE, *supra* note 29, at 262.

<sup>31</sup> On the “sex work as legitimate employment” position, see “World Charter of Prostitutes’ Rights,” International Congress for Prostitutes’ Rights, Amsterdam, Feb. 1985, reprinted in *A VINDICATION OF THE RIGHTS OF WHORES* 40 (Gail Pheterson ed., 1989).

<sup>32</sup> See sources cited *supra* note 27.

<sup>33</sup> See Kamala Kempadoo, *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* 1, 17 (Kamala Kempadoo & Jo Doezema eds., 1998).

governmental investment in social welfare, and drive down wages. These forces press more women into waged work for the support of themselves and their children, with few other viable economic opportunities and diminishing household and familial support.

The policy position that follows from the autonomy position is full legalization and legitimization of prostitution as "a job like any other." Some advocacy groups argue for completely unrestricted commercial sex as an expression of freedom from governmental intrusion into the free choices of individuals.<sup>34</sup> At the international level, however, advocates are less libertarian, accepting that prostitution should be subject to national laws that govern other legitimate businesses, but not to unusual or targeted restrictions. 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."<sup>35</sup>

Because these positions have led to conflicting policy recommendations, it might be presumed that they begin from irreconcilable understandings of the facts concerning sex work or from contradictory moral premises. The sections that follow will argue that this presumption is not necessarily true. There is more common ground than might appear between the two positions, and the human rights framework creates the discourse within which to see that such common ground is possible.

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<sup>34</sup> The strongest position against regulation of *any* form is that of COYOTE/National Task Force on Prostitution, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 290 (Frederique Delacoste & Priscilla Alexander, eds., 1987) ("[N]o mutually voluntary aspects of prostitution should be criminal, including relationships between prostitutes and third-party managers.").

<sup>35</sup> See Jo Bindman, with the participation of Jo Doezema, *Redefining Prostitution as Sex Work on the International Agency* (1997), available at <http://www.walnet.org/csis/papers/redefining.html> (last visited Oct. 15, 2003); 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). Lim, writing a report issued under the imprint of the International Labour Organization (ILO), 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. *Id.* The report calls for "recognition" of the sex sector, including extension of "the same labour rights and benefits as other 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. The report nonetheless does not commit the ILO itself to a particular legal position on adult prostitution. *Id.* at vi.

## II. THE DICHOTOMY BETWEEN SLAVERY AND CONTRACT

A. *The Roots of the Modern Debate in Slavery*

To debate prostitution is to invoke one of the foundational political struggles of Western democracy, the abolition of slavery. For Britain and Europe, the end of the slave trade and, for the United States, emancipation and the constitutional repudiation of slavery marked profound turns in political identity.<sup>36</sup>

At one level, the struggle over slavery in the Anglo-American world was framed as a choice between free labor and chattel slavery.<sup>37</sup> With the abolition of chattel slavery, the wage labor contract emerged as the distinguishing line between freedom and bondage.<sup>38</sup> “The ascendance of contract allegedly had transformed labor from a relation of personal dominion and dependence to a commodity exchange in which buyers and sellers were formally equal and free . . . .”<sup>39</sup> Indeed, contract became the marker of free relations within *all* realms of social exchange.<sup>40</sup>

Thus within current discourses grounded in Western democratic norms, like the human rights regime, to claim that prostitution is bondage is to link it to dispossession and exploitation, and hence to chattel slavery. Conversely, to describe prostitution as work is to link it to wage labor and contract, hence to self-ownership and freedom. It is these pure and idealized forms that the mutually exclusive positions in the existing international debate over prostitution invoke.

Within the political philosophy of liberalism, contract had been powerfully legitimating even before the struggle over slavery. In the eighteenth century, social contract theory justified the authority of government over its citizens. Legitimate political power arose from the consent of the governed, and contract explained why citizens accepted the rule of law.<sup>41</sup> But despite the rise of classical liberalism, relations grounded in claims of natural authority persisted in the realms of the

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<sup>36</sup> See generally DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975).

<sup>37</sup> AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998). For the analysis of this section I am greatly indebted to Stanley's broadly synthetic treatment of slavery, labor, prostitution and marriage.

<sup>38</sup> *Id.* at 75.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at x.

<sup>41</sup> See, e.g., JOHN LOCKE, *The Second Treatise, in TWO TREATISES OF GOVERNMENT* 267, 323-24 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

household and the workplace.<sup>42</sup>

In the nineteenth century, the struggle over slavery drove contract into the ideological heart of these personal and economic relations as well. It became essential to show that individuals had voluntarily assumed the obligations to which society sought to bind them.<sup>43</sup> Not only labor but also marriage and sex were thus idealized as relations properly grounded in consent and contract.<sup>44</sup> Amy Dru Stanley goes even further to claim that the very legitimacy of commodity relations, i.e., capitalism in the late nineteenth century, rested upon maintaining appropriate boundaries between free labor and chattel slavery.<sup>45</sup>

In slavery's aftermath, the two democratic nations most implicated in the practice, the United States and Britain, were the most committed to contract as the measure of free social relations.<sup>46</sup> This was especially true in the realm of slavery's counterpart, labor relations. After slavery's abolition, the buying and selling of human commodities could be justified only if grounded in free choice.<sup>47</sup> Legal doctrine and principles of political economy defined the wage labor contract as a relationship of freedom grounded in self-ownership, the definitional opposite of the oppression and dispossession of chattel slavery.<sup>48</sup>

But societies that have confronted the legitimacy of commodity relations in human beings and have developed a critique powerful enough to displace the slave system (up to and including civil war, as in the United States) cannot help but find the morality of the traffic in human beings persistently — and perhaps peculiarly — open to question. Lea Vandervelde documents the extent to which the legislative debates surrounding the passage of the Thirteenth Amendment abolishing slavery did much more than repudiate the particular Southern institution that subjugated black persons as slaves.<sup>49</sup> These debates defined bondage against the backdrop of extensive exploration

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<sup>42</sup> See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

<sup>43</sup> STANLEY, *supra* note 37, at xi, 2 (discussing importance of contract as sign of freedom while questioning this freedom as well).

<sup>44</sup> *Id.* at 13-14, 16-17.

<sup>45</sup> *Id.* at xi.

<sup>46</sup> See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782-86 (1985).

<sup>47</sup> STANLEY, *supra* note 37, at 62, 75.

<sup>48</sup> *Id.* at 9, 13, 75.

<sup>49</sup> Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 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.

of what constitutes fair and just labor relations.<sup>50</sup> From the perspective of free labor advocates in Congress, “race slavery was objectionable not only for its pernicious racism, but also as the most obvious and brutal violation of the free labor principle. The Thirteenth Amendment was a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation.”<sup>51</sup> In the years following slave emancipation, the Anglo-American labor and feminist movements continually revisited the foundational question of whether the buying, selling, and owning of human chattel had ended, or if the problem persisted by other names.

If a society counts itself free because it has replaced bondage with contract, how can it address the ambiguities of continuing markets in human commodities, of which prostitution is one example, but so too is wage labor? The postbellum workingmen’s movement targeted the wage labor contract, evoking the enduring phrase, “wage slavery.”<sup>52</sup> Feminists found a persistent bondage in women’s dependence on men, whether in prostitution or the marriage contract. Susan B. Anthony invoked the civic republican version of freedom that also permeated the workingmen’s movement:

Alexander Hamilton said one hundred years ago, “Give to a man the right over my subsistence, and he has power over my whole moral being.” No one doubts the truth of this assertion as between man and man; while, as between man and woman, not only does almost no one believe it, but the masses of people deny it.<sup>53</sup>

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<sup>50</sup> Vandervelde agrees:

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. They delineated the free labor ideal by a recitation of specific freedoms that were the inalienable prerogatives of the working man.

*Id.* at 438-39.

<sup>51</sup> *Id.* at 495.

<sup>52</sup> The symbolic association to chattel slavery “cast doubt on the idea that freedom meant being a merchant of one’s own labor, raising questions that were metaphysical as well as moral and economic — about the nature of the human essence, about autonomy and alienation, about the relation of self-ownership, labor and time.” STANLEY, *supra* note 37, at 84.

<sup>53</sup> Susan B. Anthony, *Social Purity* (1875), in 2 IDA HUSTED HARPER, LIFE AND WORK OF SUSAN B. ANTHONY 1004, 1007 (1898).

Feminists came to use the term “white slavery” to refer to prostitution and to analogize to slavery the institution of coverture in marriage.<sup>54</sup>

Slavery had become a metaphor to describe something otherwise inconceivable — a condition of bondage imposed by that supposed instrument of freedom, the contract.<sup>55</sup> The labor and feminist critiques challenged any absolute difference between the commodity relations of slavery and freedom and challenged the premise that the presence of contract dispelled bondage. The views of these early critics of contract freedom provide a complexity and depth of insight absent from much current debate about prostitution. Against the dominant view that whatever workers will consent to marks the line between free and unfree relations, these radicals articulated an idea of voluntary bondage.

Before slave emancipation and its aftermath, however, political thinkers in the classical liberal tradition consistently rejected the idea that one could sell oneself into slavery.<sup>56</sup> One may not alienate the entirety of one’s own body and personality through enslavement, even if the enslaved consents freely to the subjection. Hegel perhaps best explains this powerful exception to the defining liberal commitment to individual autonomy and free contract. Because the moral personality requires a physical embodiment in this world, Hegel believed that the body comes to stand for the self. He writes, “Therefore those 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.”<sup>57</sup>

Yet from the outset, liberal theory contained an internal ambiguity on this crucial question of the voluntary alienation of the self. Locke, most

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<sup>54</sup> Elizabeth Cady Stanton compared the status of women in marriage to the status of blacks under slavery, using the analogy to argue that women needed a right to autonomy. See, e.g., Letter from Elizabeth Cady Stanton to the Editor of the New York Tribune (May 30, 1860), reprinted in HISTORY OF WOMAN SUFFRAGE, 1861-1876, at 738, 738-39 (Elizabeth Cady Stanton et al. eds.) (1882) (“An unmarried woman can make contracts, sue and be sued, enjoy the rights of property, to her inheritance — to her wages — to her person — to her children . . . . It is only in marriage that [woman] must demand her right to person, children, property, wages, life, liberty, and the pursuit of happiness.”). On the use of the marriage-slavery analogy, see generally Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25 (SPRING 1990).

<sup>55</sup> See STANLEY, *supra* note 37, at xi-xii.

<sup>56</sup> See LOCKE, *supra* note 41, at 357 (“[N]o Body has an absolute Arbitrary Power over himself, or over any other. . . .”).

<sup>57</sup> GEORG WILHELM FRIEDRICH HEGEL, HEGEL’S PHILOSOPHY OF RIGHT § 66, at 52-53 (1821) (T. M. Knox, trans., Oxford Univ. Press 1949). For extension of the argument into modern property law, see generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

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* of his Hands, we may say, are properly his.”<sup>58</sup> 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 hopes to sell. In the liberal regime, property is not only the right to use and enjoy; it is crucially the right to alienate.<sup>59</sup> Yet this alienability of property in labor leads, inexorably, 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 commodity 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.”<sup>60</sup> As a commodity, labor is sold in markets that, absent political intervention, do not differentiate between human and non-human commodities.

The boundary between slavery and free labor thus depends importantly upon the possibility of separating “services” or “labor power” from the person such that the sale of labor is not a sale of the person.<sup>61</sup> Liberalism makes three conventional distinctions to mark off the sale of labor from the sale of the person.<sup>62</sup> First, work is not slavery because the worker consents to the arrangement, which 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, unlike slavery. Locke summarizes:

[A free man becomes a worker by] selling . . . for a certain time, the

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<sup>58</sup> LOCKE, *supra* note 41, at 287 (emphasis in original). 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 JOHN LOCKE, *The First Treatise, in TWO TREATISES OF GOVERNMENT* 137, 173, 206 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); LOCKE, *supra* note 41, at 321.

<sup>59</sup> C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 215 (1962).

<sup>60</sup> *Id.* at 48.

<sup>61</sup> PATEMAN, *supra* note 42, at 72.

<sup>62</sup> See generally *id.* for a critical review of the literature.

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.<sup>63</sup>

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

Critics of wage slavery recognized these distinctions, but argued that they did not mitigate the negation of self-ownership inherent in the sale of labor.<sup>64</sup> 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.<sup>65</sup> What the wage laborer sells is control over body, energy, will, and time. Labor radicals denied the separation between sale of labor and sale of the self: 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 amounts to slavery.<sup>66</sup>

Second, even if any one wage bargain is temporally and metaphysically limited, given unequal resources, the worker must continuously repeat the transaction throughout life. According to labor reformer George McNeill, in exchange for sustenance, the worker is "required to keep up the repetition of the same bargain every day."<sup>67</sup> He is "chained to his daily toil."<sup>68</sup> Thus, even though the free laborer may not sell himself for the full time of his life, by selling himself over and over, the wage laborer confronts a bondage as permanent as chattel status.<sup>69</sup>

Finally, where wages fall below the level required for a dignified life, or even for survival,<sup>70</sup> the exchange of value is so unbalanced as to negate

<sup>63</sup> LOCKE, *supra* note 41, at 322.

<sup>64</sup> STANLEY, *supra* note 37, at 84-97.

<sup>65</sup> The sale of the *fruits* of one's labor (the manuscript of this essay, for example) does not necessarily transfer one's *person* to the buyer. For example, Hegel writes, "Single products of my particular physical and mental skill . . . I can alienate to someone else . . . By alienating the whole of my time, as crystallized in my work, and everything I produced, I would be making into another's property the substance of my being, my universal activity and actuality, my personality." HEGEL, *supra* note 57, at § 67, at 54.

<sup>66</sup> See STANLEY, *supra* note 37, at 87-93.

<sup>67</sup> *Id.* at 93 (quoting George E. McNeill, AN ARGUMENT IN FAVOR OF A LEGISLATIVE ENACTMENT TO ABOLISH THE TENEMENT-HOUSE CIGAR FACTORIES IN NEW YORK AND BROOKLYN 19-20 (New York, 1882)).

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* at 93.

<sup>70</sup> Significantly, the ICESCR contemplates fair wages as well as an adequate standard of living including food, clothing, and housing; both premises would support labor's argument of nonreciprocity if these standards are not met. ICESCR, *supra* note 27, at art. 7, 11.

reciprocity. Even owners of slaves, after all, had to keep their laborers alive enough to work and reproduce.

Although the labor radicals' claim of "wage slavery" was never literally accepted, it challenged the ideology of free contract. The eventual response was significant government intervention in the labor market, which by the twentieth century had made the employment contract unlike any other commodity contract. Despite more recent erosions, 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.<sup>71</sup> The law provides additional protection to those with least bargaining power, including children and workers subject to exclusion or abuse based on social status.<sup>72</sup> And, although neither equivalence of exchange in the wage bargain nor parity of bargaining power is required, labor law encourages workers to aggregate their bargaining power through collective action.<sup>73</sup> But even if they bargain collectively, workers cannot consent to working conditions deemed too exploitative to be compatible with freedom. These checks on contract freedom reflect the conviction that the labor exchange is more than just another commodity contract, and they also reveal an implicit recognition that contract alone cannot prevent bondage in labor.

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<sup>71</sup> See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (2003), which strives toward "eliminating substandard working conditions" for all employees.

<sup>72</sup> See, e.g., 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting discrimination in employment based on race, color, religion, sex, or national origin).

<sup>73</sup> In 1935, the U.S. Congress observed:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

National Labor Relations Act, 29 U.S.C. § 151 (1994) (originally enacted in 1935).

*B. Defining Prostitution as Work and as Bondage*

For workingmen of the nineteenth century, prostitution symbolized the degradation of all labor under conditions of economic compulsion.<sup>74</sup> The prostitute cast a shadow over the bright line drawn between contract and bondage: at once she embodied the freedom to sell one's labor and the unhappy reality of a continuing trade in people. Stanley describes this perception of the prostitute as "a figure of free society who was nonetheless bought, body and soul."<sup>75</sup>

Postbellum feminists also condemned prostitution as the sale of the human body, invoking the parallel to slavery. Dr. Elizabeth Blackwell said that if women "are made the subjects of temporary purchase, they become the subjects of trade,"<sup>76</sup> and she went on to condemn this as "[t]he introduction of the slave principle (the purchase of the human body)."<sup>77</sup> Blackwell explicitly linked the recurrence of the "slave principle" to the degradation of labor under the so-called "freedom of contract" of laissez-faire capitalism. "[A]ssuming the female body to be an article of merchandise, necessarily subjects this merchandise to those fluctuations of the market, those variation of demand and supply, and that tyranny of capital over labour which destroy freedom of contract," she argued.<sup>78</sup>

Feminists observed that working women faced the same wage slavery of low pay, harsh conditions and unemployment as men. In fact, gender norms that restricted female labor to a few trades and paid women workers lower wages than men made their labor-market prospects even harsher.<sup>79</sup> According to the influential 1859 study of prostitution by physician William Sanger, "[r]eal necessity forces [the prostitute] on the town . . . . No economist, however closely he may calculate, will pretend that fourteen cents a day will supply any women with lodging, food and clothes."<sup>80</sup> Sanger described the choice faced by women in the labor market as that between "voluntary dishonor and killing indigence."<sup>81</sup>

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<sup>74</sup> See STANLEY, *supra* note 37, at 219.

<sup>75</sup> *Id.* at xiii.

<sup>76</sup> ELIZABETH BLACKWELL, *Purchase of Women: The Great Economic Blunder*, in *ESSAYS IN MEDICAL SOCIOLOGY* 133, 137 (Arno Press 1972) (1902).

<sup>77</sup> *Id.* at 162.

<sup>78</sup> *Id.* at 155-56.

<sup>79</sup> See STANLEY, *supra* note 37, at 225-26, 230, 232.

<sup>80</sup> WILLIAM W. SANGER, *HISTORY OF PROSTITUTION, ITS EXTENT, CAUSES AND EFFECTS THROUGHOUT THE WORLD, BEING AN OFFICIAL REPORT TO THE BOARD OF ALMS-HOUSE GOVERNORS OF THE CITY OF NEW YORK* 448, 523, 575-77 (1858).

<sup>81</sup> *Id.*

Blackwell took up this argument, emphasizing the cruel struggle between economic need and sexual respectability for wage-earning women:

It is now a fact that in every large city, no woman with any pretension to natural attractiveness can fail to meet a purchaser. There are men who think it neither shame nor wrong to purchase for shillings or pounds, as the case may be, temporary physical gratification, without reflection upon the inevitable results, individual and social, of their temporary action. The knowledge that money may be gained so easily, spreads from woman to woman. The contrast between the ease with which the wages of sin may be gained, and the laborious, even crushing methods of honest industry, becomes an ever present and burning temptation to working women.<sup>82</sup>

So, too, the argument for the minimum wage in the postbellum period was often explicitly linked to concerns about prostitution.<sup>83</sup>

Although these early feminists understood that prostitution was proximately caused by unjust working conditions and wages, their critique went deeper than that of the labor movement to identify prostitution as a structure of bondage specifically founded on sex and gender.<sup>84</sup> Women were unable to live independently not simply because they were wage slaves, but because men controlled the means of subsistence. The resulting asymmetry of power shaped the morality of market exchanges, including the labor contract. The low pay offered women workers, and the resulting pressure towards prostitution, was evidence that there was more value in a woman's sexual labor than any other form of her labor.<sup>85</sup> "Whoever controls work and wages," wrote Susan B. Anthony, "controls morals."<sup>86</sup> Pressed by a gendered economic dependency, Anthony concluded, women entered contracts of bondage in prostitution and also in marriage.<sup>87</sup> Anthony thus spoke of the moral

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<sup>82</sup> BLACKWELL, *supra* note 76, at 159.

<sup>83</sup> See, e.g., *Adkins v. Childrens' Hosp.*, 261 U.S. 525 (1923) (evaluating this argument in support of minimum wage law for women).

<sup>84</sup> The alliance between labor-supporters and feminists was not always upheld. Lea Vandervelde notes that the Radical Republican members of Congress who spoke up for the dignity of labor in the debates over the Thirteenth Amendment also sought to ensure that certain types of non-labor status relationships, including marriage and parent-child relations, be excluded from the amendment's scope. See Vandervelde, *supra* note 49, at 455.

<sup>85</sup> Anthony, *supra* note 53, at 1009.

<sup>86</sup> *Id.* at 1008.

<sup>87</sup> *Id.*

imperative to “lift this vast army of poverty-stricken women who now crowd our cities, above the temptation, the necessity, to sell themselves, in marriage or out, for bread and shelter.”<sup>88</sup>

Feminists also sought to broadly strengthen their ties to the labor movement by emphasizing that the tolerance for prostitution drove down workingmen’s wages. Blackwell argued that it was a principle of political economy that bare subsistence is the natural limit below which capital cannot drive workers’ wages, “for no man will consent to labour for less wages than will keep him alive.”<sup>89</sup> But this is not the case in regard to women’s wages, she continued, which can be forced below subsistence because employers know that women can be pressed into sexual labor (“the wages of vice”) to supplement underpayment for other work.<sup>90</sup> The result, she concluded, is a “powerful . . . cause of derangement in the natural rewards of labour [that] has been overlooked.”<sup>91</sup>

Postbellum reformers sought to contain prostitution’s threat by a new form of abolition. In the 1870s and 1880s, many prominent antislavery abolitionists moved into the antiprostitution cause. In these years, a popular movement in both Britain and the United States definitively defeated efforts to legalize or regulate prostitution.<sup>92</sup> The “new abolition” movement began in Britain in the 1860s in the opposition organized by Josephine Butler to the Contagious Diseases Act (CD Acts).<sup>93</sup> The CD Acts were public health laws that provided for the forced inspection, detention, and treatment of women suspected as prostitutes in military districts.<sup>94</sup> Butler’s campaign protested the differential treatment accorded to prostitutes and their customers under the CD Acts (women were inspected and licensed in order to protect customers).<sup>95</sup> But the campaigners also opposed prostitution in any form, state-regulated or deregulated.<sup>96</sup> In the face of a mass opposition movement that linked Butler’s feminist followers with radical workers’ organizations and middle-class reformers, Parliament repealed the law in 1886 and took other measures to distance itself from the potent

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<sup>88</sup> *Id.* at 1007.

<sup>89</sup> BLACKWELL, *supra* note 76, at 162.

<sup>90</sup> *Id.* at 162-63.

<sup>91</sup> *Id.*

<sup>92</sup> See Walkowitz, *supra* note 27.

<sup>93</sup> HARD BARGAINS, *supra* note 1, at 124.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

accusation that the government “licensed” vice.<sup>97</sup>

In 1875, Butler helped form the British, Continental, and General Federation for the Abolition of State Regulated Prostitution.<sup>98</sup> This organization marked the beginning of an international antiprostitution movement.<sup>99</sup> The international movement to abolish prostitution was called “the new abolitionism,”<sup>100</sup> and in the United States the leading activists came to the movement from antislavery abolitionism. “Habitually willing to accept the most onerous moral responsibilities,” writes David Pivar, “[they] now envisioned themselves as new abolitionists dedicated to the emancipation of the white slave — the prostitute.”<sup>101</sup> Among these was the prominent antislavery leader, William Lloyd Garrison, who said he immediately recognized in the new reform movement, “the old ring of uncompromising warfare against sin.”<sup>102</sup>

Having been burned by the effort to regulate, the governments of Britain and the United States moved instead to criminalize the sale of sex.<sup>103</sup> Prostitution came to be defined as outside the realm of legitimate contract, a sale of services marked off from the wage labor bargain.<sup>104</sup> 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.

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<sup>97</sup> *Id.* at 125.

<sup>98</sup> See PIVAR, *supra* note 7, at 66.

<sup>99</sup> See generally *id.*

<sup>100</sup> Scholars are just beginning to trace the ancestry of the international human rights process, especially the role and strategies of nongovernmental organizations (NGOs), to such 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 state 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 antiprostitution 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 (2003) (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 “trafficking in women” as a prohibited trade in human beings. See also *supra* notes 8-9.

<sup>101</sup> PIVAR, *supra* note 7, at 7.

<sup>102</sup> *Id.* at 67.

<sup>103</sup> See generally THOMAS C. MACKEY, *RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES AND VICE DISTRICTS, 1870-1917* (1987).

<sup>104</sup> See STANLEY, *supra* note 37, at 218.

The reappearance of the issue of prostitution on the international stage at the millennium might be most easily explained by 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 the level of ideology, the renewed attention to prostitution also coincides with a crisis concerning the moral legitimacy of the market system, now captured by this complex phenomenon we call "globalization." As was true in the postbellum period, today's debate over whether prostitution is free or unfree labor goes to the very heart of the legitimacy of commodity relations, and thus of the market more generally. Given the history of contract and bondage ideology, it is significant that those nations most implicated in slavery now find prostitution most problematic. This coincidence suggests a resurgence of the post-Civil War skepticism about the ideology of contract as freedom, as well as the reemergence of the prostitute as the charged symbol of that skepticism.

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. Where all means of material sustenance and social exchange are swept up in market exchange, what remains of relations grounded in altruism, in gift, and in dependency? We fear our civic, political, and emotional relationships will not provide sufficient counterweight to the norms of market relations, much less resist their imperialistic reach. Once again prostitution and, in this new global context, trafficking stand as the defining issues for these fears.

In accepting prostitution as just another form of wage labor, global norms not only reflect but justify 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 human commodity relations continues to be debatable. If debatable, then we 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 when choice is voluntary, when not."<sup>105</sup> The presence of contract is alone not enough to fend off the dispossession, exploitation, and alienation of human bondage. In the words of Representative Holman of Indiana in the debate over the Thirteenth Amendment, "Mere exemption

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<sup>105</sup> DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 246 (1989).

from servitude is a miserable idea of freedom."<sup>106</sup>

### III. BEYOND CONSENT

#### A. *The Radical Transformation of Labor*

Anne McClintock observes that, "historically the international labor movement has argued for the radical transformation of labor, not its abolition."<sup>107</sup> Advocates for the autonomy perspective often seem to assume that once the labor framework takes over, prostitution will be legitimated, because these laws represent the power to regulate, but not to abolish. Yet McClintock's history is only partially accurate. One of the labor movement's approaches to "radical transformation" has been its efforts to eliminate work deemed inhumane or irremediably dangerous or injurious to the interests of labor as a political class.

Arguments about the "essential nature" of prostitution — arguments that to date have been conducted mostly through analogies that are at best partially apt, and at worst almost hollow of meaning — have reached an impasse without changing the experiential lives of sexual laborers. One perverse outcome of getting so 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, but not with the "guilty" woman who chooses her path. This approach has the pernicious effect of overlooking those already working in the sex industry.<sup>108</sup> Although violence, coercion, and deceit bring some into prostitution (the victims of "forced" prostitution), abuse, confinement, debt-bondage, or slavery-like conditions are also problems faced by those already working as prostitutes (the "voluntary" prostitutes). A human rights policy for prostitution must address not just the means of entry into prostitution, but also the conditions of life for those already there.

As a structure of legal and political analysis, the dichotomy drawn in the existing debate between the rights that pertain to slavery and the rights that pertain to work is inconsistent with, and indeed contrary to, human rights principles that establish labor rights as human rights. The

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<sup>106</sup> Rep. Holman of Indiana, Cong. Globe, 38th Cong., 1st Sess. 2962 (1864) (speaking in debate over enactment of Thirteenth Amendment); see Vandervelde, *supra* note 49, at 443 n.37.

<sup>107</sup> Anne McClintock, *Sex Workers and Sex Work: Introduction*, 37 SOCIAL TEXT 1, 8 (1993).

<sup>108</sup> Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in GLOBAL SEX WORKERS, *supra* note 33, at 34, 42.

Universal Declaration of Human Rights specifically provides that “[e]veryone has the right to work, to free choice of employment . . . .”<sup>109</sup> Further, it provides that “[e]veryone has the right to just and favorable conditions of work [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.”<sup>110</sup>

The International Labour Organization (ILO), the primary international organization for human rights as they pertain to work, is the entity that makes specific the meaning of these basic rights. The 1948 Declaration Concerning the Aims and Principles of the International Labour Organization, the ILO’s constitutional document, states that “labor is not a commodity.”<sup>111</sup> There, the ILO states that its fundamental objective is to obtain peace through social justice based on the understanding 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.”<sup>112</sup> Thus from the outset, the ILO has understood the human relationship of labor as one not adequately explained by the ideology of free contract or justly regulated solely by the workings of the free market.

Generally, the ILO has proceeded to define free and just labor conditions by negation: although they do not clearly specify what free labor is, they *do* directly state what it is not.<sup>113</sup> These negative boundaries fence out certain relationships and labor practices as impermissible. The enforcement mechanisms for international labor rights are weaker than for other human rights.<sup>114</sup> The ILO’s standards work by developing consensus, informing nations of the necessity for national legislation to improve labor standards, and conducting annual reviews to encourage compliance and progress.<sup>115</sup>

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<sup>109</sup> Universal Declaration, art. 23(1), *supra* note 27.

<sup>110</sup> *Id.* at art. 23(3).

<sup>111</sup> Const. of the Int’l Labour Org., Annex, Declaration concerning the aims and purposes of the International Labour Organization, *available at* <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Oct. 17, 2003).

<sup>112</sup> *Id.*

<sup>113</sup> See terms of the instruments cited *supra* note 19 (Convention on the Worst Forms of Child Labor), note 21 (Slavery Convention, Forced Labor Convention), and *infra* p. 697 and note 118 (Declaration of Fundamental Principles and Rights at Work).

<sup>114</sup> 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).

<sup>115</sup> *Id.*

The U.N. as a body, too, has moved towards incorporation of social and economic rights (including rights related to labor) into the basic human rights structure through the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>116</sup> Although many countries have agreed to the ICESCR, the United States in particular resists it.<sup>117</sup> Yet without economic rights, as the ILO's foundational declaration recognizes, people will violate their *own* human rights out of need.

In 1998, the ILO moved explicitly to link labor rights to the broader human rights structure. The Declaration of Fundamental Principles and Rights at Work identified four "core" human rights related to labor: (1) the prohibition of forced or compulsory labor, (2) the elimination of exploitative forms of child labor, (3) the freedom of association, and (4) the elimination of discrimination.<sup>118</sup>

The prohibition on forced labor was already long and well established, not only in ILO conventions, but also in the basic human rights instruments.<sup>119</sup> Freedom of association and antidiscrimination also have origins in prior agreements.<sup>120</sup> What is new in the 1998 Declaration is the effort to build consensus among nations on the concept of "exploitative" labor, beginning in the child labor context.

In 1999, the ILO put forth the Convention on Worst Forms of Child Labour,<sup>121</sup> the product of complex and extended negotiations marked by arguments over cultural difference and economic exigency. The Convention defines what kinds of work are intrinsically inimical to the nature and development of the human person in its infancy and youth. Among the four categories of work deemed immune to *any* justifiable argument, even those premised on cultural difference or economic need, are "the use, procuring, or offering of a child for prostitution or

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<sup>116</sup> ICESCR, *supra* note 27.

<sup>117</sup> See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 158.

<sup>118</sup> Declaration on Fundamental Principles and Rights at Work, International Labor Organization, June 18, 1998, 37 I.L.M. 1238 (1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (last visited Nov. 21, 2003).

<sup>119</sup> The 1930 Convention Concerning Forced or Compulsory Labour states that the term "'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of penalty, and for which the said person has not offered himself voluntarily." See Forced Labor Convention, *supra* note 21.

<sup>120</sup> See Universal Declaration, *supra* note 27.

<sup>121</sup> See Convention on the Worst Forms of Child Labor, *supra* note 19.

pornography."<sup>122</sup>

The problem of adult, voluntary prostitution and the related issue of trafficking of sexual laborers will be important arenas for a parallel development in the understanding of what kinds of *adult* labor similarly cannot be reconciled with the nature and development of the human person. Framing the question in this way invokes the work of Amartya Sen and Martha Nussbaum, who measure the good of a society and its laws in terms of "the capabilities that a person has, and the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value."<sup>123</sup>

### *B. Prostitution as a Laboratory for Labor Rights as Human Rights*

From the two related tracks of analysis explored in this Lecture, the crucial insight is that sexual labor, like other forms of work, can be exploited. I contend that prostitution may indeed be chosen as a form of work as a result of economic motivations, but that it also might be an intolerably exploitative form of labor. If so, prostitution must be resisted and ultimately abolished. Such work for abolition is not based upon a derogation of the agency of the worker, but upon a recognition that, for reasons of economic need and cultural position, *any* person may find herself consenting to bondage. If people are pressed by need or subordination to violate their own human rights, it does not diminish their dignity for the world to step in. To resist the idea of the "happy slave" is one way we reaffirm fundamental interests that all human beings share in dignity and integrity.

There thus remains a significant task for scholars, lawyers and activists to define what employment practices meet the negative standards for "forced" or "exploitative" labor. Even more challenging is the task of fleshing out what are "just and favourable" conditions "worthy of human dignity."<sup>124</sup> Instead of fruitless debates about the "essential nature" of the commodity relation of prostitution, I urge instead a

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<sup>122</sup> The other three are: (1) all forms of slavery or practices similar to slavery, (2) the use, procuring, or offering of a child for illicit activities, in particular the drug trade, and (3) work, "which, by its nature or circumstances, is likely to harm the health, safety, or morals of children." *Id.*

<sup>123</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 187 (2000) (source on file with author). See also Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993); Nussbaum's work on women and development, WOMEN, CULTURE, AND DEVELOPMENT (M. Nussbaum & J. Glover eds., 1995). This idea is ultimately rooted in Aristotelian moral thought.

<sup>124</sup> Universal Declaration, *supra* note 27.

common project aimed at defining the material, moral, and legal differences between free and unfree labor, describing with empirical depth and range what conditions of work characterize commercial sex in its various forms and locales, and measuring the sex industry against the free labor standard. What is force and compulsion in the sex labor setting? Is the definition of force such that the exchange of money refutes the claim of compulsion, or can the liberal concern for substantive freedom in labor relations translate into international standards? What working conditions render prostitution a per se unacceptably exploitative practice for children? Is it different for adults? Why or why not? What kinds of discrimination on the basis of sex or race are unacceptable? Does the demographic constitution of the market for sexual labor demonstrate such discrimination? If prostitution is one of women's best economic options, how does this shape other economic opportunities for women? Does female prostitution violate the equality ideal?

Only when these questions have been asked and answered will it be possible to determine if the labor practices of prostitution and trafficking should be subject to abolition. It is my hope that these questions have the potential to re-unify those who are concerned about the well being of the prostitute and the impacts of the practice on women as a class, but who are divided by their ex ante policy preferences. If all can agree that these are the right questions, there is at least hope that all can agree on some answers.

Such an inquiry will also demand an integrated analysis of gender, race and ethnicity, age, sexual identity, post-colonial position, and economic structure. As such, this reframing of the debate has the potential once again to unite feminists, advocates of racial justice, and labor activists in a common analysis of exploitation and dispossession. Together, these groups revolutionized the world in the nineteenth century, contributing to the end of slavery, making dramatic improvements in women's status, and creating the labor rights structure. Perhaps we, too, can have dreams of that scope.

#### CONCLUSION

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."<sup>125</sup> But the liberalism that underlies the human rights structure has always accepted, albeit uneasily, the legitimacy of wage labor under some conditions. Here, I have limited myself to a consideration of the nature of the labor relation by which workers sell their sexual body and personality. Yet I hope this specific question deepens our understanding of the fundamental and yet under-theorized social relation of labor, and hence the force of our politics around its transformation.

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<sup>125</sup> Karl Marx, *Economic and Philosophic Manuscripts of 1844*, available at <http://www.marxists.org/archive/marx/works/1844/manuscripts/comm.htm> (last visited Sept. 3, 2003).