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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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By far the longest feature in this issue, Dianne Post's "Legalization of Prostitution Is a Violation of Human Rights" is a response to a similarly thorough article in issue 66-3 of this law review entitled "Freeing Jane: The Right to Privacy and the World's Oldest Profession" by Benjamin David Novak.¹ In that article Mr. Novak argued that the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution confer a general right to sexual privacy that includes the right to work as a prostitute. This bold and controversial article did more than merely make a legal case against the continued criminalization of sex work. "Freeing Jane" also made the much larger political and sociological claim that legalizing prostitution would promote the public good by de-stigmatizing sex workers, decreasing sexually transmitted diseases and giving women more autonomy over their own bodies and sexual identity.

Apart from its scholarly merits, "Freeing Jane" was intended to serve as an invitation to further discussion of an issue about which Guild members have long been split. It wasn't at all surprising that the article immediately elicited both spirited approbation and dissent from readers. The Guild has a history of internal amicable disagreement on the question of the compatibility of women's rights and certain forms of sexual liberation. The roughly contemporaneous twin phenomena of second-wave feminism and the sexual revolution passionately divided the Guild a little more than 30 years ago years ago when, at the height of what's now called pornography's "Golden Age," an anti-pornography resolution was proposed at the Guild's national convention.²

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Dianne Post

LEGALIZATION OF PROSTITUTION IS A VIOLATION OF HUMAN RIGHTS

Introduction

Legalized prostitution cannot exist alongside true equality for women. The idea that women should be available for men's sexual access is founded on a structural inequality of gender, class, and race. Moreover, it is a violation of international law that cannot go unchallenged. The failure to challenge legalized prostitution undermines every human rights norm mandating the dignity of the person and equality for all.

Prostitution is one of the most serious human rights issues we face today. According to the renowned trafficking expert and activist, Gunilla Eckberg, "Trafficking and prostitution of women and girls for profit is one of the fastest growing global enterprises."¹ It is now ranked as the second most important arena of international crime, trailing just behind illegal drug sales, and tied with illegal arms sales.² Women and children are particularly vulnerable to forced prostitution in what amounts to modern slavery. Of the estimated 600,000 to 800,000 people trafficked across international borders each year, approximately 80 percent are women and girls and up to 50 percent are minors.³ Trafficking of women and children is a growing problem that needs to be tackled across the world.

At the same time, general acceptance of "sex workers" and the number of the prostitution industry's customers have likewise grown worldwide. The prostitution legalization movement has contributed to this change. Numbers are difficult to come by, but a British study found that the rate of paid sex with women had doubled between 1990 and 2000, while the incidence of sexually transmitted infections had also risen.⁴ Clearly, human trafficking allows the market demand for sex to be met, in an economy which is willfully blind to the source of its supply.

In some countries, however, the supply of the paid sex industry is a primary concern. Sweden, for example, officially acknowledges that prostitution is a form of violence against women and a tool of oppression. Furthermore,

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Eckberg suggests, “Legalization of prostitution means that the state imposes regulations with which they can control one class of women as prostituted.”⁵ Prostitution is not only individual discrimination, exploitation or abuse by an individual man, but also a structure reflecting and maintaining inequality between men and women. It requires “a devalued class of women” to become colonized for economic exploitation.⁶ Legalization gives approval to that violence, that control, that devaluation, and that colonization. When violence is directed at half the world’s population—women—it undermines the entire structure of human rights.

An excerpt from an anonymous poster on the *Indymedia-Québec* website sums this point up most eloquently, writing on the issue of decriminalizing prostitution in Canada:

Decriminalization of prostitution means that all laws regarding prostitution would be removed. In other words, buying a woman would be socially and legally equivalent to buying cigarettes. Prostitution in all its forms—street, brothel, escort, massage—would be legally welcomed. Pimps the world over would become our communities’ new businessmen...

In legal prostitution, the state is the pimp, collecting taxes. In decriminalized prostitution, the pimps remain in control, whether they are bar pimps, strip club pimps, taxi driver pimps, or street pimps. In both legalized and decriminalized prostitution, the john is welcomed as legitimate consumer. Decriminalization of the pimping of women and the buying of women is in effect the promotion of and profiting from childhood sexual abuse, rape and sex trafficking.

There is no way of making prostitution ‘a little bit better’ any more than it is possible to make slavery ‘a little bit better.’ Prostitution is a profoundly harmful institution. Who does it harm the most? The woman or child who is prostituting is hurt the worst. She is hurt psychologically as well as physically. There is much evidence for this.⁷

This article explicates these concerns, and argues that the legalization of prostitution violates international law, particularly the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),⁸ which prohibits its legalization by state parties. In Part I, we will look at the facts about prostitution and its connection to crime and trafficking. Then, in Part II, we will turn to applicable international jurisprudence on the issue. In Part III, we will see how legalization specifically violates Article 5 and 6 of CEDAW. Last, in Part IV, we will look at real solutions for eliminating violence against prostituted women.

Part I: Prostitution, crime and human trafficking

Prostitution is violence against women

Violence against prostituted women is equivalent to, and in many cases worse than, the violence experienced by victims of torture—persons who

have been recognized as such under international law. Torture is not only conduct against the law; it is conduct that challenges the very existence of the law, because it violates every principle of good governance, including the consent of the governed. It attacks the legitimacy of the state, provokes social conflict, and undermines peace; it is a practice of illegitimate social control taken to its violent extreme.⁹

To suggest that prostitution is torture is not a new idea. Feminist thinker Catherine MacKinnon said just this in 1993.¹⁰ Prostituted women are bought and sold precisely to be humiliated and degraded; this is similar to the goals of torture.¹¹ There is no way to ameliorate torture, whether through legalization or decriminalization. As long as attention is paid to tempering gender inequality and violence against women, rather than eliminating them, they will not only continue to exist but will also grow.

Physical violence In a 1998 five-country study, authored by Dr. Melissa Farley and colleagues, researchers found that prostituted women experienced an extensive catalog of violence.¹² The study described some of the physical acts women are forced to endure: their hair is pulled, their faces are ejaculated on, their breasts are squeezed; they are pinched, verbally abused, beaten, cut with knives, burned with cigarettes, and gang raped.¹³ This reality is typified by a complaint filed in Canada, in which the victim alleged that her pimp controlled her movements, took her money, told her he owned her forever, made her strip, burned her with a cigarette, threatened to cut off her arms, legs and tongue and poke out her eardrums, threatened to kill her mother and brother, and forced her to lick his anus.¹⁴ Victims of torture, especially in the international tribunals in Rwanda and in the former Yugoslavia, described very similar acts, which are discussed later in this article.¹⁵

Such violence is illustrated in a Greek case from August 2005. Greek police arrested one man and issued warrants for four others who forced Nigerian women to work as prostitutes.¹⁶ The estimated thirty women forced into prostitution by these men had burns inflicted both with an iron and boiling water.¹⁷ Unfortunately this example is not especially extreme or uncommon.

Homicide is a frequent cause of death among prostituted women, according to the study. The average life span for a woman after entering prostitution is four years. No population of women has a higher death rate due to murder, which accounts for fifty percent of their deaths.¹⁸ The situation is the same worldwide. Women in Korea report that they were beaten, raped, humiliated and threatened in order to be “seasoned” by breaking down their resistance to the practice.¹⁹ A 1985 Canadian report found that prostituted women had a mortality rate forty times higher than the national average.²⁰

Another five-country study of trafficked women in Indonesia, the Philippines, Thailand, Venezuela, and the United States, authored by Janice Raymond and colleagues, found much the same.²¹ There, violence against women was endemic in prostitution, with high rates of physical harm (almost 80 percent), sexual assault (over 60 percent), emotional abuse (over 80 percent), verbal threats (over 70 percent), and control through drugs/alcohol (almost 70 percent).²²

In Indonesia, reported violence against prostitutes included the use of belts, wooden sticks, and fists; the women were isolated, raped, and overworked; and this was compounded by use of law enforcement or the military to protect the brothels.²³ In the Philippines, 60 to 70 percent of prostitutes reported repeated violence.²⁴ In Thailand, women were raped, drugged and gang-raped; they were denied money, their documents were confiscated, and their names were changed; they had no control over the choice of client, pace of work or nature of activity.²⁵ One woman noted that she was treated as “the shared property of any male who can pay a price for sex and for her body.”²⁶ In Venezuela, women in the study were pushed, hit with objects, punched, isolated, victimized with guns and knives; their movements were controlled, their money withheld, and they were forced to have sex with law enforcement and immigration officials.²⁷

In the United States, 84 percent to 100 percent of the women surveyed reported physical violence of similar brutality.²⁸ Prostituted women reported such injuries as bruises, mouth and teeth injuries, vaginal bleeding, internal pain, head injuries and broken bones.²⁹ Most women reported higher rates of injury for other women than for themselves.³⁰ Even those brothels with so-called “safety policies” did not protect women from harm from customers, pimps or others.³¹

Psychological trauma and health effects The 1998 Farley study also described the psychological damage caused by prostitution. Prostituted women suffer from depression, mania, suicidal thoughts, mood disorders, anxiety disorders, dissociative disorders and chemical dependence.³² Many survivors have independently reported outside of this specific study that, in order to cope with the psychological degradation of prostitution, they developed a dissociation response—a sense of splitting off a part of the self, of “leav[ing] my body,” or of going “someplace else mentally.”³³ The aftermath is a high incidence of dissociative disorders diagnosed in individuals emerging from prostitution.³⁴

In the study, though more violence occurred in street prostitution than in brothels, the incidence of Post-Traumatic Stress Disorder (PTSD) remained

the same in either case.³⁵ The level of PTSD was higher in prostituted women than in people seeking refuge from state-organized violence.³⁶ The psychological damage stems from the act itself, and no amount of “improvement” to the conditions of prostitution will eliminate the harm.

Further studies by Melissa Farley reveal that the health effects of prostitution are wide-ranging and severe, commonly including tuberculosis, sexually-transmitted diseases, frequent viral illness, vaginal infections, backaches, pelvic pain, substance abuse, sleeplessness, depression, headaches, eating disorders, cervical cancer, hepatitis, broken bones, brain injury resulting from head trauma, anxiety disorders, dissociative disorders, infertility, and early mortality.³⁷ Along the same vein, news reports have extensively documented that HIV/AIDS infection is rampant among prostituted persons, and is a leading cause of death among prostituted women.³⁸

Poverty and inequality The harms of prostitution are so profoundly linked to gender, class, and racial inequality that the prostitution industry is one of the world’s most extreme systems of discrimination. Its victims are overwhelmingly female and overwhelmingly poor.³⁹ They are made vulnerable by a number of factors, including the disadvantaged status of women living in certain regions in the world, by childhood sexual abuse for which girls are disproportionately targeted, and by the desperation induced by poverty.⁴⁰ Once in prostitution their status falls even lower and their life prospects are more sharply curtailed.⁴¹ Trafficking and sex tourism have contributed to the already strong role of racial and ethnic discrimination in prostitution, with men from richer industrialized countries purchasing women from developing or impoverished regions.⁴² Among prostituted women, it is often undocumented women trafficked from poor countries who suffer the worst exposure to the most harmful and unsafe practices within prostitution.⁴³ Prostitution is both cause and effect of cruel and entrenched inequalities.

Legalization does not eliminate violence in prostitution

Research by Dr. Farley from 2004 has shown that legalization does not protect women nor eliminate the violence against them.⁴⁴ Women do not think legalization has helped them, whether in the Netherlands, Colombia, Germany, Mexico, South Africa, Washington D.C, or Zambia.⁴⁵ Some women in the U.S. and New Zealand actually felt safer on the streets where they could reject customers and write down license plate numbers.⁴⁶ Dutch women did not register under the prostitution laws because they did not want to be labeled as a “prostitute” for the rest of their lives, and because they feared that the zoned prostitution areas were more dangerous.⁴⁷ Another study by Dr. Farley found that women arguably have less control in brothels and other

indoor facilities because the owners control what they do and with whom, and thus, they are exposed to even more violence.⁴⁸

A study in Cambodia, where prostitution is not criminalized, found that, “Most street sex workers are frequently harassed and abused in various ways, merely because of their occupation.”⁴⁹ The research team interviewed 24 prostitutes, of which 21 percent were under 18 years of age, and 41 percent were divorced with children. The study found:

Almost all the sex workers said their final decision to enter the sex industry was driven by extreme poverty and the lack of any other opportunity to generate income. A common scenario was that one of the sex worker’s parents had become ill and had incurred significant debt from the medical treatment. As “good daughters,” they came to Phnom Penh to support their parents and pay back the family debt.

Almost all the sex workers complained to the research team that they had suffered considerably from some form of violence by clients; they are often beaten, kicked and raped. Gang rape by groups of young students is particularly common. Sex workers, however, have kept silent regarding this suffering. Despite frequent violence and fear of potential violence, street sex workers are still determined to work, because they are in urgent need of money to support their impoverished rural families.

Most of the sex workers suffer from low self-esteem and social discrimination. Some insist that they can never reveal their current occupations to their family, especially to their parents, because they fear that their parents will be ashamed or will abandon them, accusing them of becoming “broken girls.” Even though most of them are willing to quit when they can save sufficient money to support their family, the lack of adequate skills to make a living makes it difficult for them to take this step.⁵⁰

Despite claims to the contrary, legalization does not make prostitution safer or less harmful. In countries that have legalized prostitution in a misguided effort to reduce its harm, rates of assault and rape against prostituted persons remain extremely high.⁵¹ Survivors of the prostitution industry report that the trauma associated with physical danger is matched by the trauma associated with constant sexual degradation, with having one’s body sold as a commodity.⁵² One survivor described the experience in this way:

It was horrible, they’d look you up and down. That moment, when you felt them looking at you, sizing you up, judging you . . . It used to make me furious, but at the same time I was panic-stricken, I didn’t dare speak . . . I was the thing he came and literally bought. He had judged me like he’d judge cattle at a fairground, and that’s revolting, it’s sickening, it’s terrible for the women. You can’t imagine it if you’ve never been through it yourself.⁵³

Similarly, numerous accounts reveal that when prostituted women were asked if legalization would make the practice safer, large majorities of pros-

titled women said, “No,” because prostitution itself embodies physical and sexual assault. Their lives consisted of being hunted, dominated, assaulted, and battered while facing sexual harassment, economic slavery, discrimination, racism, classism and bodily invasions. Three women, in the 1998 Farley study, who worked in a U.S. brothel said that their lives were unbearable.⁵⁴ Another women in the study described prostitution as “paid rape.”⁵⁵ The study’s findings can be summed up by a statement from a Thai prostitute collective, called Empower, “We have 2,000 members who are sex workers and none of them sees this as a real profession. But most of them have a very limited education and are either forced into prostitution by poverty and ignorance or lack of other opportunities.”⁵⁶

According to the Raymond study, in the U.S. sample, one-half the women brought from the Newly Independent States (NIS) (countries which were republics of the U.S.S.R. until 1991) thought they would be killed in the brothel in spite of alleged monitoring and “bouncers” to protect them.⁵⁷ When asked if they thought prostitution should be legalized, 96 percent of Filipino women said “No,” 50 percent of Venezuelans said “No,” 56 percent percent of NIS women said “No,” and 85 percent of U.S. women said “No.”⁵⁸

Legalization does not assist women in bringing criminal or civil claims for the harm done to them. The problem is not the law; it is the general attitude toward women. But attitudes are not likely to change just because of legalization, as explained by this article from the British magazine *The New Statesman*:

Far from containing it, legalization would allow thousands more women and girls to be drawn into prostitution without any demonstrable decrease in violence or involvement of criminal gangs. The European countries that have experienced the biggest increases in numbers are those where there are elements of legalization, namely Germany, the Netherlands, Denmark and Italy; in the Australian state of Victoria, often cited by campaigners for legalization, the number of prostitutes is said to have doubled between 1994 and 2002. (Australia and the Netherlands also have the world’s highest number of sex tourists per capita, supporting the proposition that legalization normalizes the act of buying sex.) There is evidence, too, that legalization acts as a “pull factor” for traffickers; in 2003 the Amsterdam City Council decided to close down its street tolerance zone, the mayor declaring that “it appeared impossible to create a safe and controllable zone for women that was not open to abuse by organized crime.”⁵⁹

No amount of legalization can change the fact that sexual violence and physical assault are the norm for women in prostitution, resulting in long term physical and psychological harm—no matter if the assault was “legal” or illegal. In fact, even those who advocate for the legalization of prostitution admit that significant violence exists. For example, the Australian Occupa-

tion and Safety (OSHA) Codes, which govern legalized prostitution in the country, recommend self-defense training and classes in hostage negotiation skills.⁶⁰ Here is an example of government acknowledgment that prostitution is potentially violent for women. There are other jobs that are known to be dangerous—mining, oil drilling, construction—where recommendations are also made on how to avoid injury, but there the anticipated injuries are not crimes, as they are in prostitution.

Violence is a criminal act—obtaining “consent” is no defense. Some people try to make a distinction between “voluntary” and “forced” prostitution to justify legalization. The reality is, however, that violence is often the precursor to women entering into prostitution in the first place. Pimps and customers use the same methods as other abusers: denial, economic abuse, isolation, verbal abuse, threats and intimidation, physical and sexual assault, and captivity. The only difference between the behavior of pimps and johns is that money is paid. But a criminal cannot avoid prosecution because he paid the victim or the victim allegedly “consented.” A criminal act is defined by the law as an offense against societal norms, as well as against the specific victim. No degree of alleged victim “consent” can change the societal norm that represents the baseline of acceptable behavior. Thus, no amount of “consent” can de-criminalize behaviors that compromise the fundamental rights of the consenter; the state’s role as protector supersedes the individual’s right to consent in certain circumstances. Criminal law should protect women from inhuman and degrading treatment, to guarantee the preservation of their intentionally and constitutionally protected rights.

Even if a woman’s consent makes a difference, consent means more than just agreeing to do an act. For a genuine choice to exist there must be informed consent and available options. Without knowledge of the reality of prostitution, women cannot make an informed judgment about their willingness to enter into the arrangement. Unfortunately, knowledge is rarely the issue. More often it is the lack of available options. The average age of entry into prostitution is fourteen.⁶¹ At the age of fourteen a girl is not able to drive a car or bind herself in contract. A fourteen-year-old cannot consent to sex, therefore she cannot have the *mens rea* necessary to commit prostitution; it is a legal impossibility.

Homelessness is the impetus for many women to enter prostitution and its long cycle of violence. Poverty-stricken Central American women desperately fleeing to the U.S. are often forced into prostitution when smugglers steal their money and border authorities deport them back to Mexico. One woman caught in this deadly cycle asks, “What else can I do now?”⁶² Another asks, “I can’t go home, and I can’t tell my family where I am . . . What

choice did I have?”⁶³ A victim is subjected to repeated violence, and once she understands that she cannot escape, then it is claimed she has “consented.” Even law enforcement officers and social service providers know that women do not enter prostitution voluntarily.⁶⁴

The Special Rapporteur of the UN on Trafficking made specific findings about the irrelevance of “consent” in her 2005 report:

It should now be clear that the second clause of article 3 (b) is referential to the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. It does not limit the universe of cases in which consent is deemed irrelevant. Simply put, the victim’s consent to the intended exploitation set forth in subparagraph (a) is irrelevant in all trafficking cases under the Protocol definition. . . .

The Protocol does not necessarily require States to abolish all possible forms of prostitution. It does, however, require States to act in good faith towards the abolition of all forms of child prostitution and all forms of adult prostitution in which people are recruited, transported, harbored, or received 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 one person having control over another, for the purpose of exploiting that person’s prostitution. . . . For the most part, prostitution as actually practiced in the world usually does satisfy the elements of (sex) trafficking. It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution and life within “the life” is rarely one marked by empowerment or adequate options. . . . Thus, State parties with legalized prostitution industries have a heavy responsibility to ensure that the conditions which actually pertain to the practice of prostitution within their borders are free from the illicit means delineated in subparagraph (a) of the Protocol definition, so as to ensure that their legalized prostitution regimes are not simply perpetuating widespread and systematic trafficking. As current conditions throughout the world attest, State parties that maintain legalized prostitution are far from satisfying this obligation.⁶⁵

Simply put in the report, a woman must often make the least intolerable choice among bad choices. Such a “choice” is commonly the only one available to those who have been traumatized or oppressed. This is not consent.

The paradoxes of legalization

Legalization only results in greater demand, a magnification of violence, as well as bizarre paradoxes in efforts to “manage” prostitution. In Australia, for example, neither a teacher who is moonlighting as a prostitute at night, nor a male teacher who frequents a brothel could be terminated from a teaching

position.⁶⁶ In other words, if prostitution is legal, even those in charge of educating children cannot be prohibited from it. In Germany and New Zealand, where prostitution is decriminalized, women fear that they will be denied unemployment benefits if they do not “consent” to work as prostitutes. In 2005, a German woman who was a qualified information-technology worker was threatened by a government agency that her unemployment benefits would be terminated if she did not take a job at a legalized brothel.⁶⁷

Another likely paradox of legalization is the shrinkage of resources for women to actually improve their lives due to the belief that prostitution is a legitimate way out of poverty. This paradox becomes more pronounced as the prostitution market grows and is legitimized. For instance, women and girls are commoditized as products for sale to such an extreme that one can now access “consumer guides” to buy women on the web. The men who frequent such websites “consider themselves connoisseurs of fine women,” like fine wine or fine chocolates.⁶⁸ Women are forced to do as the men who buy them want because the buyers have the power to post a bad review—a kind of complaint process if their “products” dissatisfy them.

This market push and pull puts prostituted women in an impossible quandary. “It’s a double-edged sword,” said Helen, a \$350-an-hour escort in a Western state, who said she was in the business to make enough money to “go to graduate school so she could teach.”⁶⁹ Helen’s remark begs the vital question: so long as there is prostitution, why should the State provide women students support to finish their education? Robyn Few, a former prostitute who lobbies to decriminalize prostitution as executive director of the Sex Workers Outreach Project in San Francisco, responds to “consumer guides” on a personal level, saying plainly —“I hate it”—and that it facilitates women “being reviewed and rated like some subhuman.”⁷⁰ However, if prostitution is legalized, market forces will make it difficult for many women to improve their lives, while at the same time, exposing them to even more abuse, violence, and danger.

Acceptance of prostitution justifies violence against women. The men who engage in it have more discriminatory attitudes against women and are more accepting of prostitution and rape myths as well as being more violent themselves.⁷¹ A thriving sex industry increases child prostitution and other sex crimes.⁷² In other words, there is no way to improve a fundamentally discriminatory practice.

The intimate connection between prostitution and human trafficking

While there is a great global outcry against trafficking, the majority of sex trafficking would not exist if prostitution did not exist. Even the Netherlands

government admits the two cannot be separated, nor can trafficking be controlled while prostitution is legal. If there were no profit to selling women, the criminals would not bother. If they did not need more and more women for prostitution, there would be no “market.” The International Organization of Migration (IOM) attributes the rise in trafficking to the rise of prostitution in Europe.⁷³ In the Netherlands the sex industry increased by 25 percent after legalization.⁷⁴ In the same vein, the U.S. Department of State recognized that legalized prostitution makes anti-trafficking work more difficult.⁷⁵ Legalization only leads to expansion.

The clear relationship between trafficking of women for prostitution purposes is made clear in the Shadow Report for the CEDAW Committee in Australia:

Since legalization of brothel prostitution in Australia, the trafficking of women into prostitution has become a growing problem. It is estimated that 1,000 trafficked women are currently in Australia. Legalization creates the demand for trafficking, as brothels seek to find sufficient women to sell, and seek women who are willing to do particularly painful activities and work without condoms. Sex entrepreneurs find it hard to source women locally to supply an expanding industry and besides, trafficked women are more vulnerable and more profitable. In Australia trafficking mostly takes place in legal brothels

Traffickers arrange for women to arrive on tourist visas, apply for refugee status for them, and set them to work legally in brothels while they await the outcome of their applications in conditions of debt bondage. The refugee applications are routinely rejected, but by then the traffickers have made their money and may, themselves, tip off the immigration authorities to women who have expired visas. Traffickers sell women to legal and illegal brothels in Victoria for 15,000 AUD each. The women are debt bonded so the profits of their enslavement do not go to them. Police estimate trafficked women are forced to have sex with 800 men to pay off their so-called debts before they receive any money. They appear, a police spokesperson said, to be flown here “to order. It is estimated that 1 million AUD is earned from trafficked women weekly.

The legalization of the industry has made life easier for the traffickers—not their victims. Women are told that the industry in Australia is safe because it is legal. For that reason, prostitutes also told the police will not be sympathetic to complaints.⁷⁶

Thus, legalization creates a false impression of security among women while simultaneously cutting off their ability or motivation to report abuse. When a woman does seek legal redress she is often not believed to be credible. In a Victoria case from 2004, “[the] jury did not find in favour of the trafficked women because they could not fathom the idea that debt bondage equaled slavery when a woman had ‘consented’ to come to Australia for prostitution

in the legal industry.”⁷⁷ This example reinforces that legalization not only fails to reduce violence against women, it is often used as a tool to perpetuate it.

The Netherlands experiment: The failure of decriminalization

It is estimated that about 30,000 people “work” in prostitution in the Netherlands.⁷⁸ The prostitution industry rakes in one hundred million dollars per year.⁷⁹ The Netherlands’ strategy to eliminate trafficking was to decriminalize prostitution and initiate a license system for brothel operators handled by the municipalities. It was seen as a way to stop ignoring the brothels and instead admit their existence. The goal of decriminalization and regulation of prostitution was to raise working conditions for sex workers, make the sex industry more transparent, and allow the police to monitor the situation effectively.⁸⁰

The Netherlands passed the “Abolition of the Ban of Brothels” in 2000.⁸¹ The purpose of the law was to more closely monitor and regulate the approximately 2,000 pre-existing brothels and sex-clubs in the country. Lawmakers believed the law would work against the so-called “involuntary” prostitution and the exploitation of minors and undocumented immigrants in prostitution, and other unacceptable forms of sexual exploitation. This law was supposed to make it unattractive and impossible to employ undocumented immigrants as prostitutes, thus diminishing trafficking to the Netherlands.⁸² It has been a complete failure. The alleged goal of legalization—the prevention of trafficking—has not been accomplished. Following the Hague Ministerial Declaration on European Guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation from 1997, the Netherlands appointed a National Reporter on Traffic of Persons, *Mensenhandel*.⁸³ This bureau estimated the number of victims of human trafficking in the Netherlands to be about 3,000 to 3,500 persons in 2003.⁸⁴

The central problem is in the economics of the sex industry. A story in January 2006 from the UN Information Service welcomes a new campaign in the Netherlands to identify victims of trafficking who have been forced into prostitution.⁸⁵ In the report, it is noted, “Victims of trafficking suffer the most cruel, degrading and violent treatment. I encourage people to support this important campaign and provide information to their local police or through the hotline. I hope other European countries will also do more to end sexual exploitation.”⁸⁶ What the speaker fails to realize is that the State cannot end sexual exploitation so long as it endorses prostitution. Prostituted women and girls will always have to be procured anew. If demand is not addressed, there will never be enough supply of women as “product,” and trafficking will continue.

It is critical to point out that even though the international recruitment of persons for “sex workers” is criminalized, domestic or “voluntary”

prostitution in many places is not. Everybody seems to agree that trafficking is a violation of human rights, but trafficking would not exist without prostitution and the market for it. It is not possible to separate the notions from one another. Ultimately, “Legalization protects some men’s rights to cheap, easily accessible sex and pimps’ ability to earn a damn good living by getting women to do it.”⁸⁷ Although people agree that prostitution is not an ideal “profession,” many continue to legitimize it by stating that we do not live in ideal world.⁸⁸ While that is true, the central tenet of international law is that human rights apply to all and that we should strive toward it, not simply accept the status quo.

On the other hand, pro-prostitution movements ignore social context. Author, Kathryn Cullen-Dupont, states, “The pro-prostitution lobby stands on a shaky platform of economic justice built on the false premise that prostitution is a *quid pro quo commercial sexual transaction and as such should be subject to standard labor laws and protections.*”⁸⁹ As Cullen-Dupont correctly observes, the belief that economic justice exists is simply not so when women do not have equal bargaining power with men. It is a contract of adhesion that by definition is not equal.

Such a rationale, to professionalize prostitution, has been put forth by the Netherlands and Belgium. However, this rationale has been contradicted by positions later taken by the countries in other legal proceedings. In one case, the Netherlands argued they could refuse entry to prostituted women “on grounds of public interest.”⁹⁰ If it is in the public interest to refuse entry to the Netherlands on the grounds that a given person is a prostitute, how can it be in the public interest to have legal prostitution? The Secretary of State rejected applicants on these grounds, stating that, “prostitution is prohibited activity or at least not a socially acceptable form of work and cannot be regarded as being either a regular job or a profession.”⁹¹ The abolitionists agree, but coming from the Secretary of State of the Netherlands, where prostitution was legalized, it shows a certain hypocrisy toward women, and worse, indicates that legalization has nothing to do with improving the health or dignity of the women.

Similarly, both the Netherlands and Belgian governments argued that prostitution could not be treated as a regular commercial activity because it is impossible to determine if a prostitute has freely moved to the Member State to pursue those activities. The Governments argue that prostitution may have the appearance of independence, but because procuring women (through trafficking) is illegal, any employment relationship must be organized illegally. Therefore, “prostitutes are normally in a subordinate position in relation to a

pimp.”⁹² Both countries argued that trafficking for the purposes of prostitution is illegal, immoral and difficult to control. The Netherlands continued to hold conflicting opinions regarding legalization and improved conditions for prostituted women as late as 2004.⁹³ If the Netherlands government agrees that it is impossible to control trafficking and that every employment relationship with the prostituted woman must be organized illegally and that women are in a subordinate position, then they should outlaw it

A European Union Court held in a 2001 case, *Jany*, that prostitution is an economic activity that can be pursued by a self-employed person, but it must be established that there is no relationship of subordination regarding choice, working conditions and conditions of remuneration; it must be under that person’s own responsibility; and the monies must be paid directly and in full to the person.⁹⁴ Under these requirements, brothels are illegal in the EU because a brothel cannot ever meet these conditions. Because human trafficking and prostitution are inextricable, the legalization of prostitution cannot avoid violating international law.

Part II: International jurisprudence defines sexual violence as a crime

States that legalize prostitution are violating several international conventions. Article 9 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, requires that states take legislative action to discourage exploitation and acts that lead to trafficking.⁹⁵ But, states are doing the exact opposite when they legalize prostitution because prostitution is the driving force behind increased sex trafficking, and it specifically targets and exploits women.

Precedential International Law

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is the leading international law instrument developed to fight gender inequality. It says clearly in Article 6 that states must eliminate exploitative prostitution.⁹⁶ When a state legalizes prostitution and collects taxes on the abuse of women, it is exploitation. Equality before the law and the dignity of the individual are norms in every human rights document. These norms are violated by the legalization of prostitution, which gives license to the sellers of women and use of their bodies as commodities in the market place.

Further, CEDAW General Recommendation 19 declares that violence against women constitutes gender discrimination.⁹⁷ Gender-based violence is a powerful example of such discrimination. Specific sections in Recommenda-

tion 19 say that State Parties should take appropriate measures to overcome all forms of gender-based violence, whether public or private acts.⁹⁸ State Parties shall also ensure that laws against abuse, rape, sexual assault and other gender-based violence give adequate protection to all women; respect their integrity and dignity as persons; take effective measures to overcome attitudes and practices on gender-based violence; and acknowledge specific preventive and punitive measures necessary to overcome trafficking and sexual exploitation.⁹⁹

The Vienna Declaration and Program of Action (1993) Article 1 of the Vienna Declaration defines the term, “violence against women,” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹⁰⁰ The Declaration stipulates that gender-based violence and exploitation, including international trafficking, must be eliminated.¹⁰¹ To comport with the Declaration, States should prohibit degrading practices such as trafficking in women and prostitution and protect victims and persons in potentially exploitable situations. The Declaration is not legally binding but can be used as precedential soft law and thus set standards for interpretation.

The Slavery Conventions The conditions of prostituted women are akin to slavery. These conditions are arguably banned under the Slavery Convention of 1926 and 1956. Under the Convention a “slave” is defined as:

Article 1(1) [A] person over whom any or all of the powers attaching to the right of ownership are exercised. (2) ‘Slave trade’ is defined to include ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’¹⁰²

There is no doubt that “powers attaching to the right of ownership” are exercised in prostitution. Women are bought and sold, traded and shipped like merchandise. This is the account of many survivors. The existence of actual “slave markets” where women are literally put on the auction block is well documented.¹⁰³ The “consumer guide” to prostitutes, mentioned earlier, is another example of the ultimate commodification.¹⁰⁴

Under the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the definition of “slavery” was expanded to debt bondage.¹⁰⁵ Further outlawed was any institution where a woman, without a right to refuse, is promised or given in marriage in payment or consideration of money or services. A husband cannot transfer his wife, nor can any woman be inherited on death or parents

sell a young child.¹⁰⁶ Transporting slaves between countries—i.e., trafficked women—was also prohibited.¹⁰⁷ In addition, the International Labor Organization (ILO) also prohibits the conditions under which prostituted women are held.¹⁰⁸ The voices of the women are clear. They are held in slavery; they are being traded as slaves.

The Convention Against Torture (CAT) The international prohibition against torture is one of the most fundamental tenets of human rights law.¹⁰⁹ Torture is an assault on the person's identity, respect, and dignity. It often involves isolation, removal of clothing, assaulting sexual organs, depriving the victim of sleep, inflicting psychological and physical pain, and rape—many of the exact crimes prostituted women report on a routine basis. The human rights activist Barbara Rogalla suggests looking at individual instances of torture as a social process happening over time.¹¹⁰ That process involves ongoing indignities and ill-treatment leading to psychological damage, isolation and the invisibility of the victim. That is exactly what happens to prostitution victims.

Sexual violence is a means of exercising power and domination over the victim to gain control, degrade, and humiliate. Rape is gender-based torture used to intimidate and humiliate women and strip women of their integrity and sense of self. The trauma extends far beyond the attack itself, including emotional torment, psychological damage, physical injuries, disease, social ostracism and other consequences that devastate the lives of women.¹¹¹ It attacks the essential physical and psychological integrity of a human being.¹¹² The International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Furundzija*¹¹³ stated that humanitarian law must include humiliation of the victim as a possible outcome of torture. In fact, the opinion analogized humiliation to intimidation, which is explicitly named.¹¹⁴

The International Criminal Court The International Criminal Court Statute defines crimes against humanity to include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity . . . when committed as part of a widespread or systemic attack directed against a civilian population, with knowledge of the attack . . .”¹¹⁵ International jurisprudence has moved to recognize rape and other sexual offenses toward women for what they are—crimes.

Ad Hoc Tribunals The East Timor Regulations promulgated by the United Nations Transitional Administration list sexual offenses as a serious crime.¹¹⁶ As crimes against humanity, it includes rape, sexual slavery, enforced prostitution, and other forms of sexual violence of comparable style.¹¹⁷ Torture is

defined as the “infliction of severe pain or suffering either physical or mental in custody or under the control of the abuser.”¹¹⁸

In 1998, the Rwanda Tribunal defined rape as a form of genocide¹¹⁹ and the Yugoslavia Tribunal defined rape as a form of torture in *Celebici*¹²⁰ and *Furundzija*.¹²¹ The statutes of both tribunals list rape among the crimes against humanity and through the jurisprudence of both, rape and other forms of sexual and gender-based violence have been recognized as a form of genocide and torture.

The acts of the defendants at the ICTY¹²² were very similar to the acts done to prostituted women on a daily basis, as found in the studies detailed in Part I. Soldiers rubbed a knife against a woman’s inner thigh and lower stomach, threatened to put a knife into her vagina, badly beat one victim, beat the women on the feet with a baton, and forced them to have oral and vaginal intercourse as well as lick their penises.¹²³ Victims were forced to stand naked, their children were threatened, and they were locked in a room with only a small blanket.¹²⁴ The court found that the victims experienced severe physical and mental suffering as a result.¹²⁵

The Court held that under international human rights law, the prohibition on inhuman and degrading treatment and torture is a peremptory norm or *jus cogens*. In other words, a State cannot use any excuse to justify those acts, including the legalization of prostitution.¹²⁶ The fact that inhuman and degrading treatment is *jus cogens* prevents any State from passing any legislative, administrative, or judicial act authorizing the acts. States are actually obligated to prevent the acts and must take measures to end any such behavior. Any legislation permitting inhuman treatment to continue must be repealed.

Further, the State has an obligation to other States as well. The facts show that legalized prostitution drives sex trafficking. Therefore, States owe an obligation to other States to prevent sex trafficking by ending prostitution. The Convention Against Torture was not intended to leave persons without redress because their State was incapable or disinclined to protect them.¹²⁷ Victims are protected regardless of their characters, their own actions, or even their torturers.¹²⁸

In another ICTY case, the female victims were locked in an apartment with no access to the outside world.¹²⁹ Their male captors had knives, rifles and pistols.¹³⁰ The women had to obey every command, including cleaning up after their tormenters and serving them food.¹³¹ They were stripped, ordered to dance, and, ultimately, they were sold.¹³² The tribunal found that such acts, “no doubt constitute serious violations of common Article 3,¹³³ entail criminal responsibility under customary international law.”¹³⁴ The Court went

further than the *Furundzija* Tribunal by discussing factors other than coercion or force that would render sex as rape. The underlying legal principle, it explained, was that sexual penetration is rape if it is not truly voluntary or consensual on the part of the victim, which goes beyond only looking at force but also looking at the issue of sexual autonomy. Sexual autonomy is violated whenever the person has not freely agreed to it or is otherwise not a voluntary participant.¹³⁵ Prostituted women continually say they have no ability to control whom they must service or which acts they must perform. In fact, they have *less* control in legalized brothels than on the street.

The absence of consent or voluntary participation was also discussed in *Dragoljub*.¹³⁶ Looking at the circumstances that define the vulnerability or deception of the victim, the Court concluded that the common denominator was that the perpetrator overcame the victim's will or negated her ability to freely refuse sexual acts—temporarily or permanently.¹³⁷ It found that alleged consent is not a defense under the Rules of Procedure¹³⁸ because no person can consent to be a victim of crime. The opinion urged that the focus must remain on the criminal act, not on the behavior of the victim. Prostituted women are “seasoned” by beatings and rapes, deprived of their identification documents, left naked, locked in rooms until they learn that they have no hope of escape. Capitulation of the victim cannot be construed as “consent.”

The European Court of Human Rights The European Court of Human Rights (ECtHR) has established that filthy conditions, water shortages, skin infections, and sleep deprivation can constitute torture when the suffering is intense. Likewise, when the government refuses to intervene, it is systematically facilitating torture, and should be held liable under the Convention.¹³⁹ Many women in prostitution report such conditions. In places where prostitution is legalized, the state not only ignores the conditions, it legitimizes them. Therefore, States must be held accountable under ECtHR for their failure to eradicate torture.

In *Siliadin v. France*,¹⁴⁰ the ECtHR held that there had been a violation of Article 4 of the European Convention of Human Rights' prohibition of servitude. The victim was a Tolese national who was brought to Paris at fifteen to do domestic work but who became an unpaid servant when her passport was confiscated.¹⁴¹ The couple controlling her was first convicted, then acquitted on appeal, and then convicted again of making the victim work for them without pay.¹⁴² However, the Court found that her working and living conditions were incompatible with human dignity.¹⁴³

This decision was taken to the ECtHR as violating Article 4 against forced or compulsory labor. Given that the vast majority of women are coerced into prostitution and 92 percent of prostituted women seek to escape, one

can certainly argue that they are providing services under coercion.¹⁴⁴ The factors the Court used to find compulsory servitude in the *Siliadin* case were that her papers were confiscated; promises to adjust her immigration status were never carried out; she feared being arrested by the police; she had no freedom of movement or free time; she was subjected to complete dependence on the couple; and she had no hope that her situation would improve.¹⁴⁵ This describes precisely the condition of most prostituted women.

Torture does not need to be enumerated in the European Convention for an act to constitute a violation. Rape alone is sufficient to be defined as torture depending on the motive of the perpetrator. In *Ortiz v. Cramajo*, for example, the kidnapping, beating, and rape of a nun constituted torture.¹⁴⁶ In *Selmouni v. France*, the victim was beaten, sodomized, and threatened, which constituted torture.¹⁴⁷ The acts were considered to be universally intense, humiliating, heinous, and continuous so that they constituted torture rather than just degrading treatment. These are very similar or identical to acts prostituted women experience daily, sometimes under the auspices of “legal prostitution.”

In *Aydin v. Turkey*, the female detainee complained of rape and argued that it constituted torture.¹⁴⁸ She had been stripped, put into a car tire and spun around, beaten, sprayed with cold water from a high-pressure hose, blindfolded, and raped.¹⁴⁹ Medical evidence showed bruising and a torn hymen.¹⁵⁰ The Court reiterated that there could be no derogation from the prohibition on torture¹⁵¹ because rape is an especially grave and abhorrent act that leaves deep psychological scars that do not respond to healing as quickly as other types of injuries.¹⁵² Therefore, rape can be defined as torture rather than inhuman and degrading treatment.

Prison conditions that are more humane than the captivity of many prostitutes have been held, in some circumstances, to violate human rights.¹⁵³ In one case, the inmate only had access to an open toilet, a tap with cold water, two beds, a table and bench, central heating and a window with bars but no natural lighting. The inmate had books, food, soap, and toilet paper in the cell. The cell was overheated. The light was on twenty-four hours a day, but the radio was switched off at night. The inmate had only recently been allowed outside for walks. The Court found there was a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms based on these conditions.¹⁵⁴ In another case,¹⁵⁵ prisoners were held in cells with a metal frame bed with a mattress, blanket and chair. There was no natural light; the ventilation system did not work well and was noisy; there was no call system in the cell; and there were no facilities for exercise. This was held to violate the Convention as well.¹⁵⁶ Women held in prostitution

report being confined in much worse situations than those described by these prisoners, and they have not been convicted of any crime.

Sexual assault is a serious interference in a person's private life. It also is a crime. States must criminalize such acts and create possibilities for prosecuting the perpetrators of these assaults.¹⁵⁷ Physical integrity is a right protected by Article 8 of the European Convention on Human Rights.¹⁵⁸ Interference with the physical integrity of a person must thus be proscribed by law and requires consent.¹⁵⁹ States can curtail serious abuse, even if it takes place with the abused person's consent, by passing appropriate laws.¹⁶⁰ States, however, may interfere when very strong reasons exist for such interference. Such reasons could be the protection of minors, protection of others in dependent positions, or protection of people who cannot make their decisions in complete freedom. States can interfere with sexual acts that include the use of significant violence even if consent exists.¹⁶¹ This has been done in a case concerning sadomasochistic acts.

In many ways tolerance for prostitution is analogous to antiquated views of sexual assault and domestic violence. It took a long time for institutions to understand that rape is violence and not sex. Likewise, it took a long time for the justice system to understand that domestic violence is not an acceptable part of the marriage contract. At one time it was considered men's right to beat, rape, sell and even kill their wives because they owned them. Such acts were not seen as "violence" or criminal. Historically speaking, it has been only recently that both women and men agreed that these acts are not acceptable and that women have all the human rights men do. Renunciation of the right of men to rape their wives is an even more recent phenomenon. The parallels among prostitution, domestic violence and marital rape are very strong. How long will it take us to see that prostitution is simply men paying to perpetrate violence against women?

Legalization of prostitution constitutes "state action" under international law

Prostitution has been legalized in the Netherlands, Germany, New Zealand, some states of Australia, and in parts of Nevada in the United States.¹⁶² Canada and Thailand are considering it.¹⁶³ In 2000, the Dutch Ministry of Justice argued for a legal quota of foreign "sex workers" to feed their prostitution market that demanded more "bodies."¹⁶⁴ Similarly, the European Court recognized prostitution as an economic activity so that more bodies could be supplied.¹⁶⁵

The level of "state action" sufficient to be covered under international law does not need to be actual authority but can merely be the "semblance of official authority."¹⁶⁶ Legalization gives actual authority for the acts to occur.

The acts need not occur when the government has direct control over the victim but only the “consent or acquiescence of a public official” is necessary.¹⁶⁷ By legalizing prostitution, the government is giving its consent to the systemic violence toward women that is endemic to prostitution. Violence is the logical outcome of government policy legalizing prostitution.

International law cases have found that a person who knew sexual violence was occurring and allowed it to take place is responsible because her or his actions sent a clear signal of official tolerance.¹⁶⁸ The ICTY tribunal held that the *actus reus* of aiding and abetting in international law requires practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime.¹⁶⁹ It further held that mere knowledge that the actions aid and abet is sufficient for *mens rea*.¹⁷⁰ The facts show that legalizing prostitution increases both legal and illegal prostitution and does nothing to diminish harm to women. Rather, it increases harm to women.

The European Court of Human Rights held in *HLR v. France*¹⁷¹ that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms relating to torture may also apply when the danger emanates from persons or groups of persons who are not public officials because of the absolute character of the right involved. Therefore, the State cannot escape liability by claiming that private citizens own the brothels. The State by its actions has authorized private citizens to engage in violence. There is nothing novel about applying international law to individuals who are outside the State. In fact international law binds every citizen just as municipal law does. Thus both the State and the individual are legally responsible.

Legalization of prostitution encourages human trafficking in violation of international law

Without prostitution, which is the profit motive for sex trafficking, there would be no trafficking. “Trafficking and Prostitution are one in the same,” states anti-prostitution activist, Chong Kim. “How can they not be when human beings are being bought and sold for the sole purpose of marketing?”¹⁷²

The CEDAW Committee has recognized that prostitution is intimately connected to the trafficking of women. In the concluding observation for Nepal, it voiced concern for the:

[H]igh incidence of prostitution and the increase in trafficking in women and girls,” especially for prostitution. The committee urged the State to review its current laws, to commit to implementing and enforcing compliance, and to assess their compatibility with the Convention. Also important, the committee urged States to “establish repatriation and rehabilitation programs, and to support services for victims of trafficking.”¹⁷³

In its report for Cuba, the Committee acknowledged not only the increase in prostitution but also the need to attack the root causes of prostitution and provide rehabilitative programs for the women involved, citing programs that promote economic independence in women as particularly effective.¹⁷⁴ The Committee again urged the State to assess the effectiveness of its preventative measures and to align them with Article 6 of the Convention.¹⁷⁵ Legalizing prostitution does not attack these root causes, but feeds on the women's economic desperation.

Part III: Legalized prostitution violates key provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW Committee has recognized explicitly, as required by Article 6, that prostitution exposes women to violence and exploitation.¹⁷⁶ As such, women are exposed to increased violence, crime victimization, and health risks, which are key targets of CEDAW's goal to eliminate gender inequality.

There is a stark contrast between countries with legalized prostitution and criminalized prostitution in terms of the promotion of gender rights. On one hand, the abuse of women has become so entwined in Thailand that it makes up 4.3 billion dollars per year.¹⁷⁷ The sale and abuse of women's bodies that contributes to the maintenance of the Thai government and society for the benefit of men can be described as nothing but exploitation. The World Trade Organization has suggested counting the proceeds in the gross national product, suggesting that exploitation and abuse should be counted as legitimate profit. The result of the situation in Thailand is indicated by the CEDAW Committee's Concluding Observations, namely the concern "[t]hat traditional attitudes that foster discrimination against women and girls continue to prevail and to hinder the full implementation of the Convention."¹⁷⁸

Rather than tackling the serious problem of discrimination against women in Thai society, the government compounds the problem by condoning the sale of women as objects for the use of men, which infects the entire culture and prevents the implementation of the CEDAW principles in the country. When women are commodities, they need be treated no better than other marketed products. Legalizing the sale of women only increases the problem, as the Committee has found.¹⁷⁹ Legalization allows for sex services to be advertised in daily newspapers, which significantly increases prostitution.

On the other hand, countries that criminalize prostitution have stronger records of preventing violence against women and children. In the 2001 remarks regarding Finland, the Committee pointed out not only that violence against women is a very serious human rights problem, but also that the government took it seriously and criminalized the buying of sexual services

from minors.¹⁸⁰ The report also highlighted encouraging shifts in attitudes toward legalized prostitution, including the decision of an eminent newspaper not to publish advertisements for phone sex lines.

The Committee report further observes the vulnerability of immigrant women in countries with legalized prostitution. The Netherlands report, for instance, once again showed an increase in violence against immigrant women, and higher rates of sexual violence against women as a whole.¹⁸¹ Likewise, in Spain, 9 out of 10 prostituted women are from other countries, and many are there illegally, i.e., trafficked.¹⁸² The leftist union found these facts “alarming” and called for the “elimination” of prostitution, which it considered “not work, but a modern form of slavery, inequality and gender violence.”¹⁸³ Their report said 95 percent of prostitution is not voluntary.¹⁸⁴ As for the remaining 5 percent, “the description of voluntary must be viewed in the context of the social, cultural and economic conditions that women face.”¹⁸⁵

These outcomes are no surprise because the legalization of prostitution creates the impression that women are suitable targets of violence. Violent behaviors against women have been associated with attitudes that promote men’s beliefs that they are entitled to sexual access to women, that they are superior to women, and that they are licensed as sexual aggressors.¹⁸⁶

Not only are certain women—including immigrant women—more vulnerable to abuse through prostitution, but legalization also promotes other criminal activity, as evidenced by the CEDAW Committee.¹⁸⁷ Legalized prostitution incentivizes illegal migration, and provides a lucrative source of money for criminal gangs.¹⁸⁸ To effectively address organized criminal enterprises, the international community must be willing to identify, and eliminate, the inherent harms of prostitution.

Finally, another major concern found in the CEDAW report is the effect of legalized prostitution on women’s health. The Committee, for example, has recognized the risk posed by HIV/AIDS and STDs, stating that it is “[c] oncerned that th[e] women are exposed to HIV/AIDS and health risks and that existing legislation encourages mandatory testing and isolation.”¹⁸⁹ In affirming that response to the Guyana report, the Committee stated that “in the light of the high incidence of HIV/AIDS in Guyana, full attention must be paid to the health services available to prostitutes.”¹⁹⁰

Legalization does not attack the poverty that the committee has recognized as a commanding factor forcing women into prostitution

According to official UNDP data, almost half the world’s population lives on less than US \$1 per day. Of this number, 70 percent are women. The ILO

report made it perfectly clear that women are forced into prostitution due to economic need and sheer survival.¹⁹¹ Under such extreme conditions, it is unlikely that any of these women offer genuine consent to be used as prostitutes.

Committee reports repeatedly observed a connection between poverty and prostitution. The CEDAW committee questioned, in the Finland Concluding Observations, “[w]hether an increase in prostitution and traffic in women was noticeable in view of the dire economic situation of the Baltic States and whether related interim measures had been taken.”¹⁹² The Committee made a similar observation in its report on Fiji, stating its concern with the increasing prostitution problem because of economic hardship.¹⁹³ Likewise in the Czech Republic Conclusions, the Committee recognized that discrimination against women (e.g. wage disparities), segregation into low paying jobs, rising unemployment, and the lack of opportunities for women has been a driving force for prostitution and trafficking.¹⁹⁴ To combat these considerable problems, the Committee recommended that the government work to fight the feminization of poverty and to improve the economic situation of women in order to prevent trafficking and prostitution.

Finally, the link between prostitution and the lack of job opportunities was highlighted in the Committee’s report on Cuba.¹⁹⁵ The Committee credited both a growing tourist base and economic problems for women as the impetus behind the rebirth of prostitution in Cuba.¹⁹⁶ Again, the Committee appealed to the Cuban government “[t]o offer more and better job opportunities to women who engaged in prostitution, and not to place the sole responsibility for prostitution on the women themselves.”¹⁹⁷

So long as women are denied very basic means of survival—decent economic opportunities and equality in the marketplace—they can never hope to achieve social equality. Maintaining prostitution as a viable last refuge for poverty-stricken women is inherently untenable. So long as prostitution remains as an “option” for poor women, there will be less incentive to develop educational opportunities, job programs, or economic policies that could lift these women out of poverty in a positive, therapeutic fashion.

Legalization of prostitution violates CEDAW Articles 2(f) and 5(a) to eliminate practices based on the idea of the inferiority of women

Article 2(f) of CEDAW mandates that parties to the Convention shall “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹⁹⁸ Article 5(a) requires “all appropriate measures” be taken to “modify the social and cultural patterns of conduct of men and women,” so as to eliminate prejudices, customs, and any other behaviors or

practices founded on the idea that either gender is inferior to the other or on gender stereotypes.¹⁹⁹

The definition of “harmful traditional practices” was first offered in a 1995 UN Fact Sheet.²⁰⁰ As well as damaging the health of women and girls, traditional and cultural practices are said to “reflect values and beliefs held by members of a community for periods often spanning generations.”²⁰¹ These practices are in place to benefit men. They are “consequences of the value placed on women and the girl child by society,” and they occur in an “environment of discrimination, which denies women and the girl child equal access to health care, education, employment and wealth.”²⁰² They persist because they are not questioned and eventually take on an aura of morality in the eyes of those practicing them.

Prostitution fulfills this part of the “harmful traditional practices” definition very well. Defenders of prostitution tend to say that it is “the oldest profession” and often use examples from prehistory to justify the view that prostitution should be honored and celebrated.²⁰³ One problem with such celebration is that the proponents assume a golden age in which women were equal and in which the form of prostitution that existed was empowering to women rather than abusive.

But there is no good evidence to suggest that prostitution had its origins in an egalitarian society. Gerda Lerner attributes prostitution’s origins to the practice of slavery in Mesopotamia, where extra slave women were placed in brothels.²⁰⁴ Similarly, Julianna Howell notes that when legislation legalizing prostitution in Victoria, Australia was introduced, “a common view expressed by members of parliament (MPs) [was] that prostitution is the ‘oldest profession’ and one that will never disappear.”²⁰⁵ A Victorian MP, who had accepted the inevitability of prostitution told the story of “one of the great [Australian] dynasties,” which was founded when the “right man” married a “humble prostitute.”²⁰⁶ The historical evidence of the longevity of prostitution, and indeed its glorification, in different forms, can also be used to support the idea that prostitution should be categorized as a harmful traditional practice.

The legalization of prostitution perpetuates gender inequality under the guise of women’s empowerment

All of the commotion emanating from the debates presently raging in the international community of non-government organizations and feminist academics about prostitution concentrate upon women as if men were not involved in prostitution at all. Separating “forced” from “free” prostitution, as some sex work and even anti-trafficking organizations now do, encour-

ages the exclusion of the male buyers, and those who make profits from that abuse, from consideration. But without these considerations, an accurate picture of prostitution is impossible to achieve. Legalized prostitution exists for the benefit of men.

It is a socially constructed masculine sexual desire that provides the stimulus to the prostitution industry. Women cannot become prostitutes without men's demand to exercise their sexuality in the bodies of women bought for that purpose. The prostitution industry exploits the economic, physical, and social powerlessness of women and children, in order to service what is primarily a male desire.

Prostitution is not about women enjoying rights over their own bodies. On the contrary, it is an expression of men's control over women's sexuality. It is the hiring out of one's body for the purposes of sexual intercourse, abuse, and manifestations of undifferentiated male lust. It is about gender, ethnic, age, racial, and class power relations. By no means is it the "consent of two adults," when the purchasing party happens to be socially constructed as "the superior sex," or "the better class," "the more mature" or "the lighter skinned," among other characterizations."²⁰⁷

In western cultures women are conceptualized as freely choosing prostitution while the male abusers are invisible.²⁰⁸ Perhaps this is a testament to the growing acceptance that women possess free choice. More likely, however, is the observation that men need to remain invisible if the social harm of their woman-buying behavior is to be hidden from their women partners, relatives, and workmates. Thus, prostitution, and the sins that it embodies, remains primarily a "female problem." This idea of the female prostitute as the carrier of sin is reflected in the motivations of legalization. When legalization is enacted in the present, the preservation of public health from sexually transmitted diseases is generally given as the most important aim. In fact, the object is to protect the health of the male buyers—not to prevent women from further harm.

A comparison can be made here with female genital mutilation (FGM),²⁰⁹ which is often represented as something that women choose for their female children. This practice is usually carried out by women alone and men are absolved of responsibility. However, feminists campaigning against FGM have consistently stressed that FGM occurs so that women may conform to male ideas of female sexuality, and it is indeed male requirements that underlie the practice.²¹⁰

Further proof that the system of legal prostitution is set up for the benefit of men and not the protection of women is in Australia's Occupational Health

and Safety (OSHA) codes.²¹¹ OSHA laws guarantee the right of all workers not to have their health put at risk through carrying out the ordinary requirements of their work.²¹² Therefore, to protect the “workers” from health risks of STDs, the customers—not the prostituted women—should be the ones required to have health checks prior to any contact.²¹³ A medical certificate, updated monthly, should be required from each customer and so on.

Some argue that because the woman is the seller, she must comply with certain regulations to avoid “*caveat emptor*.” However, then it becomes clear that the practice has nothing to do with women’s autonomy or dignity, but her status as a product. It is not an item she is selling or even a service. Instead, she is selling the right to do something to her body. Society does not allow complete control over our own bodies—we cannot legally sell a kidney though we can give one away. We cannot sell a baby though we can give one away. Laws set certain baselines to illustrate what a society defines as human rights, autonomy, and dignity.

The OSHA regulations in Australia also say that a woman can refuse to have sex with a man who will not put on a condom.²¹⁴ But how should this be enforced? A video camera in every room? A panic button around the sex worker’s neck—which might lead to her being strangled? A microphone, perhaps, where she will yell out a magic word and guards will come and remove him? Should he then be arrested? Some rooms now have three panic buttons. At the least, the brothels should keep a computerized list of men who have refused to wear condoms and check the identification of the men upon entry, refusing entry to those on the list. There are no known instances of this having been done, however.

The Australian government has a document on the “Resourcing Health and Education in the Sex Industry” website that clearly instructs inexperienced, and probably very young, prostituted women that they should be nice to customers, and that prostitution is not abusive. “Tips for Novices” tells women to *respect their customers*, stating that “[u]nless a customer is terribly rude there is no reason to cop an attitude with him or her. Both you and your customers get something valuable out of the transaction that takes place. It behooves you to honor the mutual exchange.”²¹⁵ These instructions are provided by a state-financed and state-run organization. The state seems to have taken sides here, serving the interests of the pimps rather than the abused women. Women must smile their way through the abuse they experience and not think negatively about it.²¹⁶ In fact, the state tells them their decision to become a prostitute deserves as much respect as Mother Theresa’s decision to become a nun.²¹⁷

Prostitution has started to take on an aura of morality

Although prostitution traditionally has led to punishment and social isolation for women (although not for the men who benefit from it), now it has been legalized on a large scale. When the 1998 ILO report on prostitution, *The Sex Sector*, can call for the recognition of the usefulness of prostitution to the economies of South East Asia, then the status of prostitution as an industry starts to take on the appearance of a positive good, rather than a social evil.²¹⁸ The status of prostituted women does not necessarily change, however, even though the business of making a profit from the industry can become respectable.

The sex industry is a powerful educator itself, creating its own morality through pornography. Pornography consists of photographs and moving images of women being paid to perform sexual acts, i.e., prostitution. It conveys important messages that legitimize men's prostitution abuse. It teaches that women like and crave to be sexually used, despite the fact that the women are in fact simulating desire or are even enslaved and clearly abused. It teaches the practices of prostitution as what sex is. Pornography is, as Kathleen Barry argues, the "propaganda of women hatred," but it is also the force which propels the prostitution industry to expand and teaches new generations of men a morality where the abuse of women in a sexual context is appropriate.²¹⁹

Prostitution is increasingly promoted as a therapeutic institution for lonely, busy, elderly, or disabled men. Organizations, such as Touching Base in Sydney, Australia, promote prostitution among disabled and aged care organizations, and enlist community figures such as the Governor of New South Wales to advocate on behalf of their organization. The rhetoric of organizations such as Touching Base attempt to justify men's use of women in prostitution under the guise of "sexual rights," without regard for the rights of the women. The organizations distort sympathies for the situations of people with disabilities to promote prostitution. For example, Touching Base's website offers that the organization was "developed to assist people with disabilities and sex workers to connect with each other, focusing on access, discrimination, human rights, legal issues, and attitudinal barriers that both communities face."²²⁰ Surely there is nothing related to true women's empowerment in this arrangement.

Prostitution is further given an aura of morality via academic rationalizations, which represent it as good for women, as embodying women's choice and agency and even as "feminism in action." Thus prostitution is depicted as contributing to women's empowerment and those who continue to point out the brutality involved in men's prostitution behavior can be said to be

acting against women's interests. Mentioning the men whose interests create and maintain prostitution becomes a social solecism.

Rather than striving to eliminate gender inequality through prostitution, a significant amount of energy is being put toward better integrating prostitution into the global market. At a conference in the Balkans in the late 1990s, co-organized by the anti-trafficking organization La Strada, a Transparency International spokesperson actually stated that promoting a higher class of prostitutes is "improving the product," and making it easier for johns to find cheaper women is "making it easier for the customer to find the right product."²²¹ This illustrates two critical points: (1) that legalizing prostitution means women become commodities in the stream of commerce; and (2) that once prostitution is legal, all women potentially are prostitutes. The state can no longer protect women from it, or prohibit women from doing it, and can force women to do it.²²²

Legislation of prostitution violates community norms

Some states and even international and United Nations organizations exhibit a schizophrenic attitude toward prostitution. A UN/AIDS and World Health Organization (WHO) condom campaign in Thailand humiliated Thai women by posting their photographs in brothels if they had agreed to sex without a condom.²²³ Men who refused to have sex without a condom were not similarly humiliated. In 2001, a WHO staff member, Dr. Cris Tunon, suggested that we should "accept the imperfections of society."²²⁴ In that case, should we then accept slavery and torture along with prostitution? The universal answer is "no." Individuals and institutions that advocate for kind and just treatment of fellow human beings require that the answer be "no." Yet we tend to accept the rape and abuse of women, simply because it is so widespread and commonplace. In the 1980s, a lobbyist in Arizona argued exactly that—because discrimination against women was so common to prohibit it would diminish the seriousness of the law and the attention that could be paid to other marginalized groups.²²⁵ It is a twisted logic that does not pass inspection.

Moreover, countries considering the legalization of prostitution are not paying attention to harsh lessons learned elsewhere²²⁶ In fact, "the reports from Australia and New Zealand claim that such legalization led to more organized crime-controlled street prostitution 'terrorizing' communities, illegal brothels and a rise in victimized children and human trafficking."²²⁷ Prostituted women generally feel that laws do little about violence, and that violence is a harmful but inevitable part of the sex industry. Ultimately, social norms and prohibitions regarding trafficking, slavery, violence, and exploitation of women and children have been violated by all countries with

legalized prostitution, and they are guaranteed to be violated in countries that legalize in the future.

Brenda Zurita of Concerned Women For America, an national organization that campaigns against sex trafficking, cited the case of Amsterdam to make her point that prostitution is not a profession but exploitation:

Amsterdam is known for prostitution. Its red light district draws tourists from around the globe in search of sex and voyeurism. So, how did legalizing prostitution work for Amsterdam? Amsterdam's mayor admitted on October 20, 2005 that the Dutch experiment to end abuse by legalizing prostitution has failed. An article in *Life Site News* quotes Mayor Job Cohen, "Almost five years after the lifting of the brothel ban, we have to acknowledge that the aims of the law have not been reached. Lately we've received more and more signals that abuse still continues. The police admit, "We are in the midst of modern slavery."²²⁸

Eighty percent of the women in Dutch brothels are trafficked, for example.²²⁹ As other illegal behaviors are inherently tied to prostitution, the legalization of prostitution violates underlying community norms and standards associated with such behavior, albeit cloaked in the legitimacy that legalization provides.

Part IV: Solutions—to end exploitation

Demand must be attacked

There have long been viable solutions aimed at eliminating gender-based violence rather than sanctioning it. The CEDAW Committee comments regarding Norway—where buying sex is illegal but selling it is not—recognized that in spite of various steps taken to assist victims, "[v]iolence against women does not seem to have been reduced."²³⁰ Likewise, child abuse had increased, especially incest,²³¹ along with an increase in hardcore pornography, prostitution and trafficking.²³² Whether looking at individual history, re-victimization, power relations, or family patterns, legalizing prostitution has a negative impact on every indicator of violence against women. The men who engage in it have more discriminatory attitudes toward women and are more accepting of prostitution and rape myths as well as being more violent themselves.²³³ A thriving sex industry increases child prostitution and other sex crimes²³⁴ and has a negative effect on how women are regarded by men.²³⁵ The lack of gender equality promotes violence against women.

Norway has attempted to look not only at the women prostitutes but at their male consumers. The Committee in its report on Norway referenced a study that represented "prostitution as a problem that is not simply a problem of women but of male sexual needs and desire to 'control sexual relations.'"²³⁶ This finding by the Norwegian government fits clearly within the feminist perspective and empirical evidence. The problem is not the women; the prob-

lem is the gender relationship of power and control. Legalizing prostitution only institutionalizes that relationship and gives it government credibility.

The missing link is the user, the customer, the john.²³⁷ On the rare occasions when a trafficker is caught, she or he may get a lengthy sentence. Often, when the victims are caught, they too are punished or immediately deported. But the customers, who are creating the demand without which there would be no prostitution, rarely bear any penalty. These customers may be having sex with children, often knowingly or at their own request, or with women they can see are battered and bruised. Yet they face far fewer legal or societal consequences.

Studies of the customers show their use of prostitutes is tied to their disregard for women. A john who was guaranteed anonymity said prostitution was like “renting an organ for ten minutes.” Another man said, “I use them like I might use any other amenity, a restaurant, or a public convenience.”²³⁸

As writer Joan Smith postulates, many assumptions exist regarding the interrelatedness of male sexuality and prostitution:

One is the rarely challenged claim that there is something peculiar to male sexuality that makes men entitled to sexual release whenever they want it; another is that women are a class from which men should expect to get sex, regardless of the damage they inflict on individuals. In that sense, it is just as much an abuse of human rights as conventional slavery, which assumed that Africans could be bought and sold for use by white people.²³⁹

But there is a shifting understanding of this interrelatedness. The CEDAW Committee has recognized more than once that the client and procurer must face criminal penalties to end prostitution, and that the responsibility for ending prostitution should not be placed on the women but on the procurers and clients.²⁴⁰ That is to say, there is a shift away from male entitlement and toward male culpability.

This shift, however, is not without skepticism. In the 2001 Concluding Observations²⁴¹ the Committee expressed concern that Sweden’s approach to penalizing the buyer might increase clandestine prostitution while likewise expressing concern that Sweden has become a destination for trafficked women. The Committee urged the Government to evaluate the policy, which it has done. The effects of legalization on the numbers of women involved in prostitution is clear from a comparison with Germany, which has legalized brothels and has 3.8 prostituted people per 1000 population, and Sweden, which penalizes the male buyers and has 0.3 prostituted people per 1000 population.²⁴²

In fact, the effect of the Swedish law has been dramatic. Official figures show that the number of women involved in prostitution fell from 2,500 before

the law came into force in 1999 to 1,500 in 2002.²⁴³ By 2004 the recruitment of women into street prostitution had almost halted.²⁴⁴ With a population of 9 million, Sweden is estimated to have only 500 street prostitutes, while neighboring Denmark, with a population just over half that size, had between 5,500 and 7,800 in 2004, half of whom, it is estimated, were victims of trafficking.²⁴⁵ In contrast, a five-year evaluation of the German law shows that it has neither improved conditions for women in the prostitution industry nor helped women to leave. It has also failed “to reduce crime in the world of prostitution.”²⁴⁶ The reported results are that “prostitution should not be considered to be a reasonable means for securing one’s living.”²⁴⁷

Supporters of the Swedish law say it has also had an impact on trafficking into Sweden, with the National Criminal Investigation Department (NCID) reporting that the country is no longer an attractive market for foreign gangs.²⁴⁸ Intercepted telephone conversations show that pimps and traffickers express frustration about setting up shop in Sweden, preferring to operate in Denmark, Germany, the Netherlands, and Spain. In its 2004 report the NCID concluded that the law “continues to function as a barrier against the establishment of traffickers in Sweden”; it estimates that roughly 400–600 women are trafficked into Sweden each year, compared with between 10,000 and 15,000 into Finland.²⁴⁹ The law’s opponents claim it has made street prostitution more risky because the few remaining clients tend to be more “perverted,” but most of them concede that it has reduced demand.²⁵⁰

Norway adopted the model in 2009 and has seen a 20 percent decrease in street prostitution, 16 percent in indoor prostitution and a 60 percent decrease in advertisements for sexual activities.²⁵¹ It appears that the Swedish approach is a strong, viable method to ending exploitation and prostitution of women. The Swedish government’s premier vision has inspired the international community, including the CEDAW Committee, to begin to recognize that prostitution is not some inevitable societal fixture, but is driven by the patriarchal expectation of males to have sexual access to females on demand. The success of the Swedish approach clearly shows the way forward for implementation of Article 6.

States must address patriarchy in social relationships

Accepting the myth that men possess uncontrollable sexual urges and that prostitution is a way to prevent men from raping innocent women is seen as the ultimate justification for prostitution.²⁵² The Whore/Madonna dichotomy then continues; some women can be raped, others cannot. As scholars Vednita Carter and Evelina Giobbe state, “Prostitution exists in and is maintained by a male-controlled society where violence against women and children is

pandemic and racism flourishes.”²⁵³ Prostitution functions in tandem with racism and sexism and reduces women to objects.²⁵⁴

Diane Matte, Coordinator of the International Secretariat of the World March of Women, has outlined the four institutions that maintain the patriarchal system of exploitation of women: marriage, maternity, heterosexuality, and prostitution.²⁵⁵ While challenges exist in all four, the least progress has been made with prostitution. According to Matte, it seems that the greater the strides women make in one area of freedom, the more they are pushed back in another. Ownership and use of women’s bodies by men is the clearest example that women do not have freedom. Yet instead of the practice declining, it is actually increasing, and women who speak out against it are pilloried. As Matte puts it:

If we truly want to address the issue of violence against prostituted women, then, we must tackle inequality between women and men in a much broader way. We must above all challenge the demand, i.e., the fact that men want to purchase sexual services, and make the necessary links with the maintenance of women’s inferior status. Remember, too, that the institution of prostitution concerns all women. Under patriarchy, the man/buyer does not wonder if the woman wants to be a prostitute. He prostitutes her.²⁵⁶

Conclusion

Research clearly has shown that women who are exploited via prostitution suffer through the same kinds of acts suffered by torture victims, have the same kinds of injuries, and retain the same harms. The victims of prostitution suffer the injuries acutely and chronically. In locations where prostitution is legalized, women suffer these injuries with the permission of the State. The State, by its acquiescence in the legalization and its support of the direct actors, bears responsibility and must be held accountable.

States have an obligation to respect human rights. It cannot uphold human rights by supporting a regime to sell women as commodities in the market place. States also have an obligation to fulfill the substantive requirements of human rights. It can only be done by focusing on ending the demand for prostituted women and creating the conditions whereby women and children cannot be coerced into prostitution. This begins with ending violence against children in the home, marital rape, domestic violence, inequality in the work place, sexual harassment, lack of political representation and the feminization of poverty—not by further legitimizing the ultimate inequality- prostitution.

NOTES

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 19. Hilary Sunghee Seo, *Prostitution: Reality versus Myth*, KWAU NEWS MAGAZINE, Nov. 29, 2004, *available at* http://web.archive.org/web/20050310164844/http://www.women21.or.kr/news/W_English/W_News/W_News_View.asp?ENID=13&page=1&Rpos=2.
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23. *Id.* at 82-84.
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103. Smith, *supra* note 59.
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105. Slavery Convention art. 1(c)-(d), Sept. 25, 1926, 60 L.N.T.S. 253.
106. *Id.*
107. *Id.* Article 7 states that, for the purposes of the Convention:
- (a) ‘Slavery’ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and “slave” means a person in such condition or status;
 - (b) ‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention;
 - (c) ‘Slave trade’ means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.”
108. C29 Forced Labor Convention, 1930 states in Article 2 that “The term forced or compulsory labor shall mean 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.” And Article 25 says, “The illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member

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Andrew Strom

BOEING AND THE NLRB—
A SIXTY-FOUR YEAR-OLD
TIME BOMB EXPLODES

When Congress enacted the Taft-Hartley Act in 1947, it carved out a giant exception to the principle embodied in the National Labor Relations Act (NLRA) that the federal government would have exclusive authority to regulate private sector labor relations.¹ Congress allowed each state to decide for itself whether to outlaw provisions in collective bargaining agreements that require workers to pay their fair share of the costs incurred by the union in providing representation.² Twenty-two states, first in the south, then in the plains states and mountain west, have adopted what are misleadingly called “Right-to-Work” laws.³

Senator Wayne Morse predicted during the debates on the Taft-Hartley amendments what would happen if Congress allowed this exception to the uniform national labor policy: “Soon employers who are bound by the National Labor Relations Board will find themselves at a competitive disadvantage with employers operating in antilabor States which give to their employees the competitive advantage of antiunion-shop legislation with its resulting low wages and cheap labor.”⁴ Now, sixty-four years later, a pending complaint issued by the National Labor Relations Board’s General Counsel against the Boeing Company illustrates the difficulty of enforcing national labor policy in a country where twenty-two states maintain laws that are at odds with the basic theory of the NLRA.

On April 20, 2011, the NLRB’s General Counsel issued a complaint against Boeing, accusing it of violating the NLRA when it “decided to transfer its second 787 Dreamliner production line of three planes per month” from its unionized Washington State facilities to a non-union site in North Charleston, South Carolina. In making this accusation, the complaint relied in part on a quote from Boeing’s CEO that the decision to locate the work in South Carolina was due to “strikes happening every three to four years in Puget Sound.” As a remedy, the General Counsel is seeking an order requiring Boeing to operate its second line of 787 Dreamliner aircraft assembly production in Washington State.

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While the NLRB issues over 1,000 complaints per year,⁵ few of which attract news coverage, this complaint set off a firestorm. The Republican establishment and the business lobby issued a barrage of press releases describing this action as “dangerous” and “chilling.” Utah Senator Orrin Hatch took to the floor of the Senate to issue a lengthy tirade expressing outrage that a government official would dare to question “how a private company is permitted to do business.”⁶ Every single Republican member of the Senate Health Education Labor and Pensions committee signed a letter to the NLRB’s General Counsel, Lafe Solomon, questioning “the legal reasoning and motive behind the complaint.” The letter went on to express concern “about the chilling effect that your action may have on business decisions across the country.”⁷

Republican House members quickly introduced a bill, H.R. 2587, that would bar the Board from ever ordering any employer “to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility or location.” Every single Republican on the House Education and Workforce Committee voted in favor of the bill.

In addition, the House Oversight and Government Reform Committee sent Solomon an unprecedented subpoena seeking all documents in the Board’s possession referring or relating to Boeing in order to get the “complete facts” about his office’s decision-making process.⁸ In an equally unprecedented move, sixteen state attorneys general filed an amicus brief on Boeing’s behalf urging the administrative law judge to dismiss the complaint because the General Counsel’s theory “will harm the ability of every State ... to attract businesses and promote job growth.”⁹ Notably, the brief did not cite a single case or refer to any empirical data.

There are undoubtedly many different reasons why this complaint—the first step in a multi-tiered administrative process¹⁰—has generated so much controversy. Surely one reason is that Boeing has an especially skilled public relations and lobbying apparatus at its disposal. But that is not the whole story.

Another part of the answer is that the NLRA is generally so toothless that it is almost shocking for the NLRB to seek a remedy that actually has the potential to impose meaningful costs on an employer.¹¹ Bear in mind that in the typical case, even when an employer commits especially flagrant violations of the Act, for instance by threatening workers that they will be fired if they attempt to unionize or by spying on the workers’ off-site union meeting, the traditional remedy is simply a cease-and-desist order and a requirement

that the employer post a notice in the workplace informing workers of their rights. It's hard to imagine another legal regime where the consequences for violating the law are simply a promise not to do it again.

The Boeing complaint is also significant because it highlights the tension between the policies underlying the NLRA and the reigning ideology in many of the so-called red states. Among the findings and policies set out in Section 1 of the NLRA is that “[t]he 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 . . . tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry.”¹² Congress further declared it to be the policy of the United States to “encourag[e] the practice and procedure of collective bargaining.”¹³

Contrast that policy with statements found on the state government websites of states that have Right to be a Parasite laws. For instance, Oklahoma tries to entice employers to relocate there as follows: “Oklahoma—a Right-to-Work state—offers relocating and expanding businesses an abundant, available workforce throughout the state, with labor costs that are among the lowest in the nation.”¹⁴ The same website contains a chart demonstrating that the median hourly wage for twenty-one different occupations is lower in Oklahoma than in six other states.¹⁵ Similarly, South Carolina attempts to lure employers to relocate there with the assurance that “as a right-to-work state, South Carolina’s workforce has one of the lowest unionization rates and lowest work stoppage rates in the nation.”¹⁶ Likewise, the Mississippi Development Authority touts its state’s “business climate” by pointing out that Mississippi’s rate of union membership is less than half the national average.¹⁷

Moreover, Republican politicians have made clear that when they refer to their states as “Right-to-Work” states, they are using that as shorthand for being openly anti-union. Tennessee Senator Lamar Alexander made this abundantly clear in an op-ed he wrote in the *Wall Street Journal* earlier this year,¹⁸ in which he argued that Right to be a Parasite¹⁹ laws are necessary to keep jobs from fleeing overseas and pointed out that Nissan, Volkswagen, Honda, Toyota, BMW, Kia, Mercedes-Benz, and Hyundai had all chosen to locate plants in Right to be a Parasite states. But, in the same article, Alexander stated that when General Motors “sought greener pastures in a right-to-work state, its ‘partnership’ with the United Auto Workers could not compete.”²⁰ In other words, according to Alexander, the difference between Nissan and GM had nothing to do with Tennessee’s law governing union security agreements, but instead was simply that Nissan was non-union and GM was unionized.

So, while the formal policy of the United States continues to be to support collective bargaining in order to raise the wages of working people, states like South Carolina, Oklahoma, and Tennessee have pursued their own policies of discouraging collective bargaining and driving down rank-and-file wages. Of course, in their effort to compete with each other for business, states do more than rely upon their anti-union climate. States also offer tax breaks and other forms of corporate welfare to lure businesses across state lines. For instance, South Carolina offered Boeing an incentive package that has been valued at over \$900 million in order to secure Boeing's \$750 million investment in the North Charleston facility.²¹

South Carolina's investment in Boeing points to tension between Republican talking points and reality regarding this case. Republican politicians have painted the case as an Obama administration attack on free enterprise. Leaving aside that Lafe Solomon is actually a career employee who has worked at the agency for over 35 years, the Republicans have picked an especially odd poster child for the virtues of free enterprise. Boeing's very existence is due in large part to government contracts and billions of dollars of corporate welfare.

For instance, over a fifteen year period from 1991 to 2005, the Department of Defense provided Boeing with \$45 billion in research, development, testing and evaluation funding.²² Earlier this year, the World Trade Organization issued a report finding that Boeing had received at least \$5.3 billion in government subsidies to develop the 787 Dreamliner—the very aircraft at issue in the NLRB complaint.²³ It takes a fair amount of chutzpah to take billions of dollars from the government and then turn around and complain if the government raises questions about how you run your business.

But, just as there has been a long history in this country of socializing losses and privatizing gains, we also have socialized investment for private gain. No one screams about government interference in the free market when the government is offering subsidies to business. But, if the government is going to invest in the success of a particular corporation, is it really too much to ask that the corporation comply with federal labor law?

As Solomon has taken pains to point out, there is nothing particularly novel or far-fetched about the government's case against Boeing. The NLRA makes it illegal for an employer to retaliate against workers because they struck in the past. Here, Boeing executives announced that they were locating new production work in South Carolina instead of Washington "due to strikes happening every three to four years in Puget Sound."

Boeing executives and the Republicans in Congress are arguing that the Board is overreaching because the dispute is about new work rather than the

transfer of existing work. But, this is a distinction that should be irrelevant. Boeing's argument is akin to arguing that while it might be illegal to fire a worker for trying to unionize, it shouldn't be illegal to deny that worker overtime or a promotion. While Boeing argues that no workers in Washington have lost work yet, surely the Washington State workers would have greater opportunities for overtime and promotions if the additional assembly line were located in Washington State.

But, while the case against Boeing relies on well-established principles of labor law, there is a legitimate reason why it seems like such a stretch to casual observers. It's no secret that in locating new operations, companies tend to look to locations where unions are weak. In fact, in a 1993 law review article, Cynthia Estlund argued that "union avoidance in capital allocation decisions may account for a much greater share of the steady shrinkage in union membership than does management opposition—legal and illegal—in representation campaigns."²⁴

Estlund pointed out that these decisions are rarely challenged because the Board and the courts have created a false dichotomy between anti-union discrimination and rational business behavior. If an employer establishes that its capital allocation decision was based on cost considerations rather than mere anti-union ideology then the Board will find that the decision is not unlawful.²⁵

But, as Estlund explained, anti-union discrimination is fundamentally different from other forms of discrimination such as race or sex discrimination. With some exceptions,²⁶ those statutes are designed to respond to behavior that is economically irrational.

On the other hand, it is often economically rational for an employer to oppose unionization of its employees. As noted above, the NLRA is explicitly based on the premise that unionization will increase the bargaining power of workers vis-à-vis employers and therefore raise workers' wages. Particularly where a firm's competitors remain non-union, Estlund observes that it may "be reasonable for firms to regard union activism itself, by its very nature, as economically threatening to the firm."²⁷

The Board would not allow an employer to defend the firing of a union activist on the grounds that the firm was not motivated by hostility to unions *per se*, but rather by the concern that unionization would reduce the company's profits. But, when it comes to capital allocation decisions, employers have taken it for granted that their economic considerations will provide them with a defense to any charge of anti-union discrimination.²⁸

The incoherence of this doctrine is one reason why there is so much focus in the Boeing case on the public admission by Boeing's CEO that the

decision was motivated by past strikes. The Machinists' union has seized on this statement as a smoking gun admission of Boeing's guilt. On the other hand, Boeing sympathizers find it odd that Boeing should be punished for stating openly what other firms only say behind closed doors. As *New York Times* columnist Joe Nocera put it, "companies have often moved to right-to-work states to avoid strikes; it is part of the calculus every big manufacturer makes."²⁹

The outcome of the Boeing case is unlikely to have lasting consequences for the country as a whole. Employers will learn to be more guarded when discussing capital allocation decisions, but states like South Carolina will continue to tout their anti-union climates in their appeals to corporations. Ultimately, unless every state endorses the official national policy of supporting collective bargaining, we will continue down a path where workers' wages race to the bottom while the salaries of executives soar.

NOTES)

1. See, e.g., *Wisconsin Dept. of Industry v. Gould*, 474 U.S. 282, 286 (1986) ("It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations").
2. Section 9(a) of the NLRA provides that once a collective bargaining representative is selected by the majority of workers in a bargaining unit, the representative shall serve as the exclusive representative of all the employees in the unit. 29 U.S.C. § 159(a). Since unions must represent all employees in a unit, they typically seek to require that all employees pay dues or an equivalent fee to the union. A provision requiring such payments is referred to as a "union security" agreement.
3. Those states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Inexplicably, the labor movement has never attempted to come up with its own term for these laws. Instead, union leaders seem content to smugly refer to "Right-to-Work for less" laws. While that term may have some appeal for labor insiders, it simply reinforces the right-to-work message when laws banning union security agreements do not, in fact, offer any right to a job, even a job that pays less. It would be far more effective if opponents of these laws started calling them "Right to be a Parasite" laws, and I will use that term here.
4. 93 Cong. Rec. 6614 (1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act, 1947 at 1562* (1949).
5. 74 NLRB Annual Report 8 (2009) (Chart 6A).
6. <http://hatch.senate.gov/public/index.cfm/releases?ID=33ae54e2-49f5-4633-8ab0-bb50ca5e51b1>.
7. http://edworkforce.house.gov/UploadedFiles/5_2011_Kline_Roe_NLRB.pdf.
8. http://oversight.house.gov/index.php?option=com_content&task=view&id=1409&Itemid=29.
9. Amicus Curiae Brief of Sixteen State Attorneys General in Support of Respondent The Boeing Co. at 5, NLRB Case No. 19-CA-32431, filed June 9, 2011, available

- at http://www.nlrp.gov/sites/default/files/documents/516/14.brif_19-ca-32431.amicus_brif_of_16_state_attys_general_boeing.pdf.
10. After a Complaint issues, the Respondent is entitled to a hearing before an administrative law judge, an appeal to the five-member Board, and then a petition for review in the U.S. Court of Appeals.
 11. While the remedy sought by the General Counsel would clearly impose real costs on Boeing, the Board will not order such a remedy if Boeing can establish that it would be “unduly burdensome.” *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989).
 12. 29 U.S.C. § 151.
 13. *Id.*
 14. See <http://www.okcommerce.gov/Site-Selection/Cost-of-Doing-Business/Labor-And-Employment>, last visited Sept. 8, 2011.
 15. *Id.*
 16. <http://scommerce.com/ceos-site-consultants-prospects> (last visited Sept. 8, 2011).
 17. <http://www.mississippi.org/index.php?id=297> (last visited Sept. 9, 2011).
 18. Lamar Alexander, *The White House v. Boeing: A Tennessee Tale*, WALL ST. J., April 29, 2011.
 19. See *supra* note 3.
 20. Alexander, *supra* note 18.
 21. D. Slade & K. Stech, *Boeing’s Whopping Incentives*, THE POST AND COURIER, Jan. 17, 2010.
 22. Panel Report, United States—Measures Affecting Trade in Large Civil Aircraft, WT/DS353/R, adopted March 31, 2011 at 519.
 23. *W.T.O. Rules U.S. Subsidies for Boeing Unfair*, N.Y. TIMES, Mar. 31, 2011.
 24. Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 932 (1993).
 25. *Id.* at 940.
 26. See, e.g., *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (“It is ... not irrational, but it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race”).
 27. Estlund, *supra* note 14, at 924.
 28. Estlund struggled to find a solution for this very real problem. She recognized that the Act was not designed to “give union workers a kind of tenure protection against market forces.” *Id.* at 979. Thus, the Act necessarily has to give employers some leeway to respond to market conditions. Estlund’s proposal was to create a presumption of anti-union discrimination whenever an employer failed to bargain in good faith over a capital allocation decision. Note that here Boeing did meet with the Machinists regarding the location of the second 787 production line, although, according to the Machinists, Boeing never made any proposals. *Boeing ULP Labor Law Backgrounder*, available at http://www.iam751.org/pages/news/2011_05_03_Boeing%20ULP%20Labor%20Law%20Background.pdf.
 29. Joe Nocera, *How Democrats Hurt Jobs*, N.Y. TIMES, August 22, 2011.



Jeanne Mirer and
Marjorie Cohn

LOST IN THE DEBT CEILING DEBATE: THE LEGAL DUTY TO CREATE JOBS

The debate about the debt ceiling should have been a conversation about how to create jobs. It is time for progressives to remind the government that it has a legal duty to create jobs, and must act immediately—if not through Congress, then through the Federal Reserve.

With official unemployment reaching over nine percent¹—not to mention an unofficial rate in double digits,² and an unemployment rate for people of color more than double that of whites³—it is nerve-wracking to hear right-wing political pundits say the government cannot create jobs. Do people really believe this canard? On *Real Time with Bill Maher* a few weeks ago, Chris Hayes of *The Nation* stated that the government should create and has in the past created jobs, but he was put down by that intellectual giant Ann Coulter, who argued that those federally created jobs “were only temporary jobs.” No one challenged her.

Contrary to Ms. Coulter’s flippant opinion, most of the jobs created under the Works Progress Administration (WPA) of the 1930s—and there were millions of them—lasted for many years, or until those employed found other gainful employment.⁴ WPA jobs provided a high enough income to allow a worker’s family to meet basic needs, and they created demand for goods in an economy that was suffering, like today’s economy, from lack of demand.⁵ The WPA program succeeded in sustaining and creating many more jobs in the private sector due to the demand for goods that more people with incomes generated.⁶

The most galling thing about pundits stating with such certainty that the government cannot create jobs is the implication that the government has no business employing people. In actuality, however, the law requires the government, in particular the President and the Federal Reserve, to create jobs. This legal duty comes from three sources: (1) full employment legislation, including the Humphrey Hawkins Full Employment Act of 1978;⁷ (2) the 1977 Federal Reserve Act;⁸ and (3) the global consensus based on cus-

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tomary international law that all people have a right to a job with favorable remuneration to provide an adequate standard of living.

Full Employment Legislation

The first full employment law in the United States was passed in 1946.⁹ It required the country to make its goal one of full employment. It was motivated in part by the fear that after World War II, returning veterans would not find work, and this would provoke further economic dislocation. With the Keynesian consensus¹⁰ that government spending was necessary to stimulate the economy, and with the Depression still fresh in the nation's minds, this legislation contained a firm statement that full employment was the policy of the country. As originally written, the bill required the federal government do everything in its authority to achieve full employment, which was established as a right guaranteed to the American people. Pushback by conservative business interests, however, watered down the bill. While it created the Council of Economic Advisors to the President and the Joint Economic Committee as a Congressional standing committee to advise the government on economic policy, the guarantee of full employment was removed from the bill.

In the aftermath of the rise in unemployment which followed the "oil crisis" of 1975, Congress addressed the weaknesses of the 1946 act through the passage of the Humphrey-Hawkins Full Employment Act of 1978. The purpose of this bill, as described in its title, is:

[T]o translate into practical reality the right of all Americans who are able, willing, and seeking to work to full opportunity for useful paid employment at fair rates of compensation; to assert the responsibility of the Federal Government to use all practicable programs and policies to promote full employment, production, and real income, balanced growth, adequate productivity growth, proper attention to national priorities.¹¹

The Act set goals for the President. By 1983, unemployment rates should be not more than 3 percent for persons aged 20 or over and not more than 4 percent for persons age 16 or over, and inflation rates should not be over 4 percent. By 1988, inflation rates should be 0 percent. The Act allows Congress to revise these goals over time.

If private enterprise appears not to be meeting these goals, the Act expressly calls for the government to create a "reservoir of public employment." These jobs are required to be in the lower ranges of skill and pay to minimize competition with the private sector.

The Act directly prohibits discrimination on account of gender, religion, race, age or national origin in any program created under the Act.

Humphrey-Hawkins has not been repealed. Both the language and the spirit of this law require the government to bring unemployment down to 3 percent from over 9 percent. The time for action is now.

Federal Reserve

The Federal Reserve has among its mandates to “promote maximum employment.”¹² The origin of this mandate is the Full Employment Act of 1946, which committed the federal government to pursue the goals of “maximum employment, production and purchasing power.” This mandate was reinforced in the 1977 reforms which called on the Fed to conduct monetary policy so as to “promote effectively the goals of maximum employment, stable prices and moderate long term interest rates.”¹³ These goals are substantially equivalent to the long-standing goals contained in the 1946 Full Employment Act. The goals of the 1977 act were further affirmed in the Humphrey-Hawkins Act the following year.

The global consensus based on customary international law that all people have a right to a job with favorable remuneration and an adequate standard of living

In the aftermath of World War II, and for the short time between the end of the war and the beginning of the Cold War, there was an international consensus that one of the causes of the Second World War was the failure of governments to address the major unemployment crisis in the late '20s and early '30s, and that massive worldwide unemployment led to the rise of fascism and Nazism.¹⁴ The United Nations Charter was created specifically to “save succeeding generations from the scourge of war.” To do so, the drafters stated that promoting social progress and better standards of life were the necessary conditions “under which justice and respect for obligations arising under treaties and respect for international law can be maintained.”

It is no accident that one of the first actions of the UN was to draft the Universal Declaration of Human Rights.¹⁵ The Declaration was ratified by all the members of the United Nations on December 10, 1948. It is an extremely important document because it recognizes the connections between human rights and the economic conditions surrounding them. It is the first international document to affirm the indivisibility of civil and political rights (like those enshrined in the Bill of Rights) on the one hand, and economic, social and cultural rights on the other. The Declaration acknowledges that both civil and political rights are necessary to create conditions under which human dignity is respected and through which a person's full potential may be realized. Stated another way, without political and civil rights, there is no real ability for people to demand full realization of their economic rights.

And without economic rights, peoples' ability to exercise their civil rights and express their political will is replaced by the daily struggle for survival.

The Declaration, although not a treaty, first articulated the norms to which all countries should aspire. It stated that everyone has the right to an adequate standard of living. This includes the rights to work for favorable remuneration (including the right to form unions), health, food, clothing, housing, medical care, necessary social services, and social insurance in the event of unemployment, sickness, disability or old age.¹⁶ There has been a conspiracy of silence surrounding these rights. In fact, most people have never heard of the Universal Declaration of Human Rights.

Similarly, most Americans do not know that the UN drafted treaties which put flesh on the broad principles contained in the Declaration. One of the treaties enshrines civil and political rights;¹⁷ the other guarantees economic, social and cultural rights.¹⁸ These treaties were released for ratification in 1966. The United States ratified the treaty on civil and political rights and has signed but not ratified the economic, social and cultural rights treaty.

The latter treaty requires the countries that have ratified it to take positive steps to "progressively realize" basic economic rights, including the right to a job. Almost all countries of the world have either signed or ratified this treaty. When most countries become parties to a treaty, they do so not because they think they are morally bound to follow it but because they know they are legally bound. Once an overwhelming number of countries agree to be legally bound, outliers cannot hide behind lack of ratification.¹⁹ The global consensus gives that particular norm the status of binding customary law, which requires even countries that have not ratified a treaty to comply with its mandate.²⁰

The conspiracy of silence

With the duty to create jobs required by U.S. legislation, monetary policy and customary law, why has the government allowed pundits to reframe the debate and state with certainty the government cannot do what it has a legal obligation to do?

We allow it because of the conspiracy of silence that has prevented most people from knowing that the full employment laws exist, that the Federal Reserve has a job-creating mandate, and that economic human rights law has become binding on the United States as customary international law.

Congressman John Conyers of Michigan knows about the Humphrey-Hawkins Full Employment Act, and he has introduced legislation that would fund the job creation aspects of that Act in the "The Humphrey-Hawkins

21st Century Full Employment and Training Act,” HR 870.²¹ It would create specific funds for job training and creation paid for almost exclusively by taxes on financial transactions, with the more speculative transactions paying a higher tax.

If Congress refuses to enact this legislation, the President must demand that the Federal Reserve use all the tools relating to controlling the money supply at its disposal to create the funds called for by HR 870, and to start putting people back to work through direct funding of a reservoir of public jobs as Humphrey-Hawkins mandates.

There is nothing that would prevent the Federal Reserve from creating a fund for job training and a federal jobs program as HR 870 would require, and selling billions of treasury bonds for infrastructure improvement and jobs associated with it. The growth in jobs would stimulate the economy to the point that the interest on these bonds would be raised through increased revenue. There is no reason the Fed on its own could not add a surcharge on inter-bank loans to fund these jobs. These actions could be done without Congressional approval and would represent a major boost to employment and grow the economy. If the Federal Reserve is going to abide by its mandate to promote maximum employment, and comply with the Humphrey Hawkins Act and the global consensus, it must take these steps.

Failure of the Fed and the President to take these affirmative steps is not only illegal, it is also economically unwise. The stock market losses after the debt ceiling deal is in part based on taking almost two million more jobs out of the economy and will only further depress demand, creating further contraction in the economy. This is not an outcome any of us can afford.

NOTES

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2. Mary Engel, *The Real Unemployment Rate? 16.6%*, MSN MONEY, Jun. 4, 2010, available at <http://articles.moneycentral.msn.com/learn-how-to-invest/The-real-unemployment-rate.aspx>.
3. Ylan Q. Mui, *Black Leaders Blast Obama's Jobs Policies*, THE FISCAL TIMES, August 8, 2011, available at <http://www.thefiscaltimes.com/Articles/2011/08/08/WP-Black-Leaders-Blast-Obamas-Jobs-Policies.aspx#page1>.
4. *See* JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY, 1900-1994, at 157-84 (1994).
5. *Id.* at 59.
6. *Id.*

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8. Pub. L. No. 72-44, § 10(b), 47 Stat. 56, 56 (1977) (codified as amended at 12 U.S.C.A. § 347b(a)).
9. Employment Act of 1946, 60 Stat. 23 (1946) (codified as amended at 15 U.S.C. § 1021).
10. See generally, H.W. Singer, *The Golden Age of the Keynesian Consensus—The Pendulum Swings Back*, 25 WORLD DEV. 293 (1997).
11. 12 U.S.C. § 225a.
12. 15 U.S.C. § 1021.
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15. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21, U.N. Doc./RES/217(III) (Dec. 10, 1948).
16. *Id.*
17. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc./RES/21/2200A, art.1 (Dec. 16, 1966).
18. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc./RES/21/2200A, art.1 (Dec. 16, 1966).
19. See Ryan Dreveskracht, *Just War in International Law: An Argument for a Deontological Approach to Humanitarian Law*, 16 BUFF. HUM. RTS. L. REV. 237, 246 (2010).
20. See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 364 (2006) (“While nation-states do not specifically assent to customary international law as they do with treaties, it is nevertheless binding . . . as the law of nations.”).
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Corinna Mullin and
Azadeh Shahshahani

WESTERN COMPLICITY IN THE CRIMES OF THE BEN ALI REGIME

Though the dramatic events of the last few months have provided much cause for hope in Tunisia, many obstacles remain along the path to constructing a new polity capable of addressing not only Tunisians' political and individual grievances, but their socio-economic and collective grievances as well.

Much of the attention on the causes of the revolution have focused on longstanding structural issues, including the government's distorted budget priorities, with too much money invested in repressive security apparatuses and too little in infrastructure and social goods such as healthcare, education, training, or job creation. Add to this, the restrictive labor policies, suffocated public sphere, distorting wealth concentration, and the developmental gap between coastal areas and the interior.

Many Tunisians, especially those on the receiving end of Tunisia's "justice" system, including trade unionists, leftists, and, in particular over the last ten years, those with Islamist leanings, have expressed anger about the lack of due process, absence of the rule of law, widespread use of torture, and generally dismal prison conditions in Tunisia.

Often overlooked in the western press, however, have been the collective, or one could say national, grievances of the Tunisian people, expressed as frustration at Tunisia's lack of real sovereignty in a global order enforced by international institutions such as the IMF and the World Bank, and under the guise of "economic modernization," "democratization," and, most recently, and perhaps for Tunisians most damaging, the "war on terror."

National grievances

It was to study these latter grievances that from March 12 to 19, 2011, we joined a group of lawyers, human rights activists, and academics, based in the US, UK and Turkey to visit Tunisia at the invitation of the Tunisian National Bar Association. The report that came out of this visit, *Promises*

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and Challenges: The Tunisian Revolution of 2010-2011,¹ discusses Tunisia's history under the disgraced Ben Ali regime and the conditions and events which led to its downfall in January 2011. In particular, the delegation was interested in understanding the role of the US and EU states in supporting the Ben Ali regime, despite knowledge of its numerous and persistent human rights violations.

Our delegation met with various organizations and individuals, including those who had been on the receiving end of Ben Ali's most brutal policies and practices, those who had been involved in contesting and resisting the gross human rights violations of the ancien regime, as well as those, including many from the former two categories, that had been instrumental in bringing down the Ben Ali government. These included heads of NGOs, labor leaders, leaders of oppositional political parties, journalists and bloggers, as well as many former political prisoners and torture victims of the deposed regime.

One grievance that was expressed repeatedly by these various political actors was the perception that western governments had been complicit in the crimes committed by the Ben Ali regime, through their provision over the years of copious amounts of diplomatic, military, and economic support, in particular in the past ten years, in the context of the "war on terror."

Not only did many feel that western governments had too often turned a blind eye to the depravities of their Tunisian allies in order to secure their own economic and geo-strategic interests in the region but, even worse, many suspected that some of Ben Ali's most heinous crimes were committed at the behest of these governments.

Tunisia was among several Middle East and North African states that declared its support for the "war on terror" and offered substantial intelligence and strategic cooperation shortly after George W. Bush's infamous speech² of 20 September 2001, in which he warned: "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."

In return for its cooperation in the "war on terror," the US was willing to overlook the well-documented human rights violations of the Ben Ali regime, and indeed, political repression actually increased during this period.

In addition to increased security and intelligence cooperation, many of the lawyers, activists, and former political prisoners we met asserted their belief that the 2003 Anti-Terrorism Law was enacted to curry favour with the US. Although it is unclear what precise role the US played in the wording or timing of the legislation, it is clear that the Bush Administration was happy

with its passage. The US State Department called it³ “a comprehensive law to support the international effort to combat terrorism and money laundering.”

Discrepancy in narratives

Yet critics, both domestic and international, claimed that the law heavily violated Tunisians’ civil liberties. According to a December 2010 Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Tunisian legislation is based on a definition of terrorism that “is vague and broad, hence deviating from the principle of legality and allowing for wide usage of counter-terrorism measures in practice.” The law resulted in the arrest and often torture of thousands of innocent people, solely because of their religious and/or political beliefs and practices.

According to former Tunisian Judge Mokhtar Yahyaoui, founding member of the Association for Support of Political Prisoners, who was pushed out of his job due to his vocal opposition to judicial interference, the 2003 Anti-Terrorism Law was a direct result of US pressure for greater Tunisian cooperation in the “war on terror.” He stated his belief⁴ that US military assistance to the Tunisian government was conditioned upon Tunisia’s counter-terror cooperation and accused the Ben Ali regime of “selling our sons to the Americans” as part of this effort.

Though US president Barak Obama has now become a vocal cheerleader for the “Arab Spring,” it will be difficult for Tunisians to forget the many years in which successive US administrations, including Obama’s, maintained close relations with the Ben Ali regime despite their knowledge, as documented in numerous State Department Annual Human Rights Reports and confirmed by Wikileaks’ release of statements from the US ambassador to Tunisia, that it was patently corrupt and repressive.

From recent statements made by Obama, and proposals discussed by G8 leaders⁵ as well as the IMF and World Bank regarding the provision of funds to promote “economic reform” and “private sector” investment in Tunisia, it is unclear whether any lessons have been learned about the causes of the Tunisian revolution. The civil society and political actors with whom we met invariably expressed a vision of a future democratic Tunisia, marked by balanced development, equality, and social justice. However, economic growth driven by foreign investment under IMF dictates is generally associated with precisely the type of unbalanced development and income disparity that generated the socio-economic collective grievances leading to the Tunisian revolution.

Furthermore, statements made in Obama's May 24 speech to the British parliament⁶ suggest either a failure to comprehend, or a decision to ignore, the collective political grievances articulated in the revolution. Despite expressing US support for democratic change in the region, Obama claimed that Americans "must squarely acknowledge that we have enduring interests in the region: to fight terror with partners who may not always be perfect," thus overlooking the perception of many Tunisians that the repression they experienced for years at the hands of a brutal tyrant was facilitated, if not enabled, by US/western support.

It is clear that a significant gap exists between the perceptions of US government officials, who believe they were strong critics of the corruption and human rights abuses of the Ben Ali regime, and the Tunisian people, who perceived the US as supporters of that regime, complicit in its human rights abuses. It is the conclusion of our delegation's report that the US will fail to gain respect and credibility in this dramatically transformed region unless it recognizes this gap and honestly explores the reasons behind it. Ultimately, it is in the best interests of both western and North African/Arab states that lessons learned from this exercise inform future relations, based on the strong foundations of equality and mutual respect.

NOTES

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Heidi Boghosian

NLG MOURNS THE PASSING OF DEBRA EVENSON

The National Lawyers Guild mourns the passing of its former president, Debra Evenson. One of the nation's foremost authorities on the legal system and institutions of Cuba, Ms. Evenson was Of Counsel with the law firm Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.

“For 20 years, Debra was key to our legal defense of Cuban sovereignty,” said Michael Krinsky, a partner at Rabinowitz Boudin. “That so many in Havana, and such a diverse group of people—high government officials and ordinary workers, intellectuals and artists, academics and lawyers – deeply mourn her passing as a personal loss is testament to Debra’s great integrity, contributions, and humanity,” he continued.

During the McCarthy era, Guild membership dwindled to a few hundred. Ms Evenson was part of the generation of young lawyers and law students that revived it in the late 60s and early 70s, combining political passion to combat injustice and exploitation with outstanding legal skills. She spent much of her life as a professor, teaching later generations both skill and passion.

Debra Evenson was co-founder and executive director of the Center for Inter-American Legal Education, a U.S. not-for-profit educational foundation dedicated to educational exchanges between U.S. lawyers and legal scholars and their counterparts in Latin America. She was involved in the founding of the Sugar Law Center in Detroit and served on its board of directors. For the last three years, she taught a course on the Cuban legal system at Rutgers University Law School-Camden. She was Associate Professor of Law at DePaul University College of Law from 1980 to 1992 where she taught Intellectual Property and Comparative International Law. Prior to joining the faculty at DePaul, she was an associate in the litigation department of Wilkie, Farr and Gallagher (1976-1979). She graduated from Rutgers Law School in 1976, and from Barnard College in 1964.

From 1996-2001, Ms. Evenson was president of the Latin American Institute for Alternative Legal Services (ILSA) headquartered in Bogota, Columbia. During her tenure as president, ILSA organized important conferences related to legal services and human rights in Latin America, Asia and Africa and expanded its collaboration with human rights lawyers in Latin

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America, Central America and the Caribbean. Ms. Evenson was president of the National Lawyers Guild from 1988-1991.

“Our loss is immeasurable but we take comfort in knowing that she left behind so many others to carry on her mission,” said David Gespass, President of the National Lawyers Guild.

**DEBRA EVENSON AWARD
ESTABLISHED BY SUGAR LAW CENTER**

The Sugar Law Center plans to honor Debra Evenson for her work as a founding board member who contributed so much of her considerable talent to growing the Center and promoting its work for economic and social justice. In Debra’s honor the Sugar Law Center will sponsor an annual student writing contest, the winner of which will receive a cash prize and have his or her article published in *National Lawyers Guild Review*. Details regarding this contest will be published in an upcoming issue.

Moreover, the NLG will honor Debra’s legacy with an award in her name commemorating her contributions to international solidarity and education. It will be awarded each year to an outstanding member of the NLG who has engaged in exemplary international work. The International Committee will receive nominations and select the honoree who will receive the award at the annual National Lawyers Guild Convention. Nominations should be sent to international@nlg.org.

Jeanne Mirer
Co-chair, NLG International Committee
Board of Directors, Sugar Law Center

According to former Guild President Paul Harris, the proposed resolution, ultimately revised and passed, was “extremely controversial” and the subject of six months of vigorous consideration and debate.³ One faction of Guild members deemed commercialized pornography to be the exploitation and abuse of women and therefore subject to government regulation. The other saw it as protected speech under the First Amendment.

In 2011 commercialized sex—on and off camera—is a bigger industry than ever before. With the articles by Novak and Post the women’s liberation/sexual liberation debate, long-running both in the Guild and in society at large, begins anew and shifts from commercialized depictions of sex onscreen to commercialized sex per se. *National Lawyers Guild Review* is pleased to move this debate forward by featuring well-reasoned and thoughtful arguments on both sides.

“Western Complicity in the Crimes of the Ben Ali Regime” by Corinna Mullin and Azadeh Shahshahani, explains that much of the revolutionary fury and resentment Tunisians felt against the repressive U.S.-backed government they overthrew earlier this year was, and still is, also directed at the forces of globalization and the U.S.-led “war on terror.” The world should always rejoice when a political strongman falls, especially one as stereotypically thuggish and banal as Ben Ali.⁴ But, as this feature shows, even amid the rejoicing it is essential to understand the sources of the strongman’s strength to avoid the very real possibility that another might rise in his place.

“Lost in the Debt Ceiling Debate: The Legal Duty to Create Jobs” by Marjorie Cohn and Jeanne Mirer is a follow-up to their essay, “Obama Should Create Jobs by Executive Order,” which was published in issue 66-4. Considering that *The New York Times* has recently reported that, according to the 2010 national census, “[a]nother 2.6 million people slipped into poverty in the United States last year,”⁵ Professor Cohn’s and Ms. Mirer’s latest essay could hardly be more timely.

“Boeing and the NLRB – A Sixty-Four Year-old Time Bomb Explodes” by Andrew Strom is an analysis of the recent controversy surrounding the National Labor Relation Board’s suit against Boeing who recently retaliated against workers in Washington State for exercising their right to strike by moving operations to South Carolina, a so-called “Right to Work” state. In a year that has seen numerous bold attempts by right-wing politicians to neuter and debilitate the right to organize around the country—Wisconsin Governor Scott Walker’s successful rescission of collective bargaining rights in his state is just one example—anti-labor reactionaries in congress have mobilized in full force against the NLRB, speechifying on the Senate floor⁶

and issuing heavy-handed and onerous subpoenas⁷ likely to distract the NLRB from making its case. Professor Strom, who teaches Labor & Employment Drafting at Fordham University School of Law, provides valuable context and commentary on a case that is the latest front in the unending battle for workers rights in America.

This issue ends with two notes—the first by the Guild's Executive Director, Heidi Beghosian, the second by longtime Guild member and International Committee Co-Chair, Jeanne Mirer—on the life and legacy of former Guild President Debra Evenson, whose great dedication to human rights will be sorely missed.

NOTES

1. Benjamin David Novak, *Freeing Jane: The Right to Privacy and the World's Oldest Profession*, 66 Nat'l Lawyers Guild Rev. 137-164 (2009).
2. Paul Harris, *We Are Family*, at <http://nlgchicago.org/about/we-are-family/> (last visited Sept. 18, 2011).
3. *Id.*
4. Ben Ali was a North African strongman straight from central casting. During the uprising he fled to Saudi Arabia, which has become a retirement home for many of the region's most ruthless dictators, including Idi Amin, over the years. The impoverished people of Tunisia recently found \$27 million dollars worth of cash and jewels in one of his palaces. Ben Ali managed to compound the stifling authoritarianism of his reign, and even the narrative of his escape from the revolution, with the added qualities of predictability and tedium. See, *Tunisia's Former President Zine al-Abidine Ben Ali and His Wife Sentenced to 35 Years in Prison*, THE TELEGRAPH, June 20, 2011, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/tunisia/8588000/Tunisias-former-president-Zine-al-Abidine-Ben-Ali-and-his-wife-sentenced-to-35-years-in-prison.html>.
5. Sabrina Tavernise, *Soaring Poverty Casts Spotlight on 'Lost Decade'*, NY TIMES, Sept. 13, 2011, at http://www.nytimes.com/2011/09/14/us/14census.html?_r=1
6. Scott Wong, *GOP to Block Labor Nominees*, POLITICO, MAY 5, 2011, at <http://www.politico.com/news/stories/0511/54385.html>
7. Mike Elk, *Issa Subpoenas NLRB, Solomon Could Face Contempt of Congress Charges*, IN THESE TIMES, Aug. 9, 2011, at http://www.inthesetimes.com/working/entry/11816/issa_subpoenas_nlrn_nlrn_general_counsel_could_face_contempt_of_congre/

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"to the end
that human
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be more
sacred than
property
interests."

—Preamble, NLG
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