

## “WHETHER FROM REASON OR PREJUDICE”: TAKING MONEY FOR BODILY SERVICES

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Taking leave of Binod, Durga slowly, deliberately walks towards the shack of Sukhlal the contractor, who stared at her even yesterday and flashed ten-rupee notes.

What else can one do, she argues to herself, except fight for survival? The survival of oneself, one’s loved ones, and the hopes that really matter. (MANIK BANDYOPADHYAY, “A Female Problem at a Low Level” [1963])

If the story is about the peasant wife selling her body, then one must look for the meaning of that in the reality of peasant life. One can’t look at it as a crisis of morality, in the sense one would in the case of a middle-class wife. (MANIK BANDYOPADHYAY, *About This Author’s Perspective* [1957])<sup>1</sup>

### I

ALL of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body. Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators—we all do things with parts of our bodies for which we receive a wage in return.<sup>2</sup> Some peo-

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<sup>1</sup> Both the story and the extract from the critical work are translated from the Bengali by Kalpana Bardhan. See *Of Women, Outcastes, Peasants, and Rebels: A Selection of Bengali Short Stories* 157, 19 (Bardhan trans. 1990). Bandyopadhyay (1908–56) was a leading Bengali writer who focused on peasant life and issues of class conflict.

<sup>2</sup> Even if one is a Cartesian dualist, as I am not, one must grant that the human exercise of mental abilities standardly requires the deployment of bodily skills. Most traditional Christian positions on the soul go still further; Aquinas, for example, holds that souls separated from the body have only a confused cognition and cannot recognize particulars. So my statements about professors can be accepted even by believers in the separable soul.

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ple get good wages, and some do not; some have a relatively high degree of control over their working conditions, and some have little control; some have many employment options, and some have very few. And some are socially stigmatized, and some are not.

The stigmatization of certain occupations may be well founded, based on convincing, well-reasoned arguments. But it may also be based on class prejudice or stereotypes of race or gender. Stigma may also change rapidly as these background beliefs and prejudices change. Adam Smith, in *The Wealth of Nations*, tells us that there are “some very agreeable and beautiful talents” that are admirable so long as no pay is taken for them, “but of which the exercise for the sake of gain is considered, whether from reason or prejudice, as a sort of publick prostitution.” For this reason, he continues, opera singers, actors, and dancers must be paid an “exorbitant” wage to compensate them for the stigma involved in using their talents “as the means of subsistence.” “Should the publick opinion or prejudice ever alter with regard to such occupations,” he concludes, “their pecuniary recompence would quickly diminish.”<sup>3</sup> Smith was not altogether right about the opera market,<sup>4</sup> but his discussion is revealing for what it shows us about stigma. Today, few professions are more honored than that of opera singer; and yet only two hundred years ago, that public use of one’s body for pay was taken to be a kind of prostitution. Looking back at that time, we now think that the judgments and emotions underlying the stigmatization of singers were irrational and objectionable, like prejudices against members of different classes and races. (I shall shortly be saying more about what I think those reasons were.) Nor do we see the slightest reason to suppose that the unpaid artist is a purer and truer artist than the paid artist. We think it entirely right and reasonable that high art should receive a high salary. If a producer of opera should take the position that singers should not be paid, on the grounds that receiving money for the use of their talents involves an illegitimate form of commodification and even market alienation of those talents, we would think that this producer was a slick exploiter, out to make a profit from the ill treatment of vulnerable and impressionable artists.<sup>5</sup> On the whole, we think that, far from cheapening or ruining talents, the pres-

<sup>3</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.x.b.25 (R. H. Campbell *et al.* ed. 1981) (1776). Elsewhere (Adam Smith, *Lectures on Rhetoric and Belles Lettres* ii.230 (J. C. Bryce ed. 1983)), Smith points out that in ancient Greece acting was “as creditable . . . as it is discreditable now.”

<sup>4</sup> He expresses the view that the relevant talents are not so rare and that when stigma is removed many more people will compete for the jobs, driving down wages; this is certainly true today of acting, but far less so of opera, where “the rarity and beauty of the talents” remains at least one dominant factor.

<sup>5</sup> Such arguments have often been used in the theater; they were used, for example, in one acting company of which I was a member in order to persuade actors to kick back their

ence of a contract guarantees conditions within which the artist can develop her art with sufficient leisure and confidence to reach the highest level of artistic production.<sup>6</sup>

It is widely believed, however, that taking money or entering into contracts in connection with the use of one's sexual and reproductive capacities is genuinely bad. Feminist arguments about prostitution, surrogate motherhood, and even marriage contracts standardly portray financial transactions in the area of female sexuality as demeaning to women and as involving a damaging commodification and market alienation of women's sexual and reproductive capacities.<sup>7</sup> The social meaning of these transactions is said to be both that these capacities are turned into objects for the use and control of men and also that the activities themselves are being turned into commodities and thereby robbed of the type of value they have at their best.

One question we shall have to face is whether these descriptions of our current judgments and intuitions are correct. But even if they are, what does this tell us? Many things and people have been stigmatized in our nation's history, often for very bad reasons. An account of the actual social meaning of a practice is therefore just a door that opens onto the large arena of moral and legal evaluation. It invites us to raise Smith's question: are these current beliefs the result of reason or prejudice? Can they be defended by compelling moral arguments? And, even if they can, are these the type of moral argument that can properly be a basis for a legal restriction? Smith, like his Greek and Roman Stoic forebears, understood that the evaluations that ground emotional responses and ascriptions of social meaning in a society

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(union-mandatory) salaries to the owners. This is fairly common in theater, where the union is weak and actors are so eager for employment that they are vulnerable to such arguments.

<sup>6</sup> The typical contract between major U.S. symphony orchestras and the musicians' union, for example, guarantees year-round employment to symphony musicians, even though they do not play all year; this enables them to use summer months to play in low-paying or experimental settings in which they can perform contemporary music, chamber music, do solo and concerto work, and so forth. It also restricts hours of both rehearsal and performance during the performing season, leaving musicians free to teach students, attend classes, work on chamber music with friends, and in other ways enrich their work. It also mandates blind auditions (that is, players play behind a curtain)—with the result that the employment of female musicians has risen dramatically over the past 20 or so years since the practice was instituted.

<sup>7</sup> See Elizabeth Anderson, *Value in Ethics and Economics* (1993); Elizabeth Anderson, *Is Women's Labor a Commodity?* 19 *Phil. & Pub. Aff.* 71 (1990); Margaret Jane Radin, *Contested Commodities: The Trouble with the Trade in Sex, Children, Bodily Parts, and Other Things* (1996); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987); Cass R. Sunstein, *Neutrality in Constitutional Law: With Special Reference to Pornography, Abortion, and Surrogacy*, 92 *Colum. L. Rev.* 1 (1992); Cass R. Sunstein, *The Partial Constitution* 257–90 (1993). For contrasting feminist perspectives on the general issue of contract, see Jean Hampton, *Feminist Contractarianism*, in *A Mind of One's Own: Feminist Essays on Reason and Objectivity* 227–55 (Louise Antony & Charlotte Witt eds. 1993); Susan Moller Okin, *Justice, Gender, and the Family* (1989).

are frequently corrupt—deformed by self-interest, resentment, and mere unthinking habit. The task he undertook in *The Theory of Moral Sentiments* was to devise procedures and strategies of argument through which one might separate the rationally defensible emotions from the irrational and prejudiced. In so proceeding, Smith and the Stoics were correct. Social meaning does no work on its own: it offers an invitation to normative moral and political philosophy.

My aim in this article will be to investigate the question of sexual “commodification” by focusing on the example of “prostitution.”<sup>8</sup> I shall argue that a fruitful debate about the morality and legality of prostitution should begin from a twofold starting point: from a broader analysis of our beliefs and practices with regard to taking pay for the use of the body and from a broader awareness of the options and choices available to poor working women. The former inquiry suggests that at least some of our beliefs about prostitution are as irrational as the beliefs Smith reports about singers; it will therefore help us to identify the elements in prostitution that are genuinely problematic. Most, though not all, of the genuinely problematic elements turn out to be common to a wide range of activities engaged in by poor working women, and the second inquiry will suggest that many of women’s employment choices are so heavily constrained by poor options that they are hardly choices at all. I think that this should bother us and that the fact that a woman with plenty of choices becomes a prostitute should not bother us, provided that there are sufficient safeguards against abuse and disease, safeguards of a type that legalization would make possible.

It will therefore be my conclusion that the most urgent issue raised by prostitution is that of employment opportunities for working women and their control over the conditions of their employment. The legalization of prostitution, far from promoting the demise of love, is likely to make things a little better for women who have too few options to begin with.<sup>9</sup> The really helpful thing for feminists to ponder if they deplore the nature of these

<sup>8</sup> I shall use the terms “prostitution” and “prostitute” throughout because of their familiarity, although a number of international women’s organizations now avoid it for reasons connected to those in this article, preferring the term “commercial sex worker” instead. For one recent example, see *Reproductive Health in Developing Countries: Expanding Dimensions, Building Solutions* 30 (Amy O. Tsui, Judith N. Wasserheit, & John G. Haaga eds., report of the Panel on Reproductive Health, National Research Council 1997), stressing the wide variety of practices denoted by the term “commercial sex,” and arguing that some studies show economic hardship as a major factor but some do not.

<sup>9</sup> Among feminist discussions of prostitution, my approach is close to that of Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, 18 *N.Y.U. Rev. L. & Soc. Change* 103–29 (1990–91), and to Laurie Shrage, *Prostitution and the Case for Decriminalization*, *Dissent*, Spring 1996, at 41–45 (in which Shrage criticizes her earlier view expressed in *Should Feminists Oppose Prostitution?* 99 *Ethics* 347 (1989)).

options will be how to promote expansion in the option set through education, skills training, and job creation. These unsexy topics are insufficiently addressed by feminist philosophers in the United States, but they are inevitable in any practical project dealing with real-life prostitutes and their female children.<sup>10</sup> This suggests that at least some of our feminist theory may be insufficiently grounded in the reality of working-class lives and too focused on sexuality as an issue in its own right, as if it could be extricated from the fabric of poor people's attempts to survive.

## II

Why were opera singers stigmatized? If we begin with this question, we can move on to prostitution with expanded insight. Although we can hardly provide more than a sketch of the background here, we can confidently say that two common cultural beliefs played a role. First, throughout much of the history of modern Europe—as, indeed, in ancient Greece—there was a common aristocratic prejudice against earning wages. The ancient Greek gentleman was characterized by “leisure”—meaning that he did not have to work for a living. Aristotle reproved the Athenian democracy for allowing such base types as farmers and craftsmen to vote, since, in his view, the unleisured character of their daily activities and their inevitable preoccupation with gain would pervert their political judgment, making them grasping and small-minded.<sup>11</sup> The fact that the Sophists typically took money for their rhetorical and philosophical teaching made them deeply suspect in the eyes of such aristocrats.<sup>12</sup> Much the same view played a role in the medieval church, where it was controversial whether one ought to offer philosophical instruction for pay.<sup>13</sup> Bernard of Clairvaux, for example, held that taking fees for education is a “base occupation” (*turpis quaestus*). (Apparently, he did not think this true of all wage labor, but only where it involved deep spiritual things.)

Such views about wage labor remained closely linked to class privilege in modern Europe and exercised great power well into the twentieth century. Any reader of English novels will be able to produce many examples

<sup>10</sup> To give just one example, the Annapurna Mahila Mandel project in Bombay offers job training and education in a residential school setting to the daughters of prostitutes; they report that in 5 years they have managed to arrange reputable marriages for 1,000 such girls.

<sup>11</sup> Aristotle, *Politics* VII.9–10.

<sup>12</sup> One can find evidence for this in the attitudes evinced by characters in Platonic dialogues such as *Apology*, *Protagoras*, and *Gorgias*.

<sup>13</sup> I have profited here from reading an unpublished paper by Dan Klerman, *Slavery, Simony and Sex: An Intellectual History of the Limits of Monetary Relations* (unpublished manuscript, Univ. Chicago, March 30, 1990).

of the view that a gentleman does not earn wages and that someone who does is overpreoccupied with the baser things in life, therefore base himself. Such views were a prominent source of prejudice against Jews, who, not having the same land rights as Christians, had no choice but to earn their living. Even in this century, in America, Edith Wharton shows that these attitudes were still firmly entrenched. Lily Bart, the impoverished heroine of *The House of Mirth* (1905), is discussing her situation with her friend Gus Trenor. He praises the investment tips he has gotten from Simon Rosedale, a Jewish Wall Street investments expert whose wealth has given him entry into the world of impoverished aristocrats who both use and despise him. Trenor urges Lily to encourage Rosedale's advances: "The man is mad to know the people who don't want to know him, and when a fellow's in that state, there is nothing he won't do for the first woman who takes him up." Lily dismisses the idea, calling Rosedale "impossible," and thinking silently of his "intrusive personality." Trenor replies: "Oh, hang it—because he's fat and shiny and has a shabby manner! . . . A few years from now he'll be in it whether we want him or not, and then he won't be giving away a half-a-million tip for a dinner!"<sup>14</sup> In the telling phrase "a shabby manner," we see the age-old aristocratic prejudice against wage work, so deeply implicated in stereotypes of Jews as pushy, intrusive, and lacking in grace.

To this example we may add a moment in the film *Chariots of Fire* (1981) when the Jewish sprinter hires a professional coach to help him win. This introduction of money into the gentlemanly domain of sport shocks the head of his college, who suggests to him that as a Jew he doesn't understand the true spirit of English athletics. Genteel amateurism is the mark of the gentleman, and amateurism demands, above all, not earning or dealing in money. It may also imply not trying too hard, not giving the impression that this is one's main concern in life; but this attitude appears to be closely related to the idea that the gentleman doesn't *need* the activity, has his living provided already; so the rejection of hard work is a corollary of the rejection of the tradesman. (Even today in Britain, such attitudes have not totally disappeared; people from aristocratic backgrounds frequently frown on working too hard at one's scholarly or athletic pursuits, as if this betrayed a kind of base tradesman-like mentality.)

What is worth noting about these prejudices is that they do not attach to activities themselves, as such, but, rather, to the use of these activities to make money. To be a scholar, to be a musician, to be a fine athlete, to be an actor even, is fine so long as one does it as an amateur. But what does

<sup>14</sup> Edith Wharton, *The House of Mirth* 86–87 (Signet Classics ed. 1964).

this mean? It means that those with inherited wealth<sup>15</sup> can perform these activities without stigma, and others cannot. In England in the nineteenth century, it meant that the gentry could perform those activities, and Jews could not. This informs us that we need to scrutinize all our social views about moneymaking and alleged commodification with extra care, for they are likely to embed class prejudices that are unjust to working people.

Intersecting with this belief, in the opera singer example, is another: that it is shameful to display one's body to strangers in public, especially in the expression of passionate emotion. The anxiety about actors, dancers, and singers reported by Smith is surely of a piece with the more general anxiety about the body, especially the female body, that has been a large part of the history of quite a few cultures. Thus, in much of India until very recently (and in some parts still), it was considered inappropriate for a woman of good family to dance in public; when Rabindranath Tagore included middle-class women in his theatrical productions early in this century, it was a surprising and somewhat shocking move. In a similar manner, in the West, the female body should be covered and not displayed, although in some respects these conditions could be relaxed among friends and acquaintances. Female singers were considered unacceptable during the early history of opera; indeed, they were just displacing the castrati during Smith's lifetime, and they were widely perceived as immoral women.<sup>16</sup> Male actors, singers, and dancers suffered too; and clearly Smith means to include both sexes. Until very recently, such performers were considered to be a kind of gypsy, too fleshy and physical, unsuited for polite company. The distaste was compounded by a distaste for, or at least a profound ambivalence about, the emotions that it was, and is, the business of these performers to portray. In short, such attitudes betray an anxiety about the body, and about strong passion, that we are now likely to think irrational, even

<sup>15</sup> Or those supported by religious orders.

<sup>16</sup> Elizabeth Billington, who sang in Thomas Arne's *Artaxerxes* in London in 1762, was forced to leave England because of criticisms of her morals; she ended her career in Italy. Another early diva was Maria Catalani, who sang for Handel (died 1759), for example, in *Samson*. By the time of the publication of *The Wealth of Nations*, female singers had made great headway in displacing the castrati, who ceased to be produced shortly thereafter. For Smith's own attitudes to the female body, see Adam Smith, *The Theory of Moral Sentiments* I.ii.1.3 (D. D. Raphael & A. L. Macfie eds. 1984) (6th ed. 1781), where he states that as soon as sexual passion is gratified it gives rise to "disgust" and leads us to wish to get rid of the person who is its object, unless some higher moral sentiment preserves our regard for (certain aspects of) this person. "When we have dined, we order the covers to be removed; and we should treat in the same manner the objects of the most ardent and passionate desires, if they were the objects of no other passions but those which take their origin from the body." Smith was a bachelor who lived much of his life with his mother and did not have any lasting relationships with women.



though we may continue to share these attitudes at times; certainly we are not likely to think them a good basis for public policy.

When we consider our views about sexual and reproductive services, then, we must be on our guard against two types of irrationality: aristocratic class prejudice and fear of the body and its passions.

### III

Prostitution is not a single thing. It can only be well understood in its social and historical context. Ancient Greek *hetairai*, such as Pericles' mistress Aspasia, have very little in common with a modern call girl.<sup>17</sup> Even more important, within a given culture there are always many different types and levels of prostitution: in ancient Greece, the *hetaira*, the brothel prostitute, the streetwalker; in modern America, the self-employed call girl, the brothel prostitute, the streetwalker (and each of these at various levels of independence and economic success). It is also evident that most cultures contain a continuum of relations between women and men (or between same-sex pairs) that have a commercial aspect—ranging from the admitted case of prostitution to cases of marriage for money, going on an expensive date where it is evident that sexual favors are expected at the other end, and so forth. In most cultures, marriage itself has a prominent commercial aspect: the prominence of dowry murder in contemporary Indian culture, for example, testifies to the degree to which a woman is valued, above all, for the financial benefits one can extract from her family.<sup>18</sup> Let us, however, focus for the time being on contemporary America (with some digressions on India), on female prostitution only, and on explicitly commercial relations of the sort that are illegal under current law.

It will be illuminating to consider the prostitute by situating her in relation to several other women who take money for bodily services:

1. A factory worker in the Perdue chicken factory, who plucks feathers from nearly frozen chickens.

<sup>17</sup> Aspasia was a learned and accomplished woman who apparently had philosophical and political views; she is said to have taught rhetoric and to have conversed with Socrates. On the one hand, she could not perform any of the functions of a citizen both because of her sex and because of her foreign birth. On the other hand, her son Pericles was subsequently legitimated and became a general. More recently, it has been doubted whether Aspasia was in fact a *hetaira*, and some scholars now think her a well-born foreign woman. But other *hetairai* in Greece had good education and substantial financial assets; the two women recorded as students in Plato's Academy were both *hetairai*, as were most of the women attested as students of Epicurus, including one who was apparently a wealthy donor.

<sup>18</sup> See Martha Nussbaum, Religion and Women's Human Rights, in Religion and Contemporary Liberalism 93–137 (Paul Weithman ed. 1997).



2. A domestic servant in a prosperous upper-middle-class house.
3. A nightclub singer in middle-range clubs, who sings (often) songs requested by the patrons.
4. A professor of philosophy, who gets paid for lecturing and writing.
5. A skilled masseuse, employed by a health club (with no sexual services on the side).
6. A person whom I'll call the "colonoscopy artist": she gets paid for having her colon examined with the latest instruments, in order to test out their range and capability.<sup>19</sup>

By considering similarities and differences between the prostitute and these other bodily actors, we will make progress in identifying the distinctive features of prostitution as a form of bodily service.

Note that nowhere in this comparison am I addressing the issue of child prostitution or nonconsensual prostitution (for example, young women sold into prostitution by their parents, forcible drugging and abduction, and so forth). Insofar as these features appear to be involved in the international prostitution market, I do not address them here, although I shall comment on them later. I address only the type of choice to be a prostitute that is made by a woman over the age of consent, frequently in a situation of great economic duress.

1. *The Prostitute and the Factory Worker.* Both prostitution and factory work are usually low-paid jobs; but, in many instances, a woman faced with the choice can (at least over the short-haul) make more money in prostitution than in this sort of factory work. (This would probably be even more true if prostitution were legalized and the role of pimps thereby restricted, though the removal of risk and some stigma might at the same time depress wages, to some extent offsetting that advantage for the prostitute.) Both face health risks, but the health risk in prostitution can be very much reduced by legalization and regulation, whereas the particular type of work the factory worker is performing carries a high risk of nerve damage in the hands, a fact about it that appears unlikely to change. The prostitute may well have better working hours and conditions than the factory worker; especially in a legalized regime, she may have much more control over her working conditions. She has a degree of choice about which clients she accepts and what activities she performs, whereas the factory worker has no choices but must perform the same motions again and again for years. The prostitute also performs a service that requires skill and responsiveness to

<sup>19</sup> Although this profession, as described, is hypothetical, medical students do employ "models" to teach students how to perform pelvic and other internal exams: see page 706 and note 27 *infra*.

new situations, whereas the factory worker's repetitive motion exercises relatively little human skill<sup>20</sup> and contains no variety.

The factory worker, however, is unlikely to be the target of violence, whereas the prostitute needs—and does not always get—protection against violent customers. (Again, this situation can be improved by legalization: prostitutes in the Netherlands have a call button wired up to the police.) This factory worker's occupation, moreover, has no clear connection with stereotypes of gender—though this might not have been the case. In many parts of the world, manual labor is strictly segmented by sex, and more routinized, low-skill tasks are given to women.<sup>21</sup> The prostitute's activity does derive some of its attraction from stereotypes of women as sluttish and immoral, and it may in turn perpetuate such stereotypes. The factory worker suffers no invasion of her internal private space, whereas the prostitute's activity involves such (consensual) invasion. Finally, the prostitute suffers from social stigma, whereas the factory worker does not—at least among people of her own social class. (I shall return to this issue, asking whether stigma too can be addressed by legalization.) For all these reasons, many women, faced with the choice between factory work and prostitution, choose factory work, despite its other disadvantages.

2. *The Prostitute and the Domestic Servant.* In domestic service as in prostitution, one is hired by a client and one must do what that client wants or fail at the job. In both, one has a limited degree of latitude to exercise skills as one sees fit, and both jobs require the exercise of some developed bodily skills. In both, one is at risk of enduring bad behavior from one's client, although the prostitute is more likely to encounter physical violence. Certainly both are traditionally professions that enjoy low respect, both in society generally and from the client. Domestic service on the whole is likely to have worse hours and lower pay than (at least many types of) prostitution, but it probably contains fewer health risks. It also involves no invasion of intimate bodily space, as prostitution (consensually) does.

Both prostitution and domestic service are associated with a type of social stigma. In the case of domestic service, the stigma is, first, related to

<sup>20</sup> It is probably, however, a developed skill to come to work regularly and to work regular hours each day.

<sup>21</sup> Consider, for example, the case of Jayamma, a brick worker in Trivandrum, Kerala, India (discussed by Leela Gulati, *Profiles of Female Poverty* 35–62 (1981)), whom I met on March 21, 1997, when she was approximately 65 years old. For approximately 40 years, Jayamma worked as a brick carrier in the brick-making establishment, carrying heavy loads of bricks on her head all day from one place to another. Despite her strength, fitness, and reliability, she could never advance beyond that job because of her sex, whereas men were quickly promoted to the less physically demanding and higher-paying tasks of brick molding and truck loading.

class: it is socially coded as an occupation only for the lowest classes.<sup>22</sup> Domestic servants are in a vast majority of cases female, so it becomes coded by sex. In the United States, domestic service is very often racially coded as well. Not only in the South but also in many parts of the urban North, the labor market has frequently produced a clustering of African American women in these low-paying occupations. In my home in suburban Philadelphia in the 1950s and 1960s, the only African Americans we saw were domestic servants, and the only domestic servants we saw were African American. The perception of the occupation as associated with racial stigma ran very deep, producing difficult tensions and resentments that made domestic service seem to be incompatible with dignity and self-respect. (It needn't be, clearly; and I shall return to this.)

3. *The Prostitute and the Nightclub Singer.* Both of these people use their bodies to provide pleasure, and the customer's pleasure is the primary goal of what they do.<sup>23</sup> This does not mean that a good deal of skill and art isn't involved, and in both cases, it usually is. Both have to respond to requests from the customer, although (in varying degrees depending on the case) both may also be free to improvise or to make suggestions. Both may be paid more or less, have better or worse working conditions, and more or less control over what they do.

How do they differ? The prostitute faces health risks and risks of violence not faced by the singer. She also allows her bodily space to be invaded, as the singer does not. It may also be that prostitution is always a cheap form of an activity that has a higher, better form, whereas this need not be the case in popular vocal performance (though of course it might be).<sup>24</sup> The nightclub singer, furthermore, does not appear to be participating in, or perpetuating, any type of gender hierarchy—although in former times this would not have been the case, singers being seen as “a type of public prostitute,” and their activity associated, often, with anxiety about the con-

<sup>22</sup> Indeed, this appears to be a ubiquitous feature: in India, the mark of “untouchability” is the performance of certain types of cleaning, especially those dealing with bathroom areas. Mahatma Gandhi's defiance of caste manifested itself in the performance of these menial services.

<sup>23</sup> This does not imply that there is some one thing, pleasure, varying only by quantity, that they produce. With Mill (and Plato and Aristotle), I think that pleasures differ in quality, not only in quantity.

<sup>24</sup> This point was suggested to me by Elizabeth Schreiber. I'm not sure whether I endorse it: it all depends on whether we really want to say that sex has one highest goal. Just as it would have been right, in an earlier era, to be skeptical about the suggestion that the sex involved in prostitution is “low” because it is nonreproductive, so too it might be good to be skeptical about the idea that prostitution sex is “low” because it is nonintimate. Certainly nonintimacy is involved in many noncommercial sexual relationships and is sometimes desired as such.

trol of female sexuality. Finally, there is no (great) moral stigma attached to being a nightclub singer, although at one time there certainly was.

4. *The Prostitute and the Professor of Philosophy.* These two figures have a very interesting similarity: both provide bodily services in areas that are generally thought to be especially intimate and definitive of selfhood. Just as the prostitute takes money for sex, which is commonly thought to be an area of intimate self-expression, so the professor takes money for thinking and writing about what she thinks—about morality, emotion, the nature of knowledge, whatever—all parts of a human being's intimate search for understanding of the world and self-understanding. It was precisely for this reason that the medieval thinkers I have mentioned saw such a moral problem about philosophizing for money: it should be a pure spiritual gift, and it is degraded by the receipt of a wage. The fact that we do not think that the professor (even one who regularly holds out for the highest salary offered) thereby alienates her mind or turns her thoughts into commodities—even when she writes a paper for a specific conference or volume—should put us on our guard about making similar conclusions in the case of the prostitute.

Other similarities are that in both cases, the performance involves interaction with others, and the form of the interaction is not altogether controlled by the person. In both cases, there is at least an element of producing pleasure or satisfaction (note the prominent role of teaching evaluations in the employment and promotion of professors), although in philosophy there is also a countervailing tradition of thinking that the goal of the interaction is to produce dissatisfaction and unease. (Socrates would not have received tenure in a modern university.) It may appear at first that the intimate bodily space of the professor is not invaded—but we should ask about this. When someone's unanticipated argument goes into one's mind, is this not both intimate and bodily? (And far less consensual, often, than the penetration of prostitute by customer?) Both performances involve skill. It might plausibly be argued that the professor's involves a more developed skill, or at least a more expensive training—but we should be cautious here. Our culture is all too ready to think that sex involves no skill and is simply “natural,” a view that is surely false and is not even seriously entertained by many cultures.<sup>25</sup>

The salary of the professor, and her working conditions, are usually a great deal better than those of (all but the most elite) prostitutes. The professor has a fair amount of control over the structure of her day and her work-

<sup>25</sup> Thus the *Kama Sutra*, with its detailed instructions for elaborately skilled performances, strikes most Western readers as slightly comic since the prevailing romantic ideal of “natural” sex makes such contrivance seem quite unsexy.

ing environment, although she also has fixed mandatory duties, as the prostitute, when self-employed, does not. If the professor is in a nation that protects academic freedom, she has considerable control over what she thinks and writes, although fads, trends, and peer pressure surely constrain her to some extent. The prostitute's need to please her customer is usually more exigent and permits less choice. In this way, she is more like the professor of philosophy in Cuba than like the U.S. counterpart<sup>26</sup>—but the Cuban professor appears to be worse off, since she cannot say what she really thinks even when off the job. Finally, the professor of philosophy, if a female, both enjoys reasonably high respect in the community and also might be thought to bring credit to all women in that she succeeds at an activity commonly thought to be the preserve only of males. She thus subverts traditional gender hierarchy, whereas the prostitute, while suffering stigma herself, may be thought to perpetuate gender hierarchy.

5. *The Prostitute and the Masseuse.* These two bodily actors seem very closely related. Both use a skill to produce bodily satisfaction in the client. Unlike the nightclub singer, both do this through a type of bodily contact with the client. Both need to be responsive to what the client wants and to a large degree take direction from the client as to how to handle his or her body. The bodily contact involved is rather intimate, although the internal space of the masseuse is not invaded. The type of bodily pleasure produced by the masseuse may certainly have an erotic element, although in the type of "respectable" masseuse I'm considering, it is not directly sexual.

The difference is primarily one of respectability. Practitioners of massage have fought for, and have to a large extent won, the right to be considered as dignified professionals who exercise a skill. Their trade is legal; it is not stigmatized; and people generally do not believe that they degrade their bodies or turn their bodies into commodities by using their bodies to give pleasure to customers. They have positioned themselves alongside physical therapists and medical practitioners, dissociating themselves from the erotic dimension of their activity. As a consequence of this successful self-positioning, they enjoy better working hours, better pay, and more respect than most prostitutes. What is the difference, we might ask? One is having sex, and the other is not. But what sort of difference is this? Is it a difference we want to defend? Are our reasons for thinking it so crucial really reasons, or vestiges of moral prejudice? A number of distinct beliefs enter in at this point: the belief that women should not have sex with strangers, the belief that commercial sex is inherently degrading and makes a woman a degraded woman, the belief that women should not have to have sex with strangers

<sup>26</sup> We might also consider the example of a skilled writer who writes advertising copy.

if they do not want to, and in general, the belief that women should have the option to refuse sex with anyone they do not really choose. Some of these beliefs are worth defending, and some are not. (I shall argue that the issue of choice is the really important one.) We need to sort them out and to make sure that our policies are not motivated by views we are not really willing to defend.

6. *The Prostitute and the Colonoscopy Artist.* I have included this hypothetical occupation for a reason that should now be evident: it involves the consensual invasion of one's bodily space. (The example is not so hypothetical, either: medical students need models when they are learning to perform internal exams, and young actors do earn a living playing such roles.)<sup>27</sup> The colonoscopy artist uses her skill at tolerating the fiber-optic probe without anaesthesia to make a living. In the process, she permits an aperture of her body to be penetrated by another person's activity—and, we might add, far more deeply penetrated than is generally the case in sex. She runs some bodily risk, since she is being used to test untested instruments, and she will probably have to fast and empty her colon regularly enough to incur some malnutrition and some damage to her excretory function. Her wages may not be very good—for this is probably not a profession characterized by what Smith called “the beauty and rarity of talents,” and it may also involve some stigma, given that people are inclined to be disgusted by the thought of intestines.

And yet, on the whole, we do not think that this is a base trade or one that makes the woman who does it a fallen woman. We might want to ban or regulate it if we thought it was too dangerous, but we would not be moved to ban it for moral reasons. Why not? Some people would point to the fact that it does not either reflect or perpetuate gender hierarchy; and this is certainly true. (Even if her being a woman is crucial to her selection for the job—they need to study, for example, both male and female colons—it won't be for reasons that seem connected with the subordination of women.) But surely a far greater part of the difference is made by the fact that most people do not think anal penetration by a doctor in the context of a medical procedure is immoral,<sup>28</sup> whereas lots of people do think that vaginal or anal penetration in the context of sexual relations is (except

<sup>27</sup> See Terri Kapsalis, *Public Privates: Performing Gynecology from Both Ends of the Speculum* (1997); Terri Kapsalis, *In Print: Backstage at the Pelvic Theater*, *Chi. Reader*, April 18, 1997, at 46. While a graduate student in performance studies at Northwestern, Kapsalis made a living as a “gynecology teaching associate,” serving as the model patient for medical students learning to perform pelvic and breast examinations.

<sup>28</sup> The same goes for vaginal penetration, according to Kapsalis: she says that the clinical nature of the procedure more than compensates for “society's queasiness with female sexuality” (Kapsalis, *In Print*, *supra* note 27, at 46).

under very special circumstances) immoral and that a woman who goes in for that is therefore an immoral and base woman.

#### IV

Prostitution, we now see, has many features that link it with other forms of bodily service. It differs from these other activities in many subtle ways: but the biggest difference consists in the fact that it is, today, more widely stigmatized. Professors no longer get told that selling their teaching is a *turpis quaestus*. Opera singers no longer get told that they are unacceptable in polite society. Even the masseuse has won respect as a skilled professional. What is different about prostitution? Two factors stand out as sources of stigma. One is that prostitution is widely held to be immoral; the other is that prostitution (frequently at least) is bound up with gender hierarchy, with ideas that women and their sexuality are in need of male domination and control, and the related idea that women should be available to men to provide an outlet for their sexual desires. The immorality view would be hard to defend today as a justification for the legal regulation of prostitution, and perhaps even for its moral denunciation. People thought prostitution was immoral because they thought nonreproductive and especially extramarital sex was immoral; the prostitute was seen, typically, as a dangerous figure whose whole career was given over to lust. But female lust was (and still often is) commonly seen as bad and dangerous, so prostitution was seen as bad and dangerous. Some people would still defend these views today, but it seems inconsistent to do so if one is not prepared to repudiate other forms of nonmarital sexual activity on an equal basis. We have to grant, I think, that the most common reason for the stigma attached to prostitution is a weak reason, at least as a public reason: a moralistic view about female sexuality that is rarely consistently applied (to premarital sex, for example) and that seems unable to justify restriction on the activities of citizens who have different views of what is good and proper. At any rate, it seems hard to use the stigma so incurred to justify perpetuating stigma through criminalization, unless one is prepared to accept a wide range of morals laws that interfere with chosen consensual activities, something that most feminist attackers of prostitution rarely wish to do.

More promising as a source of good moral arguments might be the stigma incurred by the connection of prostitution with gender hierarchy. But what is the connection, and how exactly does gender hierarchy explain pervasive stigma? It is only a small minority of people for whom prostitution is viewed in a negative light because of its collaboration with male supremacy; for only a small minority of people at any time have been reflective feminists, concerned with the eradication of inequality. Such people will



view the prostitute as they view veiled women or women in purdah: with sympathetic anger, as victims of an unjust system. This reflective feminist critique, then, does not explain why prostitutes are actually stigmatized, held in disdain—both because it is not pervasive enough and because it leads to sympathy rather than to disdain.

The way that gender hierarchy actually explains stigma is a very different way, a way that turns out in the end to be just another form of the immorality charge. People committed to gender hierarchy, and determined to ensure that the dangerous sexuality of women is controlled by men, frequently have viewed the prostitute, a sexually active woman, as a threat to male control of women. They therefore become determined either to repress the occupation itself by criminalization or, if they also think that male sexuality needs such an outlet and that this outlet ultimately defends marriage by giving male desire a safely debased outlet, to keep it within bounds by close regulation. (Criminalization and regulation are not straightforwardly opposed; they can be closely related strategies. In a similar manner, prostitution is generally conceived as not the enemy but the ally of marriage: the two are complementary ways of controlling women's sexuality.) The result is that social meaning is deployed in order that female sexuality will be kept in bounds carefully set by men. The stigma attached to the prostitute is an integral part of such bounding.

A valuable illustration of this thesis is given by Alain Corbin's fascinating and careful study of prostitutes in France in the late nineteenth century.<sup>29</sup> Corbin shows that the interest in legal regulation of prostitution was justified by the alleged public interest in reining in and making submissive a dangerous female sexuality that was always potentially dangerous to marriage and social order. Kept in carefully supervised houses known as *maisons de tolérance*, prostitutes were known by the revealing name of *filles soumises*, a phrase that most obviously designated them as registered, "subjugated" to the law, but that also connoted their controlled and confined status. What this meant was that they were controlled and confined so that they themselves could provide a safe outlet for desires that threatened to disrupt the social order. The underlying aim of the regulationist project, argues Corbin (with ample documentation), was "the total repression of sexuality."<sup>30</sup> Regulationists tirelessly cited to Saint Augustine's dictum: "Abol-

<sup>29</sup> Alain Corbin, *Women for Hire: Prostitution and Sexuality in France after 1850* (Alan Sheridan trans. 1990).

<sup>30</sup> *Id.* at 29. Representative views of the authors of regulationism include the view that "debauchery is a fever of the senses carried to the point of delirium; it leads to prostitution (or to early death...)" and that "there are two natural sisters in the world: prostitution and riot" (*id.* at 373).

ish the prostitutes and the passions will overthrow the world; give them the rank of honest women and infamy and dishonor will blacken the universe."<sup>31</sup> In other words, stigma has to be attached to prostitutes because of the necessary hierarchy that requires morality to subjugate vice, and the male the female, seen as an occasion and cause of vice. Bounding the prostitute off from the "good woman," the wife whose sexuality is monogamous and aimed at reproduction, creates a system that maintains male control over female desire.<sup>32</sup>

This attitude to prostitution has modern parallels. One instructive example is from Thailand in the 1950s, when Field Marshal Sarit Thanarat began a campaign of social purification, holding that "uncleanliness and social impropriety . . . led to the erosion of social orderliness."<sup>33</sup> In theory, Thanarat's aim was to criminalize prostitution by the imposition of prison terms and stiff fines; in practice the result was a system of medical examination and "moral rehabilitation" that shifted the focus of public blame from the procurers and traffickers to prostitutes themselves. Unlike the French system, the Thai system did not encourage registered prostitution; but it was similar in its public message that the problem of prostitution is a problem of "bad" women and in its reinforcement of the message that female sexuality is a cause of social disruption unless tightly controlled.

In short, sex hierarchy causes stigma, commonly, not through feminist critique but through a far more questionable set of social meanings, meanings that anyone concerned with justice for women should call into question. For it is these same meanings that are also used to justify the seclusion of women, the veiling of women, and the genital mutilation of women. The view boils down to the view that women are essentially immoral and dangerous and will be kept in control by men only if men carefully engineer things so that they do not get out of bounds. The prostitute, being seen as the uncontrolled and sexually free woman, is in this picture seen as particularly dangerous, both necessary to society and in need of constant subjugation. As an honest woman, a woman of dignity, she will wreck society. As a *fille soumise*, her reputation in the dirt, she may be tolerated for the service she provides (or in the Thai case, she may provide an engrossing public spectacle of "moral rehabilitation").

All this diverts attention from some very serious crimes, such as the use

<sup>31</sup> Augustine, De ordine 2.4.12

<sup>32</sup> For a more general discussion of the relationship between prostitution and various forms of marriage, see Richard A. Posner, Sex and Reason 130–33 (1992).

<sup>33</sup> Sukanya Hantrakul, Thai Women: Male Chauvinism à la Thai, Nation, November 16, 1992, cited with further discussion in A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand (Asia Watch Women's Rights Project 1993).

of kidnapping, coercion, and fraud to entice women into prostitution. For these reasons, international human rights organizations, such as Human Rights Watch and Amnesty International, have avoided taking a stand against prostitution as such and have focused their energies on the issue of trafficking and financial coercion.<sup>34</sup>

It appears, then, that the stigma associated with prostitution has an origin that feminists have good reason to connect with unjust background conditions and to decry as both unequal and irrational, based on a hysterical fear of women's unfettered sexuality. There may be other good arguments against the legality of prostitution, but the existence of widespread stigma all by itself does not appear to be among them. So long as prostitution is stigmatized, people are injured by that stigmatization, and it is a real injury to a person not to have dignity and self-respect in her own society. But that real injury (as with the comparable real injury to the dignity and self-respect of interracial couples or of lesbians and gay men) is not best handled by continued legal strictures against the prostitute and can be better dealt with in other ways: for example, by fighting discrimination against these people and taking measures to promote their dignity. As the Supreme Court said in a mixed-race custody case, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>35</sup>

## V

Pervasive stigma itself, then, does not appear to provide a good reason for the continued criminalization of prostitution, any more than it does for the illegality of interracial marriage. Nor does the stigma in question even appear to ground a sound *moral* argument against prostitution. This is not, however, the end of the issue: for there are a number of other significant arguments that have been made to support criminalization. With our six related cases in mind, let us now turn to those arguments.

1. *Prostitution Involves Health Risks and Risks of Violence.* To this we can make two replies. First, insofar as this is true, as it clearly is, the problem is made much worse by the illegality of prostitution, which prevents adequate supervision, encourages the control of pimps, and discourages health checking. As Corbin shows, regimes of legal but regulated prostitu-

<sup>34</sup> See *A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights 196–273*, esp. 270–73 (1995). The pertinent international human rights instruments take the same approach, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others.

<sup>35</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

tion have not always done well by women: the health checkups of the *filles soumises* were ludicrously brief and inadequate.<sup>36</sup> But there is no reason why one cannot focus on the goal of adequate health checks, and some European nations have done reasonably well in this area.<sup>37</sup> The legal brothels in Nevada have had no reported cases of AIDS.<sup>38</sup> Certainly risks of violence can be far better controlled when the police is the prostitute's ally rather than her oppressor.

To the extent to which risks remain an inevitable part of the way of life, we must now ask what general view of the legality of risky undertakings we wish to defend. Do we ever want to rule out risky bargains simply because they harm the agent? Or do we require a showing of harm to others (as might be possible in the case of gambling, for example)? Whatever position we take on this complicated question, we will almost certainly be led to conclude that prostitution lies well within the domain of the legally acceptable: for it is probably less risky than boxing, another activity in which working-class people try to survive and flourish by subjecting their bodies to some risk of harm. There is a stronger case for paternalistic regulation of boxing than of prostitution, and externalities (the glorification of violence as example to the young) make boxing at least as morally problematic, probably more so. And yet I would not defend the criminalization of boxing, and I doubt that very many Americans would either. Sensible regulation of both prostitution and boxing, by contrast, seems reasonable and compatible with personal liberty.

In the international arena, many problems of this type stem from the use of force and fraud to induce women to enter prostitution, frequently at a very young age and in a strange country where they have no civil rights. An especially common destination, for example, is Thailand, and an especially common source is Burma, where the devastation of the rural economy has left many young women an easy mark for promises of domestic service elsewhere. Driven by customers' fears of HIV, the trade has focused on increasingly young girls from increasingly remote regions. Human rights interviewers have concluded that large numbers of these women were unaware of what they would be doing when they left their country and are kept there through both economic and physical coercion. (In many cases,

<sup>36</sup> In Paris, Dr. Clerc boasted that he could examine a woman every 30 seconds and estimated that a single practitioner saw 400 women in a single 24-hour period. Another practitioner estimated that the average number of patients per hour was 52. See Corbin, *supra* note 29, at 90.

<sup>37</sup> For a more pessimistic view of health checks, see Posner, *supra* note 32, at 209, pointing out that they frequently have had the effect of driving prostitutes into the illegal market.

<sup>38</sup> See Richard A. Posner, *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective* 149 (1993), with references.

family members have received payments, which then become a “debt” that the girl has to pay off.)<sup>39</sup> These circumstances, terrible in themselves, set the stage for other forms of risk and violence. Fifty percent to seventy percent of the women and girls interviewed by Human Rights Watch were HIV positive; discriminatory arrests and deportations are frequently accompanied by abuse in police custody. All these problems are magnified by the punitive attitude of the police and government toward these women as prostitutes or illegal aliens or both, although under both national and international law trafficking victims are exempt from legal penalty and are guaranteed safe repatriation to their country of origin. This situation clearly deserves both moral condemnation and international legal pressure; but, it is made worse by the illegality of prostitution itself.

2. *The Prostitute Has No Autonomy; Her Activities Are Controlled by Others.* This argument<sup>40</sup> does not serve to distinguish prostitution from very many types of bodily service performed by working-class women. The factory worker does worse on the scale of autonomy, and the domestic servant no better. I think this point expresses a legitimate moral concern: a person’s life seems deficient in flourishing if it consists only of a form of work that is totally out of the control and direction of the person herself. Karl Marx rightly associated that kind of labor with a deficient realization of full humanity and (invoking Aristotle) persuasively argued that a flourishing human life probably requires some kind of use of one’s own reasoning in the planning and execution of one’s own work.<sup>41</sup> But that is a pervasive problem of labor in the modern world, not a problem peculiar to prostitution as such. It certainly does not help the problem to criminalize prostitution—any more than it would be to criminalize factory work or domestic service. A woman will not exactly achieve more control and “truly human functioning” by becoming unemployed. What we should instead think about are ways to promote more control over choice of activities, more variety, and more general humanity in the types of work that are actually available to people with little education and few options. That would be a lot more helpful than removing one of the options they actually have.

3. *Prostitution Involves the Invasion of One’s Intimate Bodily*

<sup>39</sup> See A Modern Form of Slavery: The Human Rights Watch Global Report on Women’s Human Rights, *supra* note 34, at 1–7.

<sup>40</sup> See E. Anderson, Value in Ethics and Economics, *supra* note 7, at 156: “Her actions under contract express not her own valuations but the will of her customer.”

<sup>41</sup> This is crucial in the thinking behind the “capabilities approach” to which I have contributed in *Women, Culture, and Development* (M. Nussbaum & J. Glover eds. 1995) and other publications. For the connection between this approach and Marx’s use of Aristotle, see my *Aristotle on Human Nature and the Foundations of Ethics*, in *World, Mind, and Ethics: Essays on the Philosophy of Bernard Williams* (J. E. J. Altham & R. Harrison eds. 1993).

*Space.* This argument<sup>42</sup> does not seem to support the legal regulation of prostitution so long as the invasion in question is consensual—that is, that the prostitute is not kidnapped, fraudulently enticed, a child beneath the age of consent, or under duress against leaving if she should choose to leave. In this sense, prostitution is quite unlike sexual harassment and rape and far more like the activity of the colonoscopy artist—not to everyone’s taste, and involving a surrender of bodily privacy that some will find repellant, but not for that reason necessarily bad, either for self or others. The argument does not even appear to support a moral criticism of prostitution, unless one is prepared to make a moral criticism of all sexual contact that does not involve love or marriage.

4. *Prostitution Makes It Harder for People to Form Relationships of Intimacy and Commitment.* This argument is prominently made by Elizabeth Anderson in defense of the criminalization of prostitution.<sup>43</sup> The first question we should ask is, Is this true? People still appear to fall in love in the Netherlands and Germany and Sweden; they also fell in love in ancient Athens, where prostitution was not only legal but also, probably, publicly subsidized.<sup>44</sup> One type of relationship does not, in fact, appear to remove the need for the other—any more than a Jackie Collins novel removes the desire to read Proust. Proust has a specific type of value that is by no means found in Jackie Collins, so people who want that value will continue to seek out Proust, and there is no reason to think that the presence of Jackie Collins on the bookstand will confuse Proust lovers into thinking that Proust is really like Jackie Collins. So too, one supposes, with love in the Netherlands: people who want relationships of intimacy and commitment continue to seek them out for the special value they provide, and they do not have much trouble telling the difference between one sort of relationship and another, despite the availability of both.

Second, one should ask which women Anderson has in mind. Is she saying that the criminalization of prostitution would facilitate the formation of love relationships on the part of the women who were (or would have been) prostitutes? Or is she saying that the unavailability of prostitution as an op-

<sup>42</sup> Made frequently by my students, not necessarily to support criminalization.

<sup>43</sup> See Anderson, *Value in Ethics and Economics*, *supra* note 7, at 150–58; Anderson pulls back from an outright call for criminalization, concluding that her arguments “establish the legitimacy of a state interest in prohibiting prostitution, but not a conclusive case for prohibition,” given the paucity of opportunities for working women.

<sup>44</sup> See K. J. Dover, *Greek Homosexuality* (2d ed. 1978); and David Halperin, *The Democratic Body*, in *One Hundred Years of Homosexuality and Other Essays* (1990). Customers were all males, but prostitutes were both male and female. The evidence that prostitution was publicly funded is uncertain, since it derives from comic drama; but it is certain that both male and female prostitution enjoyed broad public support and approval.

tion for working-class women would make it easier for romantic middle-class women to have the relationships they desire? The former claim is implausible, since it is hard to see how reinforcing the stigma against prostitutes or preventing some poor women from taking one of the few employment options they might have would be likely to improve their human relations.<sup>45</sup> The latter claim might possibly be true (though it is hardly obvious), but it seems a repugnant idea, which I am sure Anderson would not endorse, that we should make poor women poorer so that middle-class women can find love. Third, one should ask Anderson whether she is prepared to endorse the large number of arguments of this form that might plausibly be made in the realm of popular culture and, if not, whether she has any way of showing how she could reject those as involving an unacceptable infringement of liberty and yet allowing the argument about prostitution that she endorses. For it seems plausible that making rock music illegal would increase the likelihood that people would listen to Mozart and Beethoven, that making Jackie Collins illegal would make it more likely that people would turn to Joyce Carol Oates, that making commercial advertising illegal would make it more likely that we would appraise products with high-minded ideas of value in our minds, and that making television illegal would improve children's reading skills. What is certain, however, is that we would and do utterly reject those ideas (we do not even seriously entertain them) because we do not want to live in Plato's *Republic*, with our cultural options dictated by a group of wise guardians, however genuinely sound their judgments may be.<sup>46</sup>

5. *The Prostitute Alienates Her Sexuality on the Market; She Turns Her Sexual Organs and Acts into Commodities.*<sup>47</sup> Is this true? It seems implausible to claim that the prostitute alienates her sexuality just on the grounds that she provides sexual services to a client for a fee. Does the singer alienate her voice, or the professor her mind? The prostitute still has her sexual-

<sup>45</sup> For a similar point, see Radin, Market-Inalienability, *supra* note 7, at 1921–25; and Radin, Contested Commodities, *supra* note 7, at 132–36; Anderson refers to this claim of Radin's, apparently as the source of her reluctance to call outright for criminalization.

<sup>46</sup> I would not go quite as far as John Rawls, however, in the direction of letting the market determine our cultural options. He opposes any state subsidy to opera companies, symphony orchestras, museums, and so forth, on the grounds that this would back a particular conception of the good against others. I think, however, that we could defend such subsidies, within limits, as valuable because they preserve a cultural option that is among the valuable ones and that might otherwise cease to exist. Obviously, much more argument is needed on this entire question.

<sup>47</sup> See Radin, Contested Commodities, *supra* note 7; and Anderson, *supra* note 7, at 156: "The prostitute, in selling her sexuality to a man, alienates a good necessarily embodied in her person to him and thereby subjects herself to his commands."



ity; she can use it on her own, apart from the relationship with the client, just as the domestic servant may cook for her family and clean her own house.<sup>48</sup> She can also cease to be a prostitute, and her sexuality will still be with her, and hers, if she does. So she has not even given anyone a monopoly on those services, far less given them over into someone else's hands. The real issue that separates her from the professor and the singer seems to be the degree of choice she exercises over the acts she performs. But is even this a special issue for the prostitute, any more than it is for the factory worker or the domestic servant or the colonoscopy artist—all of whom choose to enter trades in which they will not have a great deal of say over what they do or (within limits) how they do it? Freedom to choose how one works is a luxury, highly desirable indeed, but a feature of few jobs that nonaffluent people perform.

As for the claim that the prostitute turns her sexuality into a commodity, we must ask what that means. If it means only that she accepts a fee for sexual services, then that is obvious; but nothing further has been said that would show us why this is a bad thing. The professor, the singer, the symphony musician—all accept a fee, and it seems plausible that this is a good state of affairs, creating spheres of freedom. Professors are more free to pursue their own thoughts now, as moneymakers, than they were in the days when they were supported by monastic orders; symphony musicians playing under the contract secured by the musicians union have more free time than nonunionized musicians and more opportunities to engage in experimental and solo work that will enhance their art. In neither case should we conclude that the existence of a contract has converted the abilities into things to be exchanged and traded separately from the body of the producer; they remain human creative abilities, securely housed in their possessor. So if, on the one hand, to “commodify” means merely to accept a fee, we have been given no reason to think that this is bad.

If, on the other hand, we try to interpret the claim of “commodification” using the narrow technical definition of “commodity” used by the Uniform Commercial Code,<sup>49</sup> the claim is plainly false. For that definition stresses the “fungible” nature of the goods in question, and “fungible” goods are, in turn, defined as goods “of which any unit is, by nature or usage of trade, the equivalent of any other like unit.” While we may not think that the soul or inner world of a prostitute is of deep concern to the customer, she is

<sup>48</sup> On this point, see also Schwarzenbach, *supra* note 9, with discussion of Marx's account of alienation.

<sup>49</sup> See Richard Epstein, Surrogacy: The Case for Full Contractual Enforcement, 81 Va. L. Rev. 2305–41, 2327 (1995).

usually not regarded as simply a set of units fully interchangeable with other units.<sup>50</sup> Prostitutes are probably somewhat more fungible than bassoon players, but not totally so. (Corbin reports that all *maisons de tolérance* standardly had a repertory of different types of women, to suit different tastes, and this should not surprise us.) What seems to be the real issue is that the woman is not attended to as an individual, not considered as a special unique being. But that is true of many ways people treat one another in many areas of life, and it seems implausible that we should use that kind of disregard as a basis for criminalization. It may not even be immoral: for surely we cannot deeply know all the people with whom we have dealings in life, and many of those dealings are just fine without deep knowledge. So our moral question boils down to the question, Is sex without deep personal knowledge always immoral? It seems to me officious and presuming to use one's own experience to give an affirmative answer to this question, given that people have such varied experiences of sexuality.

In general, then, there appears to be nothing baneful or value-debasing about taking money for a service, even when that service expresses something intimate about the self. Professors take a salary, artists work on commission under contract—frequently producing works of high intellectual and spiritual value. To take money for a production does not turn either the activity or the product (for example, the article, the painting) into a commodity in the baneful sense in which that implies fungibility. If this is so, there is no reason to think that a prostitute's acceptance of money for her services necessarily involves a baneful conversion of an intimate act into a commodity in that sense. If the prostitute's acts are, as they are, less intimate than many other sexual acts people perform, that does not seem to have a great deal to do with the fact that she receives money, given that people engage in many intimate activities (painting, singing, writing) for money all the time without loss of expressive value. Her activity is less intimate because that is its whole point; and it is problematic, to the extent that it is, neither because of the money involved nor because of the nonintimacy (which, as I have said, it seems to me officious to declare bad in all cases) but because of features of her working conditions and the way she is treated by others.

Here we are left with an interesting puzzle: for my argument about professors and painters certainly seems to imply that there is no reason, in principle, why the most committed and intimate sex cannot involve a contract and a financial exchange. So why does it not, in our culture? One reply is

<sup>50</sup> Moreover, the Uniform Commercial Code does not cover the sale of services, and prostitution should be classified as a service rather than a good.

that it quite frequently does when people form committed relationships that include an element of economic dependence, whether one-sided or mutual; marriage has very frequently had that feature, not always for the worse. But to the extent that we do not exchange money for sex, why do we not? In a number of other cultures, courtesans, both male and female, have been somewhat more common as primary sexual partners than they are here. Unlike quite a few cultures, we do not tend to view sex in intimate personal relationships the way we view an artist's creation of a painting, namely as an intimate act that can nonetheless be deliberately undertaken as the result of an antecedent contract-like agreement. Why not? I think there is a mystery here, but we can begin to grapple with it by mentioning two features. First, there is the fact that sex, however prolonged, still takes up much less time than writing an article or producing a painting. Furthermore, it also cannot be done too often; its natural structure is that it will not very often fill up the entire day. One may therefore conduct an intimate sexual relationship in the way one would wish, not feeling that one is slighting it, while pursuing another line of work as one's way of making a living. Artists and scholars sometimes have to pursue another line of work, but they prefer not to. They characteristically feel that to do their work in the way they would wish, they ought to spend the whole day doing it. So they naturally gravitate to the view that their characteristic mode of creative production fits very well with contract and a regular wage.

This, however, still fails to explain cultural differences. To begin to grapple with these, we need to mention the influence of our heritage of romanticism, which makes us feel that sex is not authentic if not spontaneous, "natural," and to some degree unplanned. Romanticism has exercised a far greater sway over our ideas of sex than over our ideas of artistic or intellectual production, making us think that any deal or antecedent arrangement somehow diminishes that characteristic form of expression.

Are our romantic ideas about the difference between sex and art good, or are they bad? Some of each, I suspect. They are problematic to the extent that they make people think that sex happens naturally, does not require complicated adjustment and skill, and flares up (and down) uncontrollably.<sup>51</sup> Insofar as they make us think that sex fits badly with reliability, promise-keeping, and so forth, these ideas are certainly subversive of Anderson's goals of "intimacy and commitment," which would be better served, probably, by an attitude that moves sex in intimate personal relationships (and especially marriages) closer to the activity of the artist or the professor. On

<sup>51</sup> It is well known that these ideas are heavily implicated in the difficulty of getting young people, especially young women, to use contraception.

the other hand, romantic views also promote Anderson's goals to some degree, insofar as they lead people to connect sex with self-revelation and self-expression rather than prudent concealment of self. Many current dilemmas concerning marriage in our culture stem from an uneasy struggle to preserve the good in romanticism while avoiding the dangers it poses to commitment. As we know, the struggle is not always successful. There is much more to be said about this fascinating topic. But since (as I have argued) it leads us quite far from the topic of prostitution, we must now return to our primary line of argument.

6. *The Prostitute's Activity Is Shaped by, and in Turn Perpetuates, Male Dominance of Women.*<sup>52</sup> The institution of prostitution as it has most often existed is certainly shaped by aspects of male domination of women. As I have argued, it is shaped by the perception that female sexuality is dangerous and needs careful regulation, that male sexuality is rapacious and needs a "safe" outlet, that sex is dirty and degrading, and that only a degraded woman is an appropriate sexual object.<sup>53</sup> Nor have prostitutes standardly been treated with respect or been given the dignity one might think proper to a fellow human being. They share this with working-class people of many types in many ages; but, there is no doubt that there are particular features of the disrespect that derive from male supremacy and the desire to lord it over women—as well as from a tendency to link sex to (female) defilement that is common in the history of Western European culture. The physical abuse of prostitutes, and the control of their earnings by pimps—as well as the pervasive use of force and fraud in international markets—are features of male dominance that are extremely harmful and that do not have direct parallels in other types of low-paid work. Some of these forms of conduct may be largely an outgrowth of the illegality of the industry and closely comparable to the threatening behavior of drug wholesalers to their—usually male—retailers. So there remains a question about how far male dominance as such explains the violence involved. But in the international arena, where regulations against these forms of misconduct are usually treated as a joke, illegality is not a sufficient explanation for them.

Prostitution is hardly alone in being shaped by, and in reinforcing, male dominance. Systems of patrilineal property and exogamous marriage, for example, certainly do more to perpetuate not only male dominance but also female mistreatment and even death. There probably is a strong case for making the giving of dowry illegal, as has been done since 1961 in India

<sup>52</sup> See Shrage, *supra* note 9; Andrea Dworkin, Prostitution and Male Supremacy, in *Life and Death* (1997).

<sup>53</sup> An eloquent examination of the last view, with reference to Freud's account (which endorses it) is in William Miller, *The Anatomy of Disgust*, ch. 6 (1997).

and since 1980 in Bangladesh<sup>54</sup> (though with little success): for it can be convincingly shown that the institution of dowry is directly linked with extortion and threats of bodily harm and ultimately with the deaths of large numbers of women.<sup>55</sup> It is also obvious that the dowry system pervasively conditions the perception of the worth of girl children: they are a big expense, and they will not be around to protect one in one's old age. This structure is directly linked with female malnutrition, neglect, noneducation, even infanticide, harms that have caused the deaths of many millions of women in the world.<sup>56</sup> It is perfectly understandable that the governments of India, Bangladesh, and Pakistan are very concerned about the dowry system, since it seems very difficult to improve the very bad economic and physical condition of women without some structural changes. (Pakistan has recently adopted a somewhat quixotic remedy, making it illegal to serve food at weddings—thus driving many caterers into poverty.) Dowry is an institution affecting millions of women, determining the course of almost all girl children's lives pervasively and from the start. Prostitution as such usually does not have either such dire or such widespread implications. (Indeed, it is frequently the produce of the dowry system, when parents take payment for prostituting a female child for whom they would otherwise have to pay dowry.) The case for making it illegal on grounds of subordination seems weaker than the case for making dowry, or even wedding feasts, illegal; and yet these laws are themselves of dubious merit and would probably be rightly regarded as involving undue infringement of liberty under our constitutional tradition. (It is significant that Human Rights Watch, which has so aggressively pursued the issue of forced prostitution, takes no stand one way or the other on the legality of prostitution itself.)

More generally, one might argue that the institution of marriage as has most frequently been practiced both expresses and reinforces male dominance. It would be right to use law to change the most iniquitous features of that institution—protecting women from domestic violence and marital rape, giving women equal property and custody rights, and improving their

<sup>54</sup> The Dowry Prohibition Act of 1961 makes both taking and giving of dowry illegal; in Bangladesh, demanding, taking, and giving dowry are all criminal offenses: see Nussbaum, *supra* note 18.

<sup>55</sup> It is extremely difficult to estimate how many women are damaged and killed as a result of this practice. It is certainly clear that criminal offenses are vastly underreported, as is domestic violence in India generally, but that very problem makes it difficult to form any reliable idea of the numbers involved. See Indira Jaising, *Justice for Women* (1996); and Nussbaum, *supra* note 18.

<sup>56</sup> See Amartya Sen & Jean Drèze, *Hunger and Public Action* 52 & ch. 1 (1989). Kerala, the only Indian state to have a matrilineal property tradition, also has an equal number of men and women (contrasted with a 94:100 sex ratio elsewhere), and 97 percent both male and female literacy, as contrasted with 32 percent female literacy elsewhere.

exit options by intelligent shaping of the divorce law. But to rule that marriage as such should be illegal on the grounds that it reinforces male dominance would be an excessive intrusion on liberty, even if one should believe marriage irredeemably unequal. So too, I think, with prostitution: what seems right is to use law to protect the bodily safety of prostitutes from assault, to protect their rights to their incomes against the extortionate behavior of pimps, to protect poor women in developing countries from forced trafficking and fraudulent offers, and to guarantee their full civil rights in the countries where they end up—to make them, in general, equals under the law, both civil and criminal. But the criminalization of prostitution seems to pose a major obstacle to that equality.

Efforts on behalf of the dignity and self-respect of prostitutes have tended to push in exactly the opposite direction. In the United States, prostitutes have long been organized to demand greater respect, though their efforts are hampered by prostitution's continued illegality. In India, the National Federation of Women has adopted various strategies to give prostitutes more dignity in the public eye. For example, on National Women's Day, they selected a prostitute to put a garland on the head of the Prime Minister. In a similar manner, UNICEF in India's Andhra Pradesh has been fighting to get prostitutes officially classified as "working women" so that they can enjoy the child-care benefits local government extends to that class. As with domestic service, so here: giving workers greater dignity and control can gradually change both the perception and the fact of dominance.

7. *Prostitution Is a Trade That People Do Not Enter by Choice; Therefore the Bargains People Make within It Should Not Be Regarded as Real Bargains.* Here we must distinguish three cases. First is the case where the woman's entry into prostitution is caused by some type of conduct that would otherwise be criminal: kidnapping, assault, drugging, rape, statutory rape, blackmail, a fraudulent offer. Here we may certainly judge that the woman's choice is not a real choice and that the law should take a hand in punishing her coercer. This is a terrible problem currently in developing countries; international human rights organizations are right to make it a major focus.<sup>57</sup>

Closely related is the case of child prostitution. Child prostitution is frequently accompanied by kidnapping and forcible detention; even when children are not stolen from home, their parents have frequently sold them

<sup>57</sup> See, for example, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, *supra* note 33; A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights, *supra* note 34, at 1273–296; Human Rights Are Women's Rights 53–56 (1995).

without their own consent. But even where it is not, we should judge that there is an impermissible infringement of autonomy and liberty. A child (and because of clients' fears of HIV, brothels now often focus on girls as young as ten)<sup>58</sup> cannot give consent to a life in prostitution; not only lack of information and of economic options (if parents collude in the deal) but also absence of adult political rights makes such a "choice" no choice at all.

Different is the case of an adult woman who enters prostitution because of bad economic options: because it seems a better alternative than the chicken factory, because there is no other employment available to her, and so forth. This too, we should insist, is a case where autonomy has been infringed, but in a different way. Consider Joseph Raz's vivid example of "the hounded woman," a woman on a desert island who is constantly pursued by a man-eating animal.<sup>59</sup> In one sense, this woman is free to go anywhere on the island and do anything she likes. In another sense, of course, she is quite unfree. If she wants not to be eaten, she has to spend all her time and calculate all her movements in order to avoid the beast. Raz's point is that many poor people's lives are nonautonomous in just this way. They may fulfill internal conditions of autonomy, being capable of making bargains, reflecting about what to do, and so forth. But none of this counts for a great deal if in fact the struggle for survival gives them just one unpleasant option or a small set of (in various ways) unpleasant options.

This seems to me the truly important issue raised by prostitution. Like work in the chicken factory, it is not an option many women choose with alacrity when many other options are on their plate.<sup>60</sup> This might not be so in some hypothetical culture in which prostitutes have legal protection, dignity, and respect and the status of skilled practitioner, rather like the masseuse.<sup>61</sup> But it is true now in most societies, given the reality of the (albeit irrational) stigma attaching to prostitution. But the important thing to realize is that this is not an issue that permits us to focus on prostitution in isolation from the economic situation of women in a society generally. Certainly it will not be ameliorated by the criminalization of prostitution, which reduces poor women's options still further. We may grant that poor women do not have enough options and that society has been unjust to them in not ex-

<sup>58</sup> On Thailand, see A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights, *supra* note 34, at 197.

<sup>59</sup> Joseph Raz, *The Morality of Freedom* 374 (1986).

<sup>60</sup> See Posner, *supra* note 32, at 43, on the low incidence of prostitution in Sweden, even though it is not illegal; his explanation is that "women's opportunities in the job market are probably better there than in any other country."

<sup>61</sup> See Schwarzenbach, *supra* note 9.



tending more options, while nonetheless respecting and honoring the choices they actually make in reduced circumstances.

How could it possibly be ameliorated? Here are some things that have actually been done in India, where prostitution is a common last-ditch option for women who lack other employment opportunities. First, both government and private groups have focused on the provision of education to women, to equip them with skills that will enhance their options. One group I recently visited in Bombay focuses in particular on skills training for the children of prostitutes, who are at especially high risk of becoming prostitutes themselves unless some action increases their options. Second, nongovernmental organizations have increasingly focused on the provision of credit to women in order to enhance their employment options and give them a chance to “upgrade” in the domain of their employment. One such project that has justly won international renown is the Self-Employed Women’s Association (SEWA), centered in Ahmedabad in Gujerat, which provides loans to women pursuing a variety of informal-sector occupations,<sup>62</sup> from tailoring to hawking and vending to cigarette rolling to agricultural labor.<sup>63</sup> With loans they can get wholesale rather than retail supplies, upgrade their animals or equipment, and so forth. They also get skills training and, frequently, the chance to move into leadership roles in the organization itself. Such women are far less likely to need to turn to prostitution to supplement their income. Third, they can form labor organizations to protect women employed in low-income jobs and to bargain for better working conditions—once again making this work a better source of income and diminishing the likelihood that prostitution will need to be selected. (This is the other primary objective of SEWA, which is now organizing hawkers and vendors internationally.) Fourth, they can form groups to diminish the isolation and enhance the self-respect of working women in low-paying jobs; this was a ubiquitous feature of both government and nongovernment programs I visited in India, and a crucial element of helping women deliberate about their options if they wish to avoid prostitution for themselves or their daughters.

These four steps are the real issue, I think, in addressing the problem of prostitution. Feminist philosophers do not talk a lot about credit and employment;<sup>64</sup> they should do so far more. Indeed, it seems a dead end to con-

<sup>62</sup> An extremely high proportion of the labor force in India is in the informal sector.

<sup>63</sup> The Self-Employed Women’s Association was first directed by Ela Bhatt, who is now involved in international work to improve the employment options of informal-sector workers. For a valuable description of the movement, see Kalima Rose, *Where Women Are Leaders: The SEWA Movement in India* (1995).

<sup>64</sup> But see, here, Schwarzenbach, *supra* note 9; and Shrage, *supra* note 9. I have also been very much influenced by Martha Chen, *A Quiet Revolution: Women in Transition in Rural*

sider prostitution in isolation from the other realities of working life of which it is a part, and one suspects that this has happened because prostitution is a sexy issue and getting a loan for a sewing machine appears not to be. But philosophers had better talk more about getting loans, learning to read, and so forth if they want to be relevant to the choices that are actually faced by working women and to the programs that are actually doing a lot to improve such women's options.

## VI

The stigma traditionally attached to prostitution is based on a collage of beliefs, most of which are not rationally defensible and which should be especially vehemently rejected by feminists: beliefs about the evil character of female sexuality, the rapacious character of male sexuality, the essentially marital and reproductive character of "good" women and "good" sex. Worries about subordination more recently raised by feminists are much more serious concerns, but they apply to many types of work poor women do. Concerns about force and fraud should be extremely urgent concerns of the international women's movement. Where these conditions do not obtain, feminists should view prostitutes as (usually) poor working women with few options, not as threats to the intimacy and commitment that many women and men (including, no doubt, many prostitutes) seek. This does not mean that we should not be concerned about ways in which prostitution as currently practiced, even in the absence of force and fraud, undermines the dignity of women, just as domestic service in the past undermined the dignity of members of a given race or class. But the correct response to this problem seems to be to work to enhance the economic autonomy and the personal dignity of members of that class, not to rule off-limits an option that may be the only livelihood for many poor women and to further stigmatize women who already make their living this way.

In grappling further with these issues, we should begin from the realization that there is nothing per se wrong with taking money for the use of one's body. That is the way most of us live, and formal recognition of that fact through contract is usually a good thing for people, protecting their security and their employment conditions. What seems wrong is that relatively few people in the world have the option to use their body, in their work, in what Marx would call a "truly human" manner of functioning, by

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Bangladesh (1983); Martha Chen, *A Matter of Survival: Women's Right to Work in India and Bangladesh*, in Nassbaum & Glover, eds., *supra* note 41; Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (1994); and Bina Agarwal, "Bargaining" and Gender Relations: Within and beyond the Household, 3 *Feminist Econ.* 1-51 (1997).

which he meant (among other things) having some choices about the work to be performed, some reasonable measure of control over its conditions and outcome, and also the chance to use thought and skill rather than just to function as a cog in a machine. Women in many parts of the world are especially likely to be stuck at a low level of mechanical functioning, whether as agricultural laborers, factory workers, or prostitutes. The real question to be faced is how to expand the options and opportunities such workers face, how to increase the humanity inherent in their work, and how to guarantee that workers of all sorts are treated with dignity. In the further pursuit of these questions, we need, on balance, more studies of women's credit unions and fewer studies of prostitution.