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### Markets in Women's Reproductive Labor

In the past several decades American society has begun to experiment with markets in women's reproductive labor, along with markets in women's eggs. Many people believe that markets in women's reproductive labor, as exemplified by contract pregnancy,<sup>1</sup> are more problematic than other currently accepted labor markets. I call this the *asymmetry thesis* because its proponents believe that there ought to be an asymmetry between our treatment of markets in reproductive labor and our treatment of markets in other forms of labor. Advocates of the asymmetry thesis hold that treating reproductive labor as a commodity, as something subject to the supply-and-demand principles that govern economic markets, is worse than treating other types of human labor as commodities. Is the asymmetry thesis true? And, if so, what are the reasons for thinking that it is true? Can my account of noxious markets be useful in analyzing this case?

I believe that the asymmetry thesis both captures strong intuitions that exist in our society and provides a plausible argument against contract pregnancy. My aims in this chapter are to criticize several popular ways of defending the asymmetry thesis and to offer an alternative defense based on the idea of equal status.<sup>2</sup> Many feminists hold that the asymmetry thesis is true because they think it is intuitive that women's reproductive labor is a special kind of labor that should not be treated according to market norms. They draw a sharp dividing line between women's reproductive labor and human labor in general: whereas human labor may be bought and sold, women's reproductive labor is intrinsically not a commodity. According to these views, contract pregnancy allows for the extension of the market into the private sphere of sexuality and reproduction. This intrusion of the economic into the personal is seen as improper: it fails to respect the intrinsic, special nature of reproductive labor. As one writer has put it, "When women's

labor is treated as a commodity, the women who perform it are degraded.”<sup>3</sup>

Contract pregnancy provides a good test case for evaluating views about the limits of markets based on the meaning or intrinsic nature of that labor. I argue that these views are the wrong way to defend the asymmetry thesis. Although I agree with the intuition that markets in women’s reproductive labor are more troubling than other labor markets, I provide an alternative account of why this should be so. My analysis has four parts. In the first part I criticize those arguments that turn on the assumption that reproductive labor is a unique form of labor. I argue that there is no distinction between women’s reproductive labor and human labor that is relevant to the debate about contract pregnancy. Moreover I argue that the sale of women’s reproductive labor is not ipso facto degrading. Rather it becomes problematic only in a particular political and social context.<sup>4</sup> In the second part I criticize arguments in support of the asymmetry thesis that appeal to the nature of parental love. Here support for the asymmetry thesis is taken to derive from a special bond between mothers and children; the bond between a mother and her child is different from the bond between a worker and his product. In response I argue that the bond between mothers and children is more complicated than critics of contract pregnancy have assumed and that, moreover, contract pregnancy does not cause parents (or the other parties to the contract) to view children as commodities. In the third part I examine concerns about contract pregnancy’s potential for extremely harmful consequences for children. Although this argument has merit, I argue that its validity is still far from certain. In this section I also point out some analogies between contract pregnancy and the booming industry in reproductive services, especially in vitro fertilization (IVF), which raise similar concerns.

The first three parts of this chapter argue that the various reasons given in the literature for banning contract pregnancy on the basis of its special nature are inadequate. Nonetheless there does seem to be something more problematic about pregnancy contracts than other types of labor contract. The question is, What is the basis for and the significance of this intuition? And what, apart from its agreement with our intuitions, can be said in favor of the asymmetry thesis?

In the fourth part I argue that the asymmetry thesis is true, but that the reason it is true has not been properly understood. The asymmetry

thesis should be defended on external and not intrinsic or essentialist grounds. Drawing on the theory that I developed earlier in this book, I argue that society's pervasive gender inequality is primary to the explanation of what is wrong with contract pregnancy. Markets in women's reproductive labor are troubling to the extent that they reinforce gender hierarchies—unequal status between men and women—in a way that other, accepted labor markets do not. My defense of the asymmetry thesis thus rests on the way that contract pregnancy reinforces asymmetrical social relations of gender hierarchy and inequality in American society. However, it may be that not all of the features of contract pregnancy that make it troubling concern gender. Contract pregnancy may also heighten racial inequalities and have harmful effects on the other children of the gestational mother.<sup>5</sup> I do not address these points in detail here. However, these considerations would have to be addressed in order to generate a complete argument against contract pregnancy.

### THE SPECIAL NATURE OF REPRODUCTIVE LABOR

A wide range of attacks on contract pregnancy turns out to share a single premise: that the *intrinsic* nature of reproductive labor is different from that of other kinds of labor. Critics claim that reproductive labor is not just another kind of work; they argue that unlike other forms of labor, reproductive labor is not properly regarded as a commodity. I refer to this thesis as the *essentialist thesis*, as it holds that reproductive labor is by its nature something that should not be bought and sold.

In contrast to the essentialist thesis, recall that modern economic theories tend to treat the market as “theoretically all encompassing.”<sup>6</sup> Such theories tend to treat all goods and capacities as exchangeable commodities, at least in principle.<sup>7</sup> If we accept the logic of the economic approach to human behavior, we seem led to endorse a world in which everything is potentially for sale: body parts, reproductive labor, toxic waste, children, and even votes.<sup>8</sup> Many people are repulsed by such a world. But what exactly is the problem with it? Defenders of the essentialist thesis provide the starting point for a counterattack: not all human goods are commodities. In particular, human reproductive labor is

improperly treated as a commodity. When reproductive labor is purchased on the market it is inappropriately valued.

The essentialist thesis provides support for the asymmetry thesis. The nature of reproductive labor is taken to be fundamentally different from that of labor in general. In particular proponents of the essentialist thesis hold that women's reproductive labor should be respected and not used.<sup>9</sup> What is it about women's reproductive labor that singles it out for a type of respect that precludes market use?

Some versions of the essentialist thesis focus on the biological or naturalistic features of women's reproductive labor:

- Women's reproductive labor has both a genetic and a gestational component.<sup>10</sup> Other forms of labor do not involve a genetic relationship between the worker and her product.
- Whereas much human labor is voluntary at virtually every step, many of the phases of the reproductive process are involuntary. Ovulation, conception, gestation, and birth occur without the conscious direction of the mother.
- Reproductive labor extends over a period of approximately nine months; other types of labor do not typically necessitate such a long-term commitment.
- Reproductive labor involves significant restrictions of a woman's behavior during pregnancy; other forms of labor are less invasive with respect to the worker's body.

These characteristics of reproductive labor do not, however, establish the asymmetry thesis.

- With respect to the genetic relationship between the reproductive worker and her product, most critics object to contract pregnancy even where the so-called surrogate is not the genetic mother. In fact many critics consider "gestational surrogacy," in which a woman is implanted with a preembryo formed in vitro from donated gametes, more troubling than those cases in which the surrogate is also the genetic mother.<sup>11</sup> In addition men also have a genetic tie to their offspring, yet many proponents of the asymmetry thesis would not oppose the selling of sperm.
- With respect to the degree to which reproductive labor is involuntary, there are many forms of work in which workers do not have control over the work process; for example, mass-production

workers cannot generally control the speed of the assembly line, and they have no involvement in the overall purpose of their activity.

- With regard to the length of the contract's duration, some forms of labor involve contracts of even longer duration, for example, book contracts and military service agreements. Like pregnancy contracts, these are not contracts in which one can quit at the end of the day. Yet presumably most proponents of the essentialist thesis would not find commercial publishing contracts objectionable.
- With regard to invasions into the woman's body, nonreproductive labor can also involve incursions into the body of the worker. To take an obvious example, athletes sign contracts that give team owners considerable control over the athletes' diet and behavior and allow owners to conduct periodic tests for drug use. Yet there is little controversy over the sale of athletic capacities.<sup>12</sup> Sales of blood also run afoul of a noninvasiveness condition. In fact leaving aside the genetic component of reproductive labor, voluntary military service involves shares all the other features mentioned by critics. Do we really want to object to such military service on *essentialist* grounds?<sup>13</sup>

Carole Pateman suggests a different way of defending the asymmetry thesis as the basis for an argument against contract pregnancy. Rather than focusing on the naturalistic, biological properties of reproductive labor, she argues that a woman's reproductive labor is more "integral" to her identity than her other productive capacities. Pateman first sketches this argument with respect to prostitution:

Womanhood, too, is confirmed in sexual activity, and when a prostitute contracts out use of her body she is thus selling herself in a very real sense. Women's selves are involved in prostitution in a different manner from the involvement of the self in other occupations. Workers of all kinds may be more or less "bound up in their work," but the integral connection between sexuality and sense of the self means that, for self-protection, a prostitute must distance herself from her sexual use.<sup>14</sup>

Pateman's objection to prostitution rests on a claim about the intimate relation between a woman's sexuality and her identity. It is by virtue of this tie, Pateman believes, that sex should not be treated as an alienable commodity. Is her claim true? How do we decide which of a woman's attributes or capacities are essential to her identity and which

are not? In particular, why should we consider sexuality more integral to self than friendship, family, religion, nationality, and work?<sup>15</sup> After all, we allow commodification in each of these spheres. Rabbis and priests may view their religion as central to their identity, but they often accept payment for performing religious services. Does Pateman think that *all* activities that fall within these spheres and bear an intimate relationship to a person's identity should not be sold?

Pateman's argument appears to support the asymmetry thesis by suggesting that a woman's sexuality is *more* intimately related to her identity than are her other capacities. Yet she provides no explicit argument for this suggestion. Indeed at times her argument seems intended not so much to support the asymmetry thesis as to support a more general thesis against buying and selling those capacities that are closely tied to the identity of persons. But this more general argument is implausible. It would not allow individuals to sell their paintings or their book manuscripts.<sup>16</sup> It would prevent people who love their professions from selling their services.

The British government-commissioned *Warnock Report on Human Fertilisation and Embryology* links reproductive labor to a person's dignity, claiming, "It is inconsistent with human dignity that a woman should use her uterus for financial profit."<sup>17</sup> But why is selling the use of a woman's uterus "undignified," while selling the use of images of her body in a television commercial is not?

The *Warnock Report's* argument appeals to the idea that women's sexuality and reproduction are worthy of a kind of respect. Granted, but the idea of respect alone does not entail the conclusion that reproductive labor should not be treated as a commodity. As I argued in chapter 3, we sometimes sell things that we also respect. For example, I think that my teaching talents should be respected, but I don't object to being paid for teaching on such grounds. Giving my teaching a price does not diminish the other ways my teaching has value. Giving my teaching a price does not diminish the sense in which I have value.

I believe that it is a mistake to focus, as does the *Warnock Report*, on maintaining certain cultural values without examining critically the specific social circumstances from which those values emerge. Thus the view that selling sexual or reproductive capacities is "degrading" may reflect society's attempts to control women and their sexuality. At the very least, the relations between particular views of sexuality and the



maintenance of gender inequality must be taken into account. This is especially important insofar as one powerful defense of contract pregnancy rests on its alleged empowering of women.

### THE SPECIAL BONDS OF MOTHERHOOD

Sometimes what critics of pregnancy contracts have in mind is not the effect of such contracts on the relationship between reproductive labor and a woman's sense of self, but their effect on her views (and ours) of the mother-fetus and mother-child bond. On this view, what is wrong with commodifying reproductive labor is that it corrupts motherhood, the relationships between mothers and their offspring. Further, it leads to a view of children as fungible objects.

#### Mothers and Fetuses

Critics of contract pregnancy contend that the relationship between a mother and a fetus is not simply a biochemical relationship or a matter of contingent physical connection. They also point out that the relationship between a mother and a fetus is different from that between a worker and her material product. The long months of pregnancy and the experience of childbirth are part of forming a relationship with the child-to-be. Elizabeth Anderson makes an argument along these lines. She suggests that the commodification of reproductive labor makes pregnancy an alienated form of labor for the women who perform it; selling her reproductive labor alienates a woman from her "normal" and justified emotions.<sup>18</sup> Rather than viewing pregnancy as an evolving relationship with a child-to-be, contract pregnancy reinforces a vision of the pregnant woman as a mere "home" or an "environment."<sup>19</sup> The sale of reproductive labor thus distorts the nature of the bond between the mother and the developing fetus by misrepresenting the nature of a woman's reproductive labor as a commodity. What should we make of this argument?

Surely there is truth in the claim that pregnancy contracts may reinforce a vision of women as baby machines or mere wombs. Various court rulings with respect to contract pregnancy have tended to acknowledge women's contribution to reproduction only insofar as it is identical to

men's: in terms of the donation of genetic material. The gestational labor involved in reproduction is explicitly ignored in such rulings. Thus Mary Beth Whitehead won back her parental rights in the "Baby M" case because the New Jersey Supreme Court acknowledged her genetic contribution; the fact that she was the gestational mother was not decisive.<sup>20</sup>

However, as I will argue below, the concern about the discounting of women's reproductive labor is best posed in terms of a principle of equality. By treating women's reproductive contribution as identical to men's when it is not, women are not in fact being treated equally. But those who conceptualize the problem with pregnancy contracts in terms of the degradation of the mother-fetus relationship rather than in terms of the equality of men and women tend to interpret the social practice of pregnancy in terms of a maternal "instinct," a sacrosanct bonding that takes place between a mother and her child-to-be. However, not all women bond with their fetuses. Some women abort them.

Indeed there is a dilemma for those who wish to use the mother-fetus bond to condemn pregnancy contracts while endorsing a woman's right to choose an abortion. They must hold that it is acceptable to abort a fetus but not to sell it. Although the *Warnock Report* takes no stand on the issue of abortion, it uses present abortion law as a term of reference in considering contract pregnancy. Because abortion is currently legal in England, the *Report's* position has this paradoxical consequence: one can kill a fetus, but one cannot contract to sell it.<sup>21</sup> One possible response to this objection would be to claim that women do not bond with their fetuses in the first trimester. But the fact remains that some women never bond with their fetuses; some women even fail to bond with their babies after they deliver them.

Are we really sure that we know which emotions pregnancy "normally" involves? Whereas married women are portrayed as nurturing and altruistic, society has historically stigmatized the unwed mother as selfish, neurotic, and unconcerned with the welfare of her child. Until quite recently social pressure was directed at unwed mothers to surrender their children after birth. Thus married women who gave up their children were seen as "abnormal" and unfeeling, and unwed mothers who failed to surrender their children were seen as selfish.<sup>22</sup> Assumptions of "normal" maternal bonding may reinforce traditional views of the family and a woman's proper role within it.



## Mothers and Children

A somewhat different argument against contract pregnancy contends that markets in women's reproductive labor entail the commodification of children. Once again the special nature of reproduction is used to support the asymmetry thesis; the special nature of maternal love is held to be incompatible with market relations. Children should be loved by their mothers, yet commercial surrogacy responds to and promotes other motivations. Indeed critics argue that markets in reproductive labor give people the opportunity to "shop" for children. Prospective womb-infertile couples will seek out arrangements that "maximize" the value of their babies; sex, eye color, and race will be assessed in terms of market considerations. Having children on the basis of such preferences reflects an inferior conception of parenthood. It brings commercial attitudes into a sphere properly governed by love.

What are the reasons people seek to enter into contract pregnancy arrangements? As far as we know, most couples and single people who make use of surrogates want simply to have a child that is "theirs," which means for them genetically related to them. Furthermore, with respect to the charge of shopping, it might be pointed out that our adoption system reflects people's preferences about the race, sex, and ability of their prospective children; it is much harder, for example, for an older black child to be adopted than for a white infant. Such preferences may well be objectionable, but few argue that parents should have no choice in the child they adopt or that adoption should be prohibited because it gives rein to such preferences.<sup>23</sup> Instead we regulate adoption to protect the basic interests of children and we forbid the differential payment of fees to agencies on the basis of a child's ascribed characteristics. Why couldn't contract pregnancy be regulated in the same way?

Critics who wish to make an argument for the asymmetry thesis based on the nature of maternal love must defend a strong claim about the relationship between markets and love. In particular they must claim that even regulated markets in reproductive services will lead parents to love their children for the wrong reasons: love will be conditional on the child's having the "right" set of physical characteristics. But I suspect that most parents who receive their child through a contract pregnancy arrangement will love their child even if her characteristics are not what they expected.

Although I share the view that there is something problematic with the “shopping” attitude in the sphere of personal relations, it’s another issue altogether as to whether we should legally block markets in which this attitude might be expressed. Individuals in our society seek partners with attributes ranging from a specified race and height to a musical taste for Chopin. Should we ban dating services that cater to such preferences?

Some critics associate contract pregnancy with baby selling. One popular argument runs thus: In contract pregnancy women not only sell their reproductive services, but also their babies. Because baby selling is wrong, this type of argument proceeds by the following syllogism: Baby selling is wrong, and contract pregnancy is a form of baby selling, therefore contract pregnancy is wrong. The *Warnock Report*, for example, makes this charge.<sup>24</sup>

But this argument is flawed. Pregnancy contracts do not enable fathers (or prospective mothers, women who are infertile or otherwise unable to conceive) to acquire full ownership rights over children. Even where there has been a financial payment for conceiving a child, the *child* cannot be treated as a mere commodity. The father (or prospective mother) cannot, for example, simply destroy or abandon the child. He (or she) is bound by the same norms and laws that govern the behavior of any child’s biological or adoptive parents. Allowing women to contract for their reproductive services does not entail baby selling, if we mean by that a proxy for slavery.

Anderson has argued that what makes contract pregnancy a form of baby selling is the way such contracts treat the “mother’s rights over her child.”<sup>25</sup> Such contracts mandate that the mother relinquish her parental rights to the child. Furthermore such contracts can be enforced against the mother’s wishes. Anderson argues that *forcing* a woman to part with her child and to cede her parental rights by sale entails treating the child as a mere commodity. Even if this is true, it does not necessarily lead to the conclusion that pregnancy contracts should be banned. Consider adoption. Adoption is frequently regulated to respect a change of mind of a biological parent within some specified time period. After that, the adoption agreement is enforced.<sup>26</sup> Contract pregnancy could be regulated in an analogous way, including an opt-out period to prevent harmful outcomes to a birth mother who has closely bonded with her child. It could also be structured to accord more with an open model in which all the parties to the contract retain contact with the child. Finally,

pregnancy contracts could be required to increase participants' agency by providing detailed information about the emotional risks and costs associated with giving up a child.<sup>27</sup>

Finally, some writers have objected to pregnancy contracts on the ground that they must, by their nature, exploit women. They point to the fact that the compensation is very low, and that many of the women who agree to sell their reproductive labor have altruistic motivations. Anderson writes, "A kind of exploitation occurs when one party to a transaction is oriented toward the exchange of 'gift' values, while the other party operates in accordance with the norms of the market exchange of commodities."<sup>28</sup>

I have two responses to this line of argument. First, even if it is the case that all or most of the women who sell their reproductive labor are altruistically motivated,<sup>29</sup> it is implausible to argue that the other parties to the contract are motivated solely in accord with market values. The couples that use contract pregnancy are not seeking to make a profit, but to have a child. Some of them might even be willing to maintain an extended family relationship with the surrogate after the child's birth. Second, even if an asymmetry in motivation is established, it is also present in many types of service work; teaching, health care, and social work are all liable to result in "exploitation" of this sort. In all of these areas the problem is at least partially addressed by regulating working conditions and compensation. Why is contract pregnancy different?

### THE CONSEQUENCES OF CONTRACT PREGNANCY FOR CHILDREN

The feminist philosopher Susan Moller Okin makes an argument against contract pregnancy that is based on its consequences for children. She argues that the problem with pregnancy contracts is that they do not consider the best interests of the child.<sup>30</sup> For Okin the asymmetry between reproductive labor and other forms of labor is based in the fact that only in the former are a child's interests directly at stake.

Okin's argument is important because it focuses on an externality of pregnancy contracts. Such contracts can affect children who are not parties to the contract. In the language of chapter 4, children are weak

agents. Are these weak agents likely to be harmed? Putting aside the difficult question of what actually constitutes the child's best interests, it is not certain that a child's most basic or fundamental interests will always be served by remaining with his biological parents.<sup>31</sup> Some children may be better off separated from their biological parents when such parents are abusive. No one would claim that children should always remain with their biological parents. Nevertheless I agree with Okin that one problem with pregnancy contracts lies in their potential for weakening the biological ties that give children a secure place in the world.<sup>32</sup> If it can be shown that pregnancy contracts make children more vulnerable, for example, by encouraging parental exit, then such a consideration might contribute to the case for restricting or prohibiting such contracts. Such an argument will have nothing to do with the special nature of reproductive labor, nor will it have to do with the special biological relationship between a parent and a child. It will remain valid even where the child bears no genetic relation to its parents. Children are vulnerable and dependent, and this vulnerability justifies the moral obligations parents have toward them. Although this objection can be used to support the asymmetry thesis, it is important to note that weak agency and vulnerability are found throughout the social world; they are not unique to the spheres of the family, sex, and reproduction.

Nonetheless this objection does point out a difference between reproductive labor and other forms of labor. Does it justify prohibiting contract pregnancy? One of the difficulties with evaluating pregnancy contracts in terms of their effects on children is that we still have very little empirical evidence of these effects. The first reported case of a pregnancy contract in the United States occurred in 1976.<sup>33</sup> Even with the more established practice of artificial insemination, no conclusive research is available on the effects of donor anonymity on the child. Nor are we sure how different family structures, including single-parent and alternative families and adoption, affect children. We should be wary of prematurely making abstract arguments based on the child's interests without any empirical evidence. Moreover in the case of families whose life situation may be disapproved of by their community we can have moral reasons for overriding the best interests of an individual child, so long as the basic interests of the child are not harmed.<sup>34</sup> For example, if the child of a single or lesbian mother were to suffer discrimination that affected her child, I do not think that this would justify removal of the child from the mother.

At this point it is worth highlighting the divergent manner in which the basic interests of children are taken into account in the way that American society currently treats two other ways of making a family: in vitro fertilization and adoption. In vitro fertilization has largely followed a consumer choice model in which the decisions of prospective parents are largely seen as a private matter. This is true even in cases in which third parties are involved: sperm donors, the eggs of friends and relatives, and eggs acquired through a market. In such cases little weight is given to the interests of the child or the donor of genetic material, and society tends to view reproductive decisions as a private decision facilitated by markets and a growing industry in reproductive services. By contrast, adoption is extensively regulated, and prospective adoptive parents undergo home visits and inquiry by screening agencies, even when the baby is a newborn. It is a good question as to why decisions involved in assisted reproductive technology are assumed to be a highly private matter, despite the involvement of third parties such as gamete donors, doctors, children, and for-profit fertility clinics.<sup>35</sup> We seem to lack, but greatly need, a consistent approach to protecting the interests of children in the context of the changing ways of making a family.

## REPRODUCTIVE LABOR AND EQUALITY

In the preceding three sections I have argued that the asymmetry thesis cannot be defended by claiming that there is something *essential* about reproductive labor that singles it out for differential treatment, nor by arguing that contract pregnancy distorts the nature of the bonds of motherhood; nor is it conclusively supported by an appeal to the best interests of the child. In addition some of the arguments I have examined tend to accept uncritically the traditional picture of the family. Such arguments take current views of the maternal bond and the institution of motherhood as the baseline for judging pregnancy contracts, as if such current views were not reasonably contested.

If we reject these arguments for the asymmetry thesis, are we forced back to the view that the market is indeed theoretically all-encompassing? Can we reject contract pregnancy, and defend the asymmetry thesis, without claiming that reproductive labor is essentially not a commodity?

I think that the strongest argument against contract pregnancy that depends on the asymmetry thesis is derived from considerations of gender equality. It is this consideration that I believe is tacitly driving many of the arguments; for example, it is the background gender inequality that makes the commodification of women's attributes especially objectionable. My criticism of contract pregnancy centers on the hypothesis that in our society such contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal status of women.<sup>36</sup>

Contrary to the democratic ideal of equal citizenship, gender has pervasive effects on a person's opportunities and achievements in our society. These effects include the unequal distribution of housework and child care that considerably restricts married women's opportunities in the workforce; the fact that despite a positive trend the ratio between women's and men's earnings remains roughly 77:100 as of 2007; the fact that divorce is an economically devastating experience for women (during the 1970s the standard of living of young divorced mothers fell 73 percent, while men's standard of living following divorce rose 42 percent); and the fact that the majority of work done by women in our society remains in a "female ghetto": service and clerical work, secretarial work, cleaning, domestic labor, nursing, elementary school teaching, and waitressing.<sup>37</sup>

Let me try to foreground some of the particular links between contract pregnancy and women's unequal status, links I will develop further in the next chapter, when I consider prostitution, which is currently a far more common practice than contract pregnancy. In its current form and context contract pregnancy arguably contributes to gender inequality in three specific ways.

1. Contract pregnancy gives others increased access to and control over women's bodies and sexuality. There is a crucial difference between artificial insemination by donor (AID) and a pregnancy contract. AID does not give anyone control over men's bodies and sexuality. A man who elects AID simply sells a product of his body or his sexuality; he does not sell control over his body itself. The current practices of AID and pregnancy contracts are remarkably different in the scope of intervention and control they allow the buyer. Pregnancy contracts involve substantial control over women's bodies. Such provisions include agreements concerning medical treatment, the conditions under which



the surrogate agrees to undergo an abortion, and regulation of the surrogate's emotions. Thus, in the case of Baby M, Mary Beth Whitehead not only consented to refrain from forming or attempting to form any relationship with the child she would conceive, but she also agreed not to smoke cigarettes, drink alcoholic beverages, or take medications without written consent from her physician. She also agreed to undergo amniocentesis and to abort the fetus "upon demand of William Stern, natural father," if tests found genetic or congenital defects.<sup>38</sup>

On my view, what makes this control objectionable, however, is not the intrinsic features of women's reproductive labor, but rather the way such control specifically reinforces a long history of group-based inequality. Consider an analogous case that has no such consequence: voluntary (paid) military service, in which men and women sell their fighting capacities. Military service, like contract pregnancy, involves significant invasions into the body of the seller; soldiers' bodies are controlled to a large extent by their commanding officers under conditions in which the stakes are often life and death. But military service does not *directly* serve to perpetuate traditional gender inequalities (although we might worry about the ways that voluntary military service tracks social class). The fact that pregnancy contracts, like military contracts, give someone control over someone else's body is not the main issue; rather the issue is that in contract pregnancy the body that is controlled belongs to a woman, in a society that historically has subordinated women's interests to those of men, primarily through its control over women's sexuality and reproduction.

Market theorists might retort that contract pregnancy could be regulated to protect women's autonomy, in the same way that we regulate other labor contracts. However, it will be difficult, given the nature of the interests involved, for such contracts not to be very intrusive with respect to women's bodies in spite of formal agreements. The purpose of such contracts is, after all, to produce a healthy child. To help guarantee a healthy baby, a woman's behavior must be highly controlled.<sup>39</sup>

Consider that if the pregnancy contract is a contract for reproductive labor, then, as in other types of labor contracts, compliance, what the law terms "specific performance," cannot be enforced. For example, if I contract to paint your house and I default on my agreement, you can sue me for breaking the contract, but even if you win, the courts will not require me to paint your house. Indeed this is the salient difference between even

poorly paid wage labor and indentured servitude, a case I will discuss later in this book. Thus, by analogy, if the woman in a pregnancy contract defaults on her agreement and decides to keep the child, the other parties should not be able to demand performance (that is, surrender of the child); rather, they can demand only monetary compensation.<sup>40</sup>

This likely inability to enforce performance in pregnancy contracts may have consequences for the *content* of such contracts that will make them especially objectionable. Recall that such contracts occur over a long period of time, during which a woman may undergo fundamental changes in her willingness to give up the child. Earlier I referred to this uncertainty about future consequences of a transaction as “weak agency.” The other parties to the contract will need, then, some mechanisms to ensure the surrogate’s compliance. There are two mechanisms that are likely to produce compliance, but both raise concerns. (a) The contract could be set up so that payment is delivered to the woman only after the child is surrendered. But this structure of compensation closely resembles baby selling; it now looks as if what is being bought is not the woman’s services but the child itself. (b) The contract could mandate legal and psychological counseling for a woman who is tempted to change her mind. Such counseling could increase the surrogate’s agency, but we might worry that it could involve a great deal of manipulation and coercion of her emotions.<sup>41</sup>

2. The second way that contract pregnancy contributes to gender inequality is by reinforcing negative stereotypes about women as “baby machines.”<sup>42</sup> Stereotypes are sets of beliefs in which all members of a class are considered to share a set of distinguishing characteristics. Some stereotypes are empirically based. But even in those cases in which they are consistent with observation, an important point about many stereotypes is that they are self-confirming. It is because of our widespread beliefs and expectations that individuals find it rational to conform to those beliefs and expectations. It makes little sense, for example, for a black male to invest in education and human capital if he expects that employers will not reward him for that investment.<sup>43</sup> In early twentieth-century America few women aspired to be doctors; their ambitions were powerfully shaped by the structure of opportunity, but also by the expectations that they and others had about their role in the household. If the practice of contract pregnancy were to become common and widespread, it might affect the way all women see themselves.

3. Finally, contract pregnancy raises the danger, manifested in several recent court rulings, that motherhood will be defined in terms of genetic material, in the same way as fatherhood. Mary Beth Whitehead won back parental rights to Baby M on the basis of her being the genetic mother. On the other hand, Anna Johnson, a gestational surrogate, lost such rights because she bore no genetic relationship to the child.<sup>44</sup> These court rulings establish the principle of parenthood on the basis of genetic contribution. In such cases women's contribution to reproduction is recognized only insofar as it is identical to that of men. Genes alone are taken to define natural and biological motherhood. By not taking women's actual gestational contributions into account, the courts reinforce an old stereotype of women as merely the incubators of men's seeds.<sup>45</sup> In fact the court's inattention to women's unique labor contribution is itself a form of unequal treatment. By defining women's rights and contributions in terms of those of men, when they are different, the courts fail to recognize an adequate basis for women's rights and needs. These rulings place an additional burden on women.

To the extent that contract pregnancy has consequences for gender inequality, I think that the asymmetry thesis is true, and that such contracts are especially troubling. Current gender inequality lies at the heart of what is wrong with pregnancy contracts. The problem with commodifying women's reproductive labor is not that it degrades the special nature of reproductive labor or alienates women from a core part of their identities, but that it reinforces (to the extent that it does) a traditional gender-hierarchical division of labor. A consequence of my argument is that under very different background conditions, such contracts would be less objectionable.<sup>46</sup> For example, in a society in which women's work was valued as much as men's and in which child care was shared equally, pregnancy contracts might serve primarily as a way for single persons, disabled persons, and same-sex families to have children. Indeed pregnancy contracts and similar practices have the potential to transform the nuclear family.

At the same time there are potential caveats to the acceptability of a regulated form of pregnancy contract even under conditions of gender equality: (1) the importance of ensuring that women are not selling their reproductive labor out of extreme vulnerability; (2) the effect of the practice on other pervasive status inequalities, such as race; (3) the need to ensure the woman's participation in the overall purpose of the

activity; and (4) the need to ensure that the vulnerable (children) are protected from harm. We know very little about the effects of pregnancy contracts on the psychological health of children. We know very little about the effects of pregnancy contracts on parental exit or on the other children of the birth mother. And we know very little about their effects on the security of the child-to-be. A recent article in *Slate* chronicled the effects of the financial scandal on couples who could no longer afford to pay the fees to their hired surrogates. As the author notes, “If you stop paying your surrogate, she needs to quit and find another job, just like any other worker. But surrogacy isn’t like any other job. The only way to quit a pregnancy is to abort it.”<sup>47</sup> If women do not choose to abort, but have no means to support their child once the paying couple has reneged, then the security of the child is threatened.

For this reason, even under more ideal circumstances, there is reason to be cautious about the potential use of such contracts. This can be done by allowing such contracts but making them unenforceable in the courts. Not only would banning drive such contracts underground, leaving the parties more vulnerable to one another, but many of the potential consequences of such contracts are speculative. Additionally, I believe that in the light of my previous argument, in contested cases the courts should recognize no distinction between genetic and gestational surrogates with respect to parental rights. Finally, third-party brokerage of pregnancy contracts should be illegal. These proposals aim to discourage contract pregnancy and to strengthen the position of the surrogate, who is the most economically and emotionally vulnerable party in any such arrangement.

#### CONCLUSION: WAGE LABOR, REPRODUCTIVE LABOR, AND EQUALITY

In this chapter I have analyzed various grounds for forbidding markets in women’s reproductive labor. While I rejected most of these grounds, including the essentialist thesis, the opposing approach of market theorists misses the point that there are noneconomic values that should constrain market transactions. Market theorists ignore the role that markets have in shaping the relationships among individuals and social groups.

Libertarian-oriented market theorists may claim that my support for the asymmetry thesis entails a violation of liberal neutrality: it imposes a standard of gender equality on free exchanges.<sup>48</sup> Liberalism requires state neutrality among a large range of conceptions of value. This neutrality means that liberals cannot mandate that individuals converge on a single set of values. Liberals can, of course, seek to regulate exchanges so that they fall within the bounds of justice. But any argument that goes beyond justice and seeks to prohibit certain market exchanges because of a particular view of the nature of the goods being exchanged is claimed to violate liberal neutrality. Furthermore the argument that I have given is biased, distinguishing activities that harm women from those that harm everyone.

The issue of neutrality is a difficult matter to assess, for there are many interpretations of neutrality. At the very least, however, two considerations seem relevant. First, why should existing distributions serve as the standard against which neutrality is measured? I have argued that it is a mistake to assume that the realm of reproduction and sexuality is neutral; it is a product (at least in part) of the unequal social, political, and economic power of men and women. Second, most liberals draw the line at social practices such as slavery, indentured servitude, labor at slave wages, and the selling of votes or political liberties. They defend inalienable civil liberties such as freedom of conscience and association, the right to own property and to choose one's profession. Such restrictions are taken as necessary for justice. They view as suspect practices that, like systematic gender inequality, undermine a framework of free deliberation among equals. If such restrictions also violate viewpoint neutrality, the mere violation of neutrality does not seem objectionable. Indeed, on my view, if it undermines women's equal status, contract pregnancy *is* an issue of justice.

Contract pregnancy places women's bodies under the control of others and serves to perpetuate gender inequality. The asymmetries of gender, the fact of social relations of gender domination, provide the best foundation for the asymmetry thesis. I'll say more about the difference between contract pregnancy and other forms of labor that may contribute to gender inequalities, such as women being employed as domestic cleaners and preschool teachers, in the next chapter.

Not all of the potentially negative consequences of contract pregnancy involve its effects on gender inequality. I have also referred to the

problematic form that such contracts will have to take to be self-enforcing, its origins in weak agency, and its shaping effects on preferences and identities. Some of these features of pregnancy contracts are shared with other labor contracts. There is an important tradition in social philosophy that argues that it is precisely these shared features that make wage labor itself unacceptable. This tradition emphasizes that wage labor, like contract pregnancy, places the productive capacities of one group of citizens at the service and under the control of another. The asymmetry thesis does not imply that there is nothing problematic about other forms of wage labor. Unfortunately there has been little attention in political philosophy to the effects of forms of gender and class inequality on the development of women's and workers' deliberative capacities or on the formation of their preferences. We have to ask, What kinds of work and family relations and environments best promote the development of the deliberative capacities needed to support democratic institutions?<sup>49</sup>



## 6

### Markets in Women's Sexual Labor

The intuition that there is a distinction between markets in different human capacities is a deep one, even among people who ultimately think that the distinction does not justify legally forbidding sales of reproductive capacity and sex. I continue to probe this intuition in this chapter, focusing on the sale of sexual services. What, if anything, is problematic about a woman selling her sexual as opposed to her secretarial labor? And if the apparent asymmetry can be explained and justified, what implications follow for public policy?

My strategy in this chapter parallels that of chapter 5 on contract pregnancy. I sketch and criticize two popular approaches to the morality of prostitution. The *economic approach* attributes the wrongness of prostitution to its consequences for efficiency, the fact that it generates externalities. The important feature of this approach is its treatment of sex as a morally indifferent matter. The *essentialist approach* stresses that sales of sexual labor are wrong because they are inherently alienating or damaging to human happiness. In contrast to these two ways of thinking about the immorality of prostitution, I argue that the most plausible support for the asymmetry thesis stems from the role of commercialized sex and reproduction in sustaining a social world in which women form a subordinated social group. This parallels but also diverges from my argument about contract pregnancy. In the first place, I argue that prostitution, like contract pregnancy, is wrong insofar as the sale of women's sexual labor reinforces broad patterns of sex inequality. This might seem surprising insofar as the argument about contract pregnancy stressed perceptions of women as baby machines and prostitution seems to challenge exactly those perceptions. I present an alternative way that the practice of contemporary prostitution contributes to and also embodies the perception of women as socially inferior to men. But because many forms of labor

that people do not view as especially troubling may also contribute to the socially inferior position of women—women models, maids, day care workers, and au pairs—I address the question of what makes prostitution different. In the second place, prostitution, unlike contract pregnancy, does not involve potential harms to children, nor does it necessarily involve weak agency.<sup>1</sup> Therefore the case against prostitution as a noxious market cannot rest on such grounds. Yet many women are harmed in forms of prostitution, and I also hope to show that there is a third party that is harmed by prostitution: the class of women.

On the basis of my analysis of prostitution's wrongness, there is no simple conclusion as to what its legal status ought to be. Both criminalization and decriminalization may have the effect of exacerbating the gender inequalities in virtue of which I claim that prostitution is wrong. Nonetheless my argument does have implications for the form of prostitution's regulation, if legal, and its prohibition and penalties, if illegal. Overall my argument tends to support decriminalization in contexts such as the United States and Western Europe, where prohibitions on abuse can be enforced and there is a social safety net to protect women from entering into prostitution under conditions of extreme vulnerability.

The argument I put forward here is qualified and tentative in its practical conclusions, but its theoretical point is not. *I argue that the most plausible account of prostitution's wrongness turns on its relationship to the pervasive social inequality between men and women.* If in fact no causal relationship obtains between prostitution and gender inequality, then I do not think that there are good reasons, at least not among the reasons I examine, for thinking that prostitution is, by itself, especially morally troubling. What would remain troubling would be the often miserable and unjust background circumstances in which much prostitution occurs.<sup>2</sup> In my evaluation of prostitution consideration of both the social consequences and the social origins of prostitution with respect to gender inequality play a crucial role. It follows from my analysis that male prostitution raises distinct issues and is not connected to injustice in the same way as female prostitution.

Prostitution is a complex phenomenon. I begin accordingly with the question, Who is a prostitute?

## WHO IS A PROSTITUTE?

Much has been written on the history of prostitution, and some empirical studies of prostitutes themselves have been undertaken, yet the few philosophers writing on this subject have tended to treat prostitution as if the term referred to something uniform.<sup>3</sup> It does not. Not only is it hard to draw a sharp line between prostitution and practices that look like prostitution,<sup>4</sup> but as historians of the subject have emphasized, prostitution today is a very different phenomenon from earlier forms of commercial sex. In particular the idea of prostitution as a specialized occupation of an outcast and stigmatized group is of relatively recent origin.<sup>5</sup>

While outsiders tend to stigmatize all prostitutes, prostitution itself has an internal hierarchy based on class, race, and gender. The majority of prostitutes, especially when we consider the issue globally, are very poor. Even in the United States streetwalkers are a world apart from prostitution's upper tier. Consider these three cases:

- A fourteen-year-old girl prostitutes herself to support her boyfriend's heroin addiction. Later she works the streets to support her own habit. She begins, like most teenage streetwalkers, to rely on a pimp for protection. She is uneducated and is frequently subjected to violence in her relationships and with her customers. She receives no social security, no sick leave or maternity leave, and, most important, she has no control as to whether or not she has sex with a man. That is a decision that is made by her pimp.
- Now imagine the life of a Park Avenue call girl or a highly paid "escort" to wealthy powerful men.<sup>6</sup> Many call girls drift into high-class prostitution after "run of the mill promiscuity," led neither by material want nor lack of alternatives.<sup>7</sup> Some are young college graduates who upon graduation earn money by prostitution while searching for other jobs. Call girls can earn between \$30,000 and \$100,000 annually. These women have control over the entire amount they earn as well as an unusual degree of independence, greater than in many other forms of work. They can also decide whom they wish to have sex with and when they wish to do so.<sup>8</sup> There is little resemblance between their lives and that of the streetwalker.
- Finally, consider the small but increasing number of male prostitutes. Most male prostitutes (but not all) sell sex to other men.<sup>9</sup>

Often the men who buy such sex are married. Unfortunately there is little information on male prostitution; it has not been well studied as either a historical or a contemporary phenomenon.<sup>10</sup> What we do know suggests that, like their female counterparts, male prostitutes cover the economic spectrum. Two important differences between male and female prostitutes are that men are more likely to work only part time and that they are not generally subject to the violence of male pimps because they tend to work on their own.

Are these three cases distinct? Many critics of prostitution have assumed that all prostitutes were women who entered the practice under circumstances that include abuse and economic desperation. But that is a false assumption: the critics have mistaken a part of the practice for the whole. For example, although women who walk the streets are the most visible, they constitute only about 20 percent of the prostitute population in the United States.<sup>11</sup>

The varying circumstances of prostitution are important because they force us to consider carefully what we think may be wrong with prostitution. For example, in the first case the factors that seem crucial to our negative response of condemnation are the miserable background conditions of desperation, the prostitute's age, and her lack of control over whether or not she has sex with a client, as well as her vulnerability to violence at the hands of her pimp or client. In chapter 4 I referred to these factors as *vulnerability*, *weak agency*, and *extreme individual harmful outcome*. These conditions could be redressed through regulation without forbidding commercial sexual exchanges between consenting adults.<sup>12</sup> The second case of prostitution stands in sharp contrast. These women engage in what seems to be a voluntary activity, chosen among a range of decent alternatives. Many of these women sell their sexual capacities without coercion or regret. The third case rebuts arguments that prostitution has no other purpose than to exploit women.

## WHAT IS WRONG WITH PROSTITUTION?

### The Economic Approach

As we have seen in earlier chapters, economists generally frame their questions about the best way to distribute a good without reference to its

intrinsic qualities. They tend to focus on the quantitative features of a good and not its qualities. An economic approach to prostitution does not specify a priori that certain sales are wrong; no act of commodification is ruled out in advance.<sup>13</sup> Rather this approach focuses on the costs and benefits that accompany such sales. An economic approach to contracts will justify inalienability rules—rules that forbid individuals from entering into certain transactions—in cases where there are costly externalities to those transactions and in general where such transactions are inefficient.

What are the costs of prostitution? First, the parties to a commercial sex transaction share possible costs of disease and guilt.<sup>14</sup> Second, prostitution also has costs to third parties: a man who frequents a prostitute dissipates financial resources that might otherwise be directed to his family; in a society that values intimate marriage, infidelity costs a man's wife or companion in terms of mistrust and suffering (and therefore prostitution may sometimes lead to marital instability); and sexual diseases can be spread to others. Perhaps the largest third-party costs to prostitution are “moralisms”:<sup>15</sup> many people find the practice morally offensive and are pained by its existence. (Note that “moralisms” refers to people's preferences about moral issues and not to morality as such.)

The economic approach generates a contingent case for treating prostitution differently than we do other labor markets, focusing on prostitution's costs in terms of negative public opinion or the harms to prostitutes or others in the population (including through the spread of diseases). Consideration of which limitations on sexual freedom can be justified from a welfare standpoint can be illuminating, and it forces us to think about the actual effects of sexual regulations. Nevertheless I want to register three difficulties with this approach.

First, and most obviously, both markets and contractual exchanges function within a regime of property rights and legal entitlements. The economic approach ignores the background system of distribution within which prostitution occurs. Some background systems, however, are unjust. We might especially be worried about prostitution that arises as the only way to stave off starvation. In contrast to contract pregnancy, some of the participants in prostitution markets (especially if we consider the practice as a global phenomenon) are likely to be desperately poor and survive for all practical purposes as sexual slaves.

Second, this type of approach seems disabled from making sense of distinctions between goods, especially in cases where these distinctions

do not seem to reflect mere differences in the net sum of costs and benefits. The sale of certain goods seems to many people simply unthinkable; it may be possible to justify prohibitions on slavery by appeal to costs and benefits, but the problem is that such justification makes contingent an outcome (no slavery) that we do not hold contingently. It makes little sense, phenomenologically, to describe the moral repugnance people feel toward slavery as “just a cost.” Even if we are interested in tracking third party costs, as we saw in chapter 1, externalities (especially if we count moralisms as externalities) are nearly universal in practice. If we view any market that generates disapproval as producing an externality that can justify intervention, then freedom of contract is on shaky ground. We need some way of marking which costs rise to the level of justifying interference and regulation and which do not. Nothing in economic analysis helps us to do this.

Third, some goods seem to have a special status that requires that they be shielded from the market. As we saw in chapter 4, the sale of votes or political rights does not simply produce costs and benefits: it transforms the background conditions for people to interact as equals. In this sense the market is not a neutral mechanism of exchange: there are some goods whose sale reshapes the relations between the transacting parties. At best, then, the economic analysis of prostitution is incomplete. At worst it is misleading.

### The Essentialist Approach

Economists abstract from the qualities of the goods they consider. By contrast, as we saw in chapter 5, some critics hold that there is something intrinsic to sex that accounts for the distinction we mark between it and other types of labor. On this view, prostitution is not wrong simply because it *causes* harm; prostitution *constitutes* a harm. Essentialists hold that there is some intrinsic property of sex that makes its commodification wrong.

Some feminist critics of prostitution argue that sexual and reproductive capacities are more crucially tied to the nature of our selves than our other capacities.<sup>16</sup> The sale of sex is taken to cut deeper into the self, to involve a more total alienation from the self. Recall Carole Pateman:



“When a prostitute contracts out use of her body she is thus selling *herself* in a very real sense. Women’s selves are involved in prostitution in a different manner from the involvement of the self in other occupations.”<sup>17</sup>

It seems right to say that damage to and violation of our bodies affect us in a deeper way, a more significant way, than damage to our external property. Robbing my body of a kidney is a violation *different in kind* from robbing my house of a stereo, however expensive the latter is. Distributing kidneys from healthy people to sick people through a lottery is a far different act from using a lottery to distribute door prizes, even if ultimately both such lotteries could be defended.<sup>18</sup>

But this point can be only the first step in an argument in favor of treating either our organs or our sexual capacities as market-inalienable. Most liberals think that individual sovereignty over mind and body is crucial for the exercise of fundamental liberties. Thus in the absence of clear harms most liberals would reject legal bans on voluntary sales of body parts or sexual capacities. Indeed the usual justification of such bans is harm to self; such sales are presumed to be “desperate exchanges” that the individual herself would reasonably want to foreclose. American law blocks voluntary sales of individual organs and body parts, but not sales of blood, on the assumption that only the former sales are likely to be so harmful to the individual that given adequate information and any reasonable alternative, she herself would refrain from such sales.

Whatever the plausibility of such a claim with respect to body parts,<sup>19</sup> it is considerably weaker when applied to sex. There is no strong evidence that prostitution is, at least in the United States and certainly among its higher echelons, a more desperate exchange than, say, working in Walmart. This may reflect the fact that the relationship people have with their sexual capacities is diverse: for some people sexuality is a realm of ecstatic communion with another; for others it is little more than a sport or distraction. Some people will find consenting to be sexually used by another person enjoyable or adequately compensated by a wage. Even for the same person, sex can be the source of a range of experiences.

Of course the point cannot simply be that, as an empirical matter, people have differing conceptions of sexuality. The critics of prostitution grant that. The point is whether or not, and within what range, this diversity is desirable.

Margaret Jane Radin raises a distinct worry about the effects of *widespread* prostitution on human flourishing. She argues that widespread sex markets would promote inferior forms of personhood. She says that we can see this is the case if we “reflect on what we know now about human life and choose the best from among the conceptions available to us.”<sup>20</sup> If prostitution were to become common, Radin argues, it would have adverse effects on a form of personhood that itself is intrinsically valuable. Why should this be so? We might consider that if the signs of affection and intimacy were frequently detached from their usual meaning, such signs might well become more ambiguous and easy to manipulate. The marks of an intimate relationship (physical intimacy, terms of endearment, etc.) would no longer signal the existence of intimacy. In that case, by obscuring the nature of sexual relationships prostitution might undermine our ability to apply the criteria for coercion and informational failure.<sup>21</sup> Individuals might more easily enter into damaging relationships and lead less fulfilling lives as a result.

It is certainly true that prostitution usually detaches sex from intimacy. But so does casual sex. Radin’s argument is best understood as an argument that widespread prostitution produces an externality. I agree. The question is, What is the nature of the externality? Radin views the externality in terms of inferior human flourishing. But even if prostitution fails to promote flourishing, there are markets in many goods we tolerate that don’t promote flourishing: high-fat foods, for example. In arguing that we should assess and potentially regulate markets according to the extent to which they promote the best forms of flourishing, Radin implicitly accepts the view that the purpose of the state is to make people happy. This is a substantive claim with strong paternalistic ramifications. I have tried to make an argument about markets that does not depend on paternalism. Later I will claim that contemporary prostitution is wrong because it promotes unequal relationships between men and women, gender hierarchy, and exclusion—matters of justice—and not because it makes people less happy.<sup>22</sup>

An alternative version of the essentialist thesis views the sale and purchase of sex as an assault on personal dignity. Prostitution *degrades* the prostitute. Elizabeth Anderson, for example, discusses the effect of commodification on the nature of sex as a shared good, based on the recognition of mutual attraction. In commercial sex each party now values

the other only instrumentally, not intrinsically. And though both parties are thus prevented from enjoying a shared good, it is worse for the prostitute. The customer merely surrenders a certain amount of cash; the prostitute cedes her body. The prostitute is thus degraded to the status of a thing. Call this the *degradation objection*.<sup>23</sup>

I share the intuition that the failure to treat others as persons is morally significant; it is wrong to treat people as mere things. But I am skeptical as to whether this intuition supports the conclusion that prostitution is wrong. Consider the contrast between slavery and prostitution. Slavery was, in Orlando Patterson's memorable phrase, a form of "social death": it denied to enslaved individuals the ability to press claims, to be in their own right sources of value and interest.<sup>24</sup> But the mere sale of the use of someone's capacities does not *necessarily* involve a failure of this kind, on the part of either the buyer or the seller.<sup>25</sup> Many forms of labor, perhaps most, cede some control of a person's body to others.<sup>26</sup> Such control can range from requirements to be in a certain place at a certain time (e.g., reporting to the office) to requirements that a person (e.g., a professional athlete) eat certain foods and get a certain amount of sleep or maintain good humor in the face of the offensive behavior of others (e.g., airline stewardesses). Some control of our capacities by others does not seem to be *ipso facto* humiliating, destructive of our dignity.<sup>27</sup> Whether or not the purchase of a form of human labor power will have this negative consequence will depend on background social macro-level and micro-level institutions. Minimum wages, worker participation and control, health and safety regulations, maternity and paternity leave, restrictions on specific performance, and the right to exit one's job are all features that attenuate the objectionable aspects of treating people's labor as a mere economic input. The advocates of prostitution's wrongness in virtue of its connection to selfhood, flourishing, and degradation have not shown that a system of *regulated* prostitution would be unable to respond to their worries. In particular they have not established that there is something wrong with prostitution irrespective of its cultural and historical contexts.

There is, however, another way of interpreting the degradation objection that draws a connection between the current practice of prostitution and the lesser social status of women.<sup>28</sup> This connection is not a matter of the logic of prostitution *per se* but the fact that contemporary prostitution degrades women by treating them as the sexual servants of

men. Currently prostitutes are overwhelmingly women and their clients are almost exclusively men. In conceiving of a class of women as needed to satisfy male sexual desire, prostitution represents women as sexual servants to men. The degradation objection, so understood, can be seen as a way of expressing an egalitarian concern since there is no reciprocal ideology that represents men as servicing women's sexual needs. It is to this egalitarian understanding of prostitution's wrongness that I turn in the next section.

### The Egalitarian Approach

The essentialists rightly call our attention to the different relation we have with our capacities and external things, yet they overstate the nature of the difference between our sexual capacities and our other capacities with respect to our personhood, flourishing, and dignity. They are also insufficiently attentive to the background conditions in which commercial sex exchanges take place. By contrast, I see prostitution's wrongness in terms of its relationship to gender inequality. But if this argument can be extended to cover prostitution as well as contract pregnancy, why does it not extend it to all forms of sex-stereotyped work, including secretarial labor?

The answer hinges in part on how we conceive of gender inequality. On my view, there are two important dimensions of gender inequality, often conflated. The first dimension concerns inequalities in the distribution of income, wealth, and opportunity. In most nations, including the United States, women form an economically and socially disadvantaged group based on the following factors.

- Income inequality. We saw in chapter 5 that although the gap between men's and women's earnings has narrowed, it still remains a significant one.
- Poverty. Poverty rates are highest for families headed by single women, particularly if they are black or Hispanic. In 2007 28.3 percent of households headed by single women were poor; 13.6 percent of households headed by single men and 4.9 percent of married-couple households lived in poverty.<sup>29</sup>
- Unequal division of labor in the family. Within the family women spend disproportionate amounts of time on housework and rearing

children. According to one recent study, wives employed full time outside the home do 70 percent of the housework; full-time housewives do 83 percent.<sup>30</sup> The unequal family division of labor is itself caused by and causes labor market inequality; given the lower wages of working women, it is more costly for men to cut back from the labor market to participate in household labor and child rearing.

The second dimension of gender inequality does not concern income and opportunity, but standing in society. In many contemporary contexts women are viewed and treated as the social inferiors of men. This inferior treatment proceeds via several distinct mechanisms.

- Negative stereotyping. Stereotypes persist as to the types of jobs and responsibilities a woman can assume. Extensive studies have shown that people typically believe that men are more dominant, assertive, and instrumentally rational than women. Gender shapes beliefs about a person's capacities; for example, women are thought to be less intelligent than their male equals.<sup>31</sup>
- Hierarchy. Men are able asymmetrically to sanction women; they push women around to get what they want. The paradigm case is violence. Women are subjected to greater amounts of violence by men than is the reverse: according to one (somewhat controversial) study, every fifteen seconds a woman is battered in the United States; 1.3 million women a year are physically assaulted by their male partners; on average they are assaulted 3.4 times.<sup>32</sup>
- Marginalization. People who are marginalized are excluded from or absent from core productive social roles in society, roles that convey self-respect and meaningful contribution.<sup>33</sup> At the extremes, marginalized women lack the means for their basic survival; they are dependent on male partners to secure the basic necessities of life. Less severely marginalized women lack access to central and important social roles. Their activities are confined to peripheral spheres of social organization. Although women have entered the health and legal professions in increasing numbers, they are clustered in the lower status ends of these professions. And they have made little progress in some important social positions: between 1789 and July 2009 only 2 percent of the members of Congress have been women.<sup>34</sup> Occupational segregation by sex is extensive and pervasive; moreover it is a global phenomenon.

- Stigma. A woman's gender is associated, in some contexts, with stigma, a badge of dishonor. Consider rape. In crimes of rape the complainant's past behavior and character are central in determining whether or not a crime has actually occurred. This is not true of other crimes; mail fraud (pun intended) is not dismissed because of the bad judgment or naïveté of the victims. Society views rape differently because, I suggest, many people think that women really want or deserve to be forced into sex, treated as objects for male pleasure. Women's lower status thus influences the way that rape is seen.

These two forms of inequality, distributional inequality and status inequality, clearly interact. But they are distinct. I do not think it is plausible to attribute to prostitution a direct causal role in the first sense of gender inequality: distributional inequality between men and women. But I believe that it is a plausible hypothesis that prostitution, along with related practices such as pornography, makes an important contribution to women's inferior social status. Prostitution shapes and is itself shaped by custom and culture, by cultural meanings about the importance of sex and about the nature of women's sexuality and male desire.<sup>35</sup>

If prostitution is wrong it is because of its effects on how men perceive women and on how women perceive themselves. In our society prostitution represents women as the sexual servants of men. It supports and embodies the widely held belief that men have strong sex drives that must be satisfied, largely by gaining access to some woman's body. This belief underlies the mistaken idea that prostitution is the oldest profession, a necessary consequence of human (i.e., male) nature. It also underlies the traditional conception of marriage, in which a man owned not only his wife's property but also her body. Indeed until fairly late in the twentieth century many states did not recognize the possibility of "real rape" in marriage.

Why is the idea that women must service men's sexual needs an image of inequality and not mere difference? My argument suggests that there are two primary, contextual reasons.

First, in our culture there is no reciprocal social practice that represents men as serving women's sexual needs. Men are gigolos and paid escorts, but their sexuality is not seen as an independent capacity whose use *women* can buy. It is not part of the identity of a class of men that



they will service women's sexual desires. Indeed male prostitutes overwhelmingly service other men and not women.

Second, the idea that prostitution embodies an idea of women as inferior is suggested by the high incidence of rape and violence against women prostitutes. Although all women in our society are potential targets of rape and violence, the mortality rates for women engaged in prostitution are roughly six times higher than that of nonprostitute women of comparable age, race, and social class.<sup>36</sup>

My suggestion is that prostitution depicts an image of gender inequality by constituting one class of women as inferior. Prostitution is a theater of inequality; it displays for us a practice in which women are seen as servants of men's desires. This is especially the case where women are forcibly controlled by their (male) pimps. It follows from my conception of prostitution that it need not have such a negative effect when the prostitute is male. More research needs to be done on popular images and conceptions of gay male prostitutes, as well as on the extremely small number of male prostitutes who have women clients.

The negative image of women who participate in prostitution, the perception that they are legitimate targets of violence and rape, is objectionable in itself. It contributes to an important form of inequality, unequal status, based on attitudes of superiority, exclusion, and disrespect. Unfortunately political philosophers and economists, who have focused instead on inequalities in income and opportunity, have largely ignored this form of inequality. Moreover this form of inequality is not confined to women prostitutes. I believe that the negative image of women prostitutes likely also has third-party effects: it shapes and influences the way women as a whole are seen. This hypothesis is, of course, an empirical one. It has not been tested largely because of the lack of studies of the men who go to prostitutes. Most extant studies of prostitution examine the behavior and motivations of the women who enter into the practice, a fact that itself raises the suspicion that prostitution is viewed as "a problem about the women who are prostitutes . . . [rather than] a problem about the men who demand to buy them."<sup>37</sup> In these studies male gender identity is taken as a given.

To investigate prostitution's negative image effects on female prostitutes and on women generally we need research on the following questions:

- What are the attitudes of men who visit women prostitutes toward prostitutes? How do their attitudes toward prostitutes compare with the attitudes of men who do not visit prostitutes?
- What are the attitudes of men who visit women prostitutes toward women generally? What are the attitudes of men who do not visit women prostitutes toward women generally?
- What are the attitudes of women toward women prostitutes?
- How do the men and women involved in prostitution view themselves?
- Does prostitution contribute to or diminish the likelihood of crimes of sexual violence?
- What can we learn about these questions through cross-national studies? How do attitudes about women prostitutes compare between the United States and countries with more egalitarian wage policies or less status inequality between men and women?

The answers to these questions will reflect social facts about our culture. Whatever plausibility there is to the hypothesis that prostitution contributes to and expresses gender status inequality, it gains this plausibility from the surrounding cultural context, the meaning of the practice in the larger society.

I can imagine hypothetical circumstances in which prostitution would not have a negative image effect, where it could mark a reclaiming of women's sexuality. Margo St. James of COYOTE (Call Off Your Old Tired Ethics) and other feminists have argued that prostitutes can function as sex therapists, fulfilling a legitimate social need as well as providing a source of experiment and alternative conceptions of sexuality and gender.<sup>38</sup> I agree that in a different culture, with different assumptions about men's and women's gender identities, prostitution might not have harmful effects on women in prostitution and as a group. But I think that these feminists have minimized the cultural stereotypes that surround contemporary prostitution and exaggerated their own power to shape the practice. Prostitution, like pornography, is not easily separated from the larger surrounding culture that marginalizes, stereotypes, and stigmatizes women.<sup>39</sup> I think that we need to look carefully at what men and women actually learn in prostitution; I doubt that ethnographic studies of prostitution would support the claim that prostitution contributes to images of women's dignity or empowerment.

If, through its negative image of women as sexual servants of men, prostitution reinforces women's inferior status in society, then it is wrong. Even though men can be and are prostitutes, I think that it is unlikely that we will find such negative image effects on men as a group. Individual men may be degraded in individual acts of prostitution; men as a group are not.

Granting all of the above, is prostitution's negative image effect greater than that produced by other professions in which women largely service men, for example, nursing or fashion modeling? What is special about prostitution?

The negative image effect undoubtedly operates outside the domain of prostitution. But there are three significant differences between prostitution and other gender-segregated professions.

First, a large number of people currently believe that prostitution, unlike housecleaning, is especially objectionable. Holding such moral views of prostitution constant, if prostitution continues to be primarily a female occupation, then the existence of prostitution will disproportionately fuel negative images of women.<sup>40</sup> Stigma surrounds the practice, shapes it, and is reinforced by it.

Second, prostitution represents women as objects for male use. As I indicated earlier, prostitutes are far more likely to be victims of violence than other professions; they are also far more likely to be raped than other women. A prostitute's "no" does not, to the male she services as well as to other men, mean no.

The third difference concerns a third-party harm: the effects that prostitution may have on other women's sexual autonomy.<sup>41</sup> Scott Anderson has recently argued that if prostitution was viewed as just another job analogous to other forms of employment, then presumably sex could be included as part of any number of jobs. Women who did not wish to have sex on demand might find that their employment options were limited and that they were less employable on the labor market. These women would now be worse off than if prostitution were illegal, and, Anderson stresses, they might feel pressured to have sex in order to get the jobs they want.

My argument has been that if prostitution is wrong, it is because the sale of women's sexual labor may have adverse consequences for achieving a significant form of equality between men and women. This argument for the asymmetry thesis, if correct, connects prostitution to

stigma and unequal status. However, it is an injustice that operates in large part through beliefs and attitudes that might someday be changed. I now turn to the question of whether, even if we assume that prostitution is wrong under current conditions, it should remain illegal.

### SHOULD PROSTITUTION BE LEGALIZED?

It is important to distinguish between prostitution's wrongness and the legal response that we are entitled to make to that wrongness. Even if prostitution is wrong, we may not be justified in prohibiting it if that prohibition makes the facts in virtue of which it is wrong worse, or if it has too great a cost for other important values. There are a range of plausible views about the appropriate scope of state intervention and indeed the appropriate scope of equality considerations in supporting such regulation.

It is also important to keep in mind that narrowing the discussion of solutions to the single question of whether to ban or not to ban prostitution shows a poverty of imagination. There are many ways of challenging existing cultural values about the appropriate division of labor in the family and the nature of women's sexual and reproductive capacities, for example, education, consciousness-raising groups, and changes in employee parental leave policies. The law is not the only way to provide women with incentives to refrain from participating in prostitution. Nonetheless we do need to decide what the best legal policy toward prostitution should be.

I begin with an assessment of the policy that we now have. The United States is one of the few developed Western countries that criminalizes prostitution.<sup>42</sup> For example, Denmark, Holland, West Germany, Sweden, Switzerland, and Austria all have legalized prostitution, although in some of these countries it is restricted by local ordinances.<sup>43</sup> In other countries, it is illegal to pay for sex, but not to sell it. Where prostitution is permitted, it is closely regulated.

Suppose that we accept that gender equality is a legitimate goal of social policy. The question is whether the current legal prohibition on prostitution in the United States promotes gender equality. The answer, I think, is that it does not. The current legal policies in the United States arguably exacerbate the factors in virtue of which prostitution is wrong.

First, the current prohibition on prostitution renders some of the women who engage in the practice vulnerable. Some prostitutes seek assistance from pimps in lieu of the contractual and legal remedies that are denied them. Male pimps may protect women prostitutes from their customers and from the police, but the system of pimp-run prostitution has enormous negative consequences, extreme harms, for women at the lowest rungs of prostitution.

Second, women are disproportionately punished for engaging in commercial sex. Many state laws make it a worse crime to sell sex than to buy it. Consequently pimps and clients ("johns") are rarely prosecuted. In fact in some jurisdictions patronizing a prostitute is not illegal, although prostitution is. Studies have also shown that male prostitutes are arrested with less frequency than female prostitutes and receive shorter sentences. One study of the judicial processing of 2,859 male and female prostitutes found that judges were more likely to find defendants guilty if they were female.<sup>44</sup>

Nor does the current legal prohibition on prostitution provide clear benefit to women as a class because the cultural meaning of the current governmental prohibition of prostitution is ambiguous. Although an unrestricted regime of prostitution, a pricing system in women's sexual attributes, could have negative external consequences on women's self-perceptions and perceptions by men, state prohibition can also reflect a view of women that contributes to their inequality. For example, some people support state regulation because they believe that women's sexuality is for the purpose of reproduction, a claim tied to traditional ideas about women's proper role.

There is an additional reason why banning prostitution seems an inadequate response to the problem of gender inequality and which suggests a lack of parallel with the case of commercial surrogacy. Banning prostitution would not by itself, does not, eliminate it. While there is reason to think that making commercial surrogacy arrangements illegal or unenforceable would diminish their occurrence, no such evidence exists about prostitution. No American city has eliminated prostitution merely through criminalization. Instead criminalized prostitution thrives as a black market activity in which pimps substitute for law as the mechanism for enforcing contracts. It thereby makes the lives of prostitutes worse than they might otherwise be, and without clearly counteracting prostitution's largely negative image of women.

If we decide to ban prostitution these problems must be addressed. If we decide not to ban prostitution (either by legalizing it or decriminalizing it), then we must be careful to regulate the practice to address its negative effects. Certain restrictions on advertising and recruitment will be needed to address the negative image effects that an unrestricted regime of prostitution would perpetuate. But the current regime of black market prostitution harms many prostitutes. It places their sexual capacities largely under the control of men. To promote women's equality, here are some suggested regulatory principles:

- No woman should be forced, either by law or by private persons, to have sex against her will. (Recall that it is only quite recently that the courts have recognized the existence of marital rape.) A woman who sells sex must be able to refuse to give it; she must not be coerced either by law or by private persons to perform.<sup>45</sup>
- No woman should be denied access, either by law or by private persons, to contraception or to treatment for sexually transmitted diseases, particularly AIDS, or to abortion (at least in the first trimester).
- The law should increase agency, ensuring that a woman has adequate information before she agrees to sexual intercourse. The risks of venereal and other sexually transmitted diseases, the risks of pregnancy, and the laws protecting a woman's right to refuse sex should all be generally available.
- Minimum age of consent laws for sexual intercourse should be enforced. These laws should ensure that vulnerable woman (and men) are protected from coercion and do not enter into sexual relationships until they are in a position to understand what they are consenting to.
- The law should promote women's control over their own sexuality by prohibiting brokerage. If what is wrong with prostitution is its relation to gender inequality, then it is crucial that the law be brought to bear primarily on the men who profit from the use of women's sexual capacities.

Each of these principles is meant to establish and protect a woman's right to control her sexual and reproductive capacities and not to give control of these capacities to others. Each of these principles is meant to protect the conditions for women's consent to sex—to enhance her



agency, in the language of chapter 4—whether or not this sex is commercial. Each of these principles also seeks to counter the harms to women in prostitution by mitigating its nature as a form of female servitude.

## CONCLUSION

If the arguments I have offered here are correct, then prostitution is wrong by virtue of its contributions to perpetuating a pervasive form of inequality: status inequality between men and women. In different circumstances, with different assumptions about women and their role in society, prostitution might not be troubling, or at least no more troubling than many other labor markets currently allowed. It follows on my account, then, that in other circumstances the asymmetry thesis would be denied or less strongly felt. Although prostitution as intrinsically degrading is a powerful intuition (and like many such intuitions, it persists even after its proponents undergo what Richard Brandt has termed “cognitive therapy,” in which errors of fact and inference are corrected),<sup>46</sup> I believe that this intuition is itself bound up with well-entrenched views of male gender identity and women's sexual role in the context of that identity. If we are troubled by prostitution, as I think we should be, then we should direct much of our energy to putting forward alternative models of egalitarian relations between men and women.<sup>47</sup>