

SEXUAL AUTONOMY, PROSTITUTION, AND THE LAW

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ABSTRACT

Prostitution is a morally loaded word. More than just sex for money, it implies something debased, dishonourable, corrupt. But there is something puzzling about the wrong, if any, of prostitution. Intuition suggests there is something peculiar about sex that distinguishes prostitution from other bodily services. However, if we discount out-dated prejudice about promiscuity, it remains mysterious why adding money to sex should change the permissibility of the act. The current debate broadly falls into three camps: 1) Qualms about prostitution are based on mere social prejudice about sex; 2) Sex has a special value which is debased or degraded when exchanged for money; 3) Prostitution perpetuates skewed power relations that feed into wider gender inequalities. Too often these stances respectively ignore relevant points of disanalogy between sex and other bodily activities; rely on undefended essentialist views about the value of sex and how it is debased or destroyed; or focus too heavily on contingent empirical and sociological evidence, without analysing the nature of the activity itself. This thesis takes a step back, analysing the nature of sex and money to identify what sets prostitution apart from other bodily services. I suggest prostitution blurs the boundaries between a personal service and an exchange of the body as property. This raises the question to what extent individuals can willingly surrender powers over their body to others, as one might do with a piece of property. Should a liberal state allow individuals to freely transact with their bodies in this way or not? Closer examination of these puzzles serves to shed light on the tension inherent in prostitution and helps to clarify key notions in the debate, including the concept of sexual autonomy, the objectification and commodification of bodies, and the relevance of the particular risk of harm inherent in the activity.

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INTRODUCTION

Prostitution is a morally loaded word. More than just sex for money, it implies something debased, dishonourable, corrupt. Tellingly, the OED categorizes prostitution as follows in its thesaurus: society > morality > moral evil > licentiousness > unchastity > prostitution¹. And yet, there is something puzzling about the wrong, if any, of prostitution. On the one hand, our intuitions incline us to think that there is something peculiar about prostitution that marks it apart from other bodily services, and gives us reservations about advocating it as a career choice as worthy as any other. However, if we discount out-dated prejudice about the evil of promiscuity in general, it remains mysterious why and how the addition of money to sex could change the permissibility of the act.

The current debate around prostitution broadly falls into three camps: 1) Qualms about the wrong of prostitution are based on social prejudice about sex, and there really is no principled distinction between prostitution and other bodily services²; 2) There is something special and important about the value of sex itself which is debased or degraded when sex is exchanged for money³; 3) Prostitution perpetuates skewed power relations in sex that feed into wider gender inequalities, including harm, exploitation, and the subordination of women⁴. The key concepts in this battleground are the familiar ones about the objectification and commodification of women's bodies, the undermining of women's sexual autonomy, and the direct and indirect harm caused by markets in sex. Too often, though, arguments are built on assumptions which breeze over some of the most relevant philosophical questions. Stance 1) tends to dismiss social prejudice about sex too quickly, likening it to historical prejudice around other bodily activities like acting, without examining closely enough the points of disanalogy between the

¹ The Oxford English Dictionary Historical Thesaurus:
<http://www.oed.com/view/th/class/179941> (retrieved 30/08/2014)

² E.g. Nussbaum (1998)

³ E.g. Anderson (1990)

⁴ E.g. Pateman (1988), Satz (2010)

two. Conversely, stance 2) tends to rely too heavily on essentialist views about the value of sex, and controversial implicit assumptions about the ways in which values are debased or destroyed. Stance 3), meanwhile, tends to fall into the trap of either implicitly relying on essentialist views that it ostensibly rejects, or simply telling us something perhaps sociologically important about markets in sex and their contingent empirical effects on society, but not anything particularly philosophical about the nature of the activity itself.

It is my intention with this thesis to take a step further back, to analyse the nature of prostitution itself, and to begin with some fundamental questions the answers to which are too often assumed or overlooked, but which provide an insight into just why this activity remains a point of moral and political controversy even within a politically liberal context. I suggest that there is something about the nature of sex and the social meaning attached to money that sets prostitution apart from other commercial bodily activities in a way that is at least potentially problematic. As a commercial transaction, there is an indeterminacy as to whether prostitution is characterised as a personal service or as a transaction in which powers over the body are exchanged as though it were a piece of property. This prompts an investigation into the kind of ownership we have over our own bodies and the ways in which we can transfer this ownership power to others. I suggest that the notions of bodily ownership and property ownership stem from a fundamental concern that individuals be able to exercise their autonomy by acting freely in a world shared with others. As such, there are points of overlap between the kinds of ownership claims we have over our bodies and the ownership claims we can have over property. However, there is a fundamental difference between the two where it comes to the alienation of these ownership claims. Furthermore, a closer analysis of this difference and the political justification for recognising this in law, brings us to a better understanding of the relevant notions of autonomy at play in debates about the extent to which individuals may willingly surrender power over their bodies to others.

I suggest that in inhabiting a grey area between the domains of bodily rights and property rights in the way that it treats the body, prostitution by its very nature presents several puzzles that pull liberal principles in opposite directions. It is this feature of prostitution that at once renders it morally and politically problematic and makes it notoriously difficult – perhaps impossible – to pin down *the* wrong of prostitution. Closer examination of these puzzles, however, should serve to shed some greater light on the tension inherent in prostitution as well as helping to clarify some of the key notions at play in the debate, including the concept of sexual autonomy, the objectification and commodification of bodies, and the relevance of the particular risk of harm inherent in the activity.

CHAPTER ONE

AN INDETERMINACY PROBLEM FOR PROSTITUTION

This chapter analyses the various elements of sex and prostitution with the aim of pinpointing which aspects of the activity present as problematic, and why. I begin by considering how the addition of money to certain interactions can change the terrain of moral permissibility for behaviour within those interactions, and suggesting that there may be certain activities like sex for which this changes the permissibility of the commercial interaction as a whole. This prompts an analysis of how adding money to sex characterises the interaction of prostitution, and what implications this has for the way in which the transaction is carried out. I then suggest that given the wider meaning of money, prostitution is open to being characterised in two ways, either on the model of a property transaction in which the client gains powers over the sex workers body as though it were a piece of property, or as a personal service carried out like any other bodily service. I suggest that these two characterisations are plausible both within the context of the wider debate around prostitution, and that there is something about the nature of sex itself that leaves it particularly open to both these interpretations when subjected to a monetary transaction. Finally, I suggest that this indeterminacy presents a problem insofar as it challenges us to consider the kind of ownership we have over our bodies and the ways in which this both overlaps with and diverges from the kind of ownership we can have over other objects.

I. WHAT DIFFERENCE DOES MONEY MAKE?

IF consensual sex raises no particular worries until conducted for payment, then if we want to understand the source of the problematic of prostitution, we ought to begin by asking what difference money makes. It seems that often, the terrain of moral permissibility can be shaped by the social and legal framework within

which people interact. By this I do not mean simply that if the law prohibits a certain activity, and there is a moral imperative to obey the law, then engaging in that illegal activity would be morally as well as legally impermissible. Rather, I mean that where social institutions create a framework of expectations and norms for social interactions, these can affect the moral status of certain acts carried out within that framework. It can do this by affecting the meaning attached to certain actions and interactions with other people, and by setting expectations about what we owe to one another within certain socially acknowledged roles.

A simple example of how social institutions can shape moral permissibility in this way is the unwritten code of table manners. Table manners set rules for how to act in given social settings, and determine certain roles, with expectations for how people interact given their particular role in a given setting. A guest at a dinner party, for instance, is expected to show gratitude towards the host for his efforts at hospitality. For the guest to embark on a detailed critique of any shortcomings of the food served would be considered inappropriate and rude behaviour, even if the host were out of earshot at the time. However, shift the context to one in which the diner has paid the host to cook him a meal, and we might think the guest fully entitled to voice his opinions honestly. The normative bounds of acceptable behaviour shift when the roles of the participants change from invited guest and host to paying-guest and paid-host. Part of the reason why is that the expectations about how each person may behave in respect of the other change depending on the socially acknowledged roles assigned within the given context. Money can make this kind of difference.

There is a further question, however, how such shifting of behavioural norms could change the permissibility of the interaction as a whole. Indeed, there are very many activities that can be carried out either commercially or non-commercially, and we understand that the character of the commercial transactions is different from the non-commercial ones, but not in a way that is problematic. If there is a difference between sex and these other activities, such

that exchanging money for sex becomes morally problematic, then the reason must be that the way in which money changes the expected patterns of interaction between the roles of client and worker in sex creates patterns of expected behaviour that are morally problematic or impermissible.

This gives us an indication of where to begin our analysis of prostitution. We will want to see how engaging in sex within the context of a commercial interaction might affect the terrain of moral permissibility for this activity through the norms it creates as to what is expected of each party in the interaction. One way we might think this changes is as follows. Sex usually happens within the context of mutual satisfaction of desires, if not always within a loving and respectful relationship. So even in a casual sexual encounter with a stranger, the act is characterised by each person having a desire she wishes to satisfy, and engaging with the other person in recognition of a motive on the part of the other person to satisfy her own desire through this joint activity. Each might be selfishly pursuing her own ends, but doing so by lending her body for use of the other to do the same. When a person has sex in exchange for money, however, the mutual character of the interaction becomes skewed, with the sex worker (usually a woman) instead being subordinated to fulfil the desires of the client (usually a man) with no regard on either side to the desires of the sex worker. This is driven by the expectations of a commercial transaction, summarised in the popular slogan “the customer is king”. According to this account, the mutual interaction therefore becomes one in which the client has power over the sex worker in relation to the act, and can demand satisfaction as the paying-guest at the dinner table can demand that the food be prepared exactly to his taste, regardless of what the host would prefer to eat. Each party being aware of this dynamic, their attitudes towards each other are likely to shift, with the client viewing the sex worker as a mere servant to the fulfilment of his desires⁵.

⁵ C.f. Pateman (1988) and Anderson (1990). Though Anderson argues on slightly different lines that trading sex for money does damage to the value of sex. According to Anderson, sex ought to be characterized by the values of gift and friendship. Her argument seems to work on the assumption that when sex is traded commercially, people’s attitudes towards sex change in such a way as to threaten the value of sex itself, thus making commercial sex morally problematic.

According to critics such as Carole Pateman, this shift in the power balance opens the door to domination, exploitation and harm, and sparks worries about the autonomy of the sex worker who is placed in the subordinate position. Once these problems come to the fore, proponents of this kind of argument think that the sex act has shifted from something morally neutral to an act that problematically subverts the equality and autonomy of both sex workers and women in general, and subjects the vulnerable sex worker to a high risk of harm. The suggestion is that the commercial transaction and the nature of the relation it creates between client and sex worker thus make sex within this context problematic.

There are contentious claims in Pateman's account, but it seems plausible that there is something about the wider social and legal meaning of monetary transactions that might alter how the parties to a sexual encounter relate to each other depending on whether the sex has been paid for or not, and that this could make a difference to the moral character of the interaction. Furthermore, the suggestion is that this change in attitudes and expectations may change the behaviour of both parties, making it more likely that some harm will come about as a result. The challenge, however, is to explain precisely what goes wrong and how, without jumping too quickly to the explanation that harm is simply more likely to arise from the interactions that are paid for than those which are not.

This brief preliminary consideration of how the meaning and moral significance of acts can change depending on context gives us an indication of where to begin the analysis. We'll want to look not only at how money changes the designated roles within a sex act, but more importantly why this happens, and what implications this has in terms of the permissibility of these interactions.

II. AN INDETERMINACY OF FORM

The first point of analysis is to examine how exchanging money for sex characterises the interaction, and how this could significantly change the nature of an otherwise unproblematic sexual encounter. If we begin by considering simply what it means to pay for something, there are two broad ways in which handing over money can gain us access to something when we pay for it: (1) One can obtain rights of possession or control over a thing, either permanently or temporarily, as when one buys or rents an object, or (2) One can engage the services of another person by hiring them to perform some action. I will argue in this chapter that there is something about the nature of sex that makes prostitution particularly open to being construed on either of these two meanings. Furthermore, I will suggest that in the absence of public legislation to determine the nature of the transaction, the context within which it is carried out leaves it indeterminate as to which form the transaction takes, as this will be largely dependent on the attitudes of the participants to the interaction. I will claim that there is a potential for prostitution to be undertaken on the first form of transaction that makes prostitution at once problematic and philosophically interesting. This is because there is a certain common ground between the way we relate to bodies and the way we relate to objects that makes it possible to treat bodies as though they are property, and to trade in the use of a body in the same way one might trade in the use of a hire car. However, the assertion of an individual that she wishes to use her body in this way creates a point of tension for liberal principles, and a puzzle that provides no straightforward solutions.

I will first take a closer look at the two different meanings that monetary payments can have, and then consider how these apply to the case of prostitution. The first, and perhaps most obvious thing that we can do with money is to buy something, where we exchange money for goods, thereby acquiring property rights over those goods. For current purposes, the most salient model to consider is that of private property rights, as opposed to common or collective property

rights. Private property rights entail rights of exclusivity and control over the object in question, as well as the right to transfer the property to anyone else the owner may choose to give or sell it to⁶. The second way we can use money is to pay somebody to perform a certain service, and this might happen as a one-off event or under an on-going employment contract. One crucial difference between goods and services is that goods are tangible while services are intangible⁷. This has important implications for the difference in nature between buying services and goods. In the service agreement the person paying for the service does not gain property rights in the service provider or her labour in the same way one can gain property rights in a tangible good. So the client does not gain unilateral control over the service provider, who maintains the status of an autonomous agent in her own right and retains final control over the services she provides. These differences are reflected in contemporary UK law governing the sale of goods and services, where one of the key distinguishing features of personal service agreements, in contrast to sales of material goods, is that specific performance cannot be enforced⁸.

The reasons behind this distinction between paying for goods and paying for services are rooted in a fundamental concern for the autonomous status of agents involved in these kinds of contracts, and the extent to which a person can legitimately be placed under the power of another person and bound to perform certain things against her will. As Margaret Jane Radin points out, the usual reason given for precluding specific performance of such contracts is that to enforce this would smack of slavery⁹. There is a philosophical back-story here which is of particular interest in highlighting something about the moral significance in the distinction between the kinds of claims we can contract to hold over property and the claims we can contract to hold over people. Gaining a better understanding of this will help to clarify one initial problem that I suggest

⁶ Waldron (2012)

⁷ Narasinhham (2012)

⁸ Sale of Goods Act 1979; Supply of Goods and Services Act 1982

⁹ Radin (1987)

prostitution presents us with, which is to be found in the way that it blurs the distinction between an interaction with another person involving her body, and use of her body as an object to be possessed. We find a detailed analysis of this distinction in Kant¹⁰.

Kant notes that when two people enter into a contract with one another (which may be an agreement either to transfer goods or to provide a service), each party to the contract gains what he calls a personal right against the other person and her will (or promise) to perform a certain duty. So rather than obtaining a right over a person or his labour, the contract brings into play something new – the promissory agreement – which each party is bound to against the other. This is not like holding a property right in a moral person such that each holds an exclusive right over the other person’s will against everyone else. So if A agrees to sell a horse to B, B gains a right against A that he fulfil his promise of delivering the horse within an agreed timeframe upon payment of an agreed price, and this Kant calls a personal right. On delivery of the horse, B gains property rights in the horse itself. Kant calls these property rights ‘real’ rights, which entail the characteristics of exclusivity of use and transfer rights mentioned above, and which hold against all others.

Kant presents the case of the personal service relation, his example being that between a master and servant, as involving the master having a ‘personal right in a real manner’ in his servants, thus combining some elements of property rights with some elements of personal rights. This is the right of the possession of an external thing as of a thing and the use of it as of a person. Crucially, the mode of acquisition of such a right is governed neither by arbitrary fact nor by mere contract, but by Kant’s notion of the law of the right of humanity in our own person, which lies beyond every real and personal right. So for Kant, the servants of a household belong to the master of the house as if according to a real (or property) right, because if they run away the master may forcibly bring them back

¹⁰ Kant, *The Metaphysics of Morals*

under his control by unilateral arbitration. But when it comes to the particular use he makes of a servant, the master may never decide this unilaterally as if he were her owner, because the servants are brought into his power only by power of contract, which must involve two persons gaining a personal right against the other's will to fulfil a certain promise. For Kant, any contract "by which the one party foregoes his whole liberty for the advantage of the other, therefore ceases to be a person, consequently has no duty to keep a contract, but only acknowledges power, is in itself contradictory, that is, null and invalid."¹¹ So the way in which the master wishes to put the servants to use has to be agreed bilaterally between the master and servant as equal parties to the contract.

There are certainly details to query in this account, not least Kant's claim that a master has the right to forcibly bring servants back into his possession should they run away – a right he also attributes to husbands over runaway wives. If we do not take the concept of taking the servant back into possession too literally, however, we can understand the thought behind this as explaining the way in which a service contract is binding despite the fact that specific performance cannot be enforced. We can understand it as follows: the servant, having freely bound himself to a promissory agreement to serve the master for a certain time, is under obligation to return to the master, so the master can authoritatively call him back to be held to account against the terms of the agreement. It is not made clear what system of compensation or damages would be awarded to the master should the servant break the terms of the agreement and refuse to return to service at all, but what is clear is that in Kant's view the master would have no unilateral claim to have the servant's particular service enforced.

The underlying conceptual framework of Kant's account is plausibly applicable to our modern understanding of law governing the exchange of property and provision of services. The main point we should take from it is the differentiation between property rights and the claims we can hold against

¹¹ Kant, *The Metaphysics of Morals* §30

another person, and the grounding of this difference in a certain view of the moral status of persons, and the kinds of powers we can have over other autonomous beings. It is important to note that according to Kant, the servant cannot even consent to becoming the mere property of his master in a real manner, in effect becoming a slave, because the servant's negation of himself as a full moral person would render the contract invalid. This is not an unusual stance on the question of voluntary slavery, but the assertion that there is a contradiction in making a free choice to become a slave by subjecting oneself entirely to the will of another is problematic. One of the interesting things about prostitution is that it forces us to engage with the idea of sex workers selling access to their bodies like one might sell rights to a piece of property. There is a parallel to be explored between selling bodies in this way and the choice of voluntary slavery, and one which prompts liberal reasoning to seemingly paradoxical responses. I will return to this in chapter III, but before addressing that question, it remains to be seen how these two meanings of money and the context of a paid transaction could characterise prostitution.

Setting aside for the moment the question of the moral permissibility of claiming real ownership over a person or his body, it seems at least theoretically plausible that we could model prostitution to fit either of the two uses of money, which allows us to characterise prostitution in two different ways:

(i) Prostitution as body selling: When a client exchanges money to have sex with a prostitute, the transaction is carried out on the model of selling certain claims over the sex worker's body as a piece of property. The sex worker's body is thus commodified in the sense that the client gains control of the sex worker's body for a certain time and acquires rights of use similar to those of property rights, including exclusive use, control rights, perhaps even transfer rights. On this model, once the money has been paid, the sex worker's body is wholly subject to the client's will, and the client has unilateral control over it. Should the sex

worker change her mind about the pre-agreed use to which her body is to be put, she has no claim to reclaim the control of access to her body that has been granted to the client.

(ii) *Prostitution as a personal service*: The sex worker and client enter into a contract as fully autonomous individuals, each gaining a personal right against the other of fulfilment of the agreement. Both sex worker and client recognise each other as equal parties to the contract, and for the duration that the service contract holds, the client must consult with the sex worker for any particular service he wishes to be performed. Should she change her mind about providing the agreed service, specific performance cannot be enforced.

The next question to ask is whether it is plausible that adding payment to sex, and conducting it within the framework of accepted attitudes towards the wider meaning of money, can characterise prostitution in either of these ways in practical terms. If both of these characterisations *are* plausibly attributable to prostitution given the context of the monetary transaction, then it is evident from the discussion above that form (i) of prostitution as body selling might raise immediate concerns. Not only does it represent a significant departure from ordinary, unpaid consensual sex to a greater extent than form (ii), but it does so in a way that raises concerns about the preservation of the sex worker's autonomy. So are these plausible characterisations of prostitution? Much of the public debate over prostitution certainly seems to be divided along similar lines to this, with those opposed to allowing legalised prostitution often talking about it in terms of women literally selling their bodies, while those with a more permissive approach downplay the special status of prostitution by comparing it to other common and widely accepted services that people carry out with their bodies¹².

¹² As an example of the body-selling stance, Mary Honeyball MEP, discussing a French Parliament vote to impose fines on clients who use the services of prostitutes on BBC Radio 4's *Woman's Hour*, said: "as long as men are able to buy women's bodies, that is seriously detrimental to gender equality (...) this is not an occupation or a service like any other". Nussbaum (1998) is an example of the latter stance.

It should be noted at this point that there is a third option that is also commonly invoked, whereby the thing taken to be commodified and sold is not the bodies of sex workers, but rather their sexual labour¹³. This commodification of sexual labour view relies on certain claims or assumptions about the inalienability of our sexual capacities or sexual labour. These inalienability claims further rely on drawing some distinction between alienable and inalienable capacities by distinguishing those capacities which are extrinsic or intrinsic to the person, respectively¹⁴. So the argument that prostitution is wrong on the basis that sexual labour is not the sort of thing that should be commodified can in this regard be included under the characterisation of prostitution as body selling. This can be brought out if we consider what is meant by alienation of sexual labour. Alienation here must be distinct from merely sharing, because it seems that we share use of our sexual capacities any time that we have consensual sex. So there must be something about making that sexual capacity available to a client that means that it is alienated, rather than shared. This suggests the view that once sold, the client gains certain rights, claims and powers over that capacity, thereby giving him ownership over that capacity in a way that makes it subject to his will, rather than to the sex worker's. The capacity is thus removed from the sex worker's control, much as one can alienate a piece of property to somebody else. We might on this view want to talk of prostitution as 'capacity selling', though sexual labour, even construed as an inalienable capacity, is so closely tied to the physical use of our bodies, that we can still apply the title 'body selling' here. On the other side of this view, if sexual labour is instead viewed as an alienable capacity, then it would seem to fall unproblematically under title (ii) of prostitution as a service, just as a pop singer's capacity to sing and dance might be uncontroversially offered on the market.

The challenge for the commodification of sexual labour view is to explain how to draw a principled line between those capacities which are intrinsic to the

¹³ Examples of this view can be found in Radin (1996) and Anderson (1990).

¹⁴ E.g. Radin (1987)

person, and those which are extrinsic. In particular, arguments that seek to show that sexual capacities are intrinsic to personhood rely too heavily on dubious essentialist claims about our relations to sex. An additional complication for this view is that there seem to be many other commercial services that involve using capacities which strike us as equally intrinsic to our person as sex, but which are not deemed problematic, for example teaching. The question of what makes prostitution different from these other kinds of services is key to understanding where the puzzle of prostitution stems from.

So far, it seems that the two characterisations of prostitution, modelled either on a property exchange or as a personal service, are plausible at least within the terms of the general debate, where some of the main worries about prostitution stem from concerns about the commodification of the body or its capacities, and that treating them in this way poses some risk directly to the autonomy of the sex worker and indirectly to gender equality (perhaps through an inference in social attitudes that all women's bodies are up for grabs to be 'owned'). The real question, however, is whether these characterisations are plausible given the nature of sex itself. In other words, is there something distinctive about sex itself which leads to the body being commodified as an object for trade?

III. A PROBLEM SPECIFIC TO SEX?

We can begin to answer the question of whether there is a problem specific to sex and prostitution by taking a closer look at the nature of the client's desire or motivation for paying for sex, which, I take it, has two core elements. The first of these is that the client wishes to gain physical sexual gratification from the sex worker's body. Secondly, it should also be noted that when a client goes to a sex worker, he is deliberately seeking out another living, breathing person to have sex with, as opposed to an inanimate sex toy. So to characterise the client's motive

purely in terms of sexual desire for a body as a *mere* object would be too simplistic. Nevertheless, it is plausible that in many cases, the client's desire is driven mainly by the element of physical sexual gratification, and that this involves some measure of objectification in the sense of viewing the animate body of the sex worker as the object of this desire. So while the client desires to have sex with a living person, the desire itself is directed only towards that aspect of the person which is relevant to the sexual encounter. This may include certain capacities to move, talk, and display (or simulate) reciprocal desire, but is likely to exclude any regard for the sex worker's wider psychological life, memories, emotions or beliefs. This is not to say that such desire is incompatible with also recognising the wider psychological life and attributes of one's sex partner, just that the sexual desire itself is not directed towards these attributes.

We find a view similar to this in Kant, who thought that this caused a problem for sex itself that could only be solved by formalising the sexual relationship within marriage¹⁵. The problem for Kant is a threat inherent in sex to the autonomous status of the persons involved. Without committing to that strong conclusion, this Kantian line of reasoning can shed some light on why sex causes concerns about autonomy, and why the introduction of money to the equation might exacerbate this. Barbara Herman¹⁶ explains Kant's argument as follows. Sexual interest in another is not interest in the other as a person, but solely in the body and sexual attributes of that person. It is these sexual attributes that become the object of interest. This causes a problem, because for Kant, the body is inseparable from the person, so if sexual appetite takes as its object the body alone, then by extension it objectifies the person as a whole. But in regarding the other person as an object for the satisfaction of this desire, the humanity of that person as an autonomous being is subordinated to the desire. For Kant, it's not enough to argue that you simultaneously respect the other person *as* a person even as you objectify his body for sexual use. In acting on the impulse of sexual desire, Kant would say, you are acting on an impermissible impulse, and subordinating

¹⁵ Kant, *Lectures on Ethics*

¹⁶ Herman (1993)

the humanity of your partner to that impulse. A passage on this from the *Lectures on Ethics* strikingly mirrors many contemporary concerns about objectification arising from prostitution:

“Taken by itself {sexual love} is a degradation of human nature; for as soon as a person becomes an Object of appetite for another, all motives of moral relationship cease to function, because as an Object of appetite for another a person becomes a thing and can be treated and used as such by every one.”¹⁷

Kant’s fundamental worry here is that sex by its nature inevitably involves the use of another person as a mere means to the satisfaction of an appetite. Regard for the other person as a free and equal end in himself is excluded from the sexual appetite. This being the key element of personhood for Kant, the object of lust is therefore degraded to the status of a mere thing.

We may well find this an implausible critique as Kant intends it to apply to all sexual activity, but the central thought that sexual desire can lead to objectification in this way is worth examining. And if it is true that sex can lead to the bodies of people being viewed as mere things, then it seems compatible with this that these things be treated as appropriate to buy and sell as commodities. Note that we needn’t even stretch to accepting that the person is *necessarily* degraded to the level of a mere thing when the sexual appetite subordinates the other as an object for its satisfaction, as Kant thinks. On the contrary, one might think it perfectly possible to separate respect for the person and sexual use of the body such that A can use B’s body as a mere tool to her sexual appetite, while bracketing all other aspects of B’s person from this use. Something along colloquial lines of “Sure, she’s using my body, but she’s not using *me*.” We can even concede that in some cases, sexual desire may be directed towards exactly those aspects of personhood that are integral to free agency, such as when we find ourselves sexually attracted to features of personality such as ambition,

¹⁷ Kant, *Lectures on Ethics* p.163

intelligence, or wit. But even with these concessions, there is surely some truth in the claim that sexual desire viewed in a narrow sense purely as physical desire for a body has the tendency to objectify the body as a mere tool for its own satisfaction. Crucially, it is not *necessary* for the fulfilment of sexual desire that any regard be paid to the personal attributes of the person whose body one desires, or whether they have a reciprocal desire.

Setting aside for the moment the question of whether this kind of objectification is morally suspect or not, we first want to know whether such objectification is likely to happen when sex is had for payment, and if so, whether this could plausibly lead to the transaction being construed as an exchange of the body as property. If, as has been suggested above, it is the fact that regard for the wider personal attributes of one's sex partner only contingently comes into sexual desire that can lead to an attitude of objectification, then it seems plausible that this wider regard for the person is more likely to be absent from a client's sexual motive when paying for sex. As Carol Pateman¹⁸ has suggested, the client needn't pay any regard to whether the sex worker has any reciprocal sexual desire for the encounter beyond her agreement to participate for a certain price. Indeed, the subtext of prostitution is that the sex worker would not be engaging in that act if it weren't for the money, suggesting either a lack of reciprocal sexual desire or at least the complete irrelevance of this to the act. If the services are advertised in advance, it is presented as a given that once the client hands over the money, he will gain access to the object of his desire without having to engage with the sex worker on any personal level as to her reasons for engaging in that act with him in particular.

The purpose of raising these points is not to advocate an essentialist view of sex as an activity that ought always to be characterised by reciprocity of desire or some level of personal relationship, nor to endorse Pateman's claims that prostitution inherently creates a master slave relation between the client and sex

¹⁸ Pateman (1999)

worker. The point is merely to bring out that if there is an element of objectification in sexual desire in its most basic form, then it is plausible that when sex is bought, this tendency to objectification is amplified because there is less onus on the client than in even the most casual sexual encounter to pay any regard to the sex worker's personal attributes, inner mental life, or reasons for engaging in the act beyond her physical sexual performance. This tendency in turn makes it possible that the transaction be viewed by both client and sex worker as one in which the client pays for direct access to the object of his desire, in a way that subordinates that object (the sex worker's body and sexual attributes) to the fulfilment of his desire.

In light of this, we might think it plausible that the transaction has the potential to be characterised on the model of the client acquiring property rights over the sex worker's body, because for the client to gain direct access to and control over her body as if alienated as a piece of property would be the most direct way of satisfying the client's desire in the body as an object. If we were toeing the Kantian line, we would jump from this to concluding that the person, too, is 'sold' in this instance. But to refrain from committing too soon to morally loaded conclusions, we can say that perhaps the sex worker's personhood needn't come into it, perhaps this can be bracketed from the exchange, and the transaction really treated as an alienation of ownership over the body, and not quite the whole person.

This brings us as far as accepting that there is something about sex that makes it a strong candidate for leading to the commodification of bodies as things that can be treated like property to be bought, sold or hired. But this does not yet get to the heart of the puzzle, which is to explain what is special about sex that makes it more troublesome than other activities when conducted for money. We might think the argument above could well apply to other, more innocuous activities.

Take ballroom dancing as an example. If I want to dance with somebody, my appetite for doing so may be purely based on a desire for the physical sensation I get from doing the polka. I can only get this kind of satisfaction if I have a dance partner of adequate height and skill, but I'm really not bothered at all whether he particularly likes dancing or just does it for the money. My appetite for dancing, then, has as its object my dance partner's body and only those characteristics of him that pertain to his dancing skill. I have absolutely no regard for his wider psychological life or any attributes that pertain particularly to his status as a free agent with his own ends to set. If I'm looking for a new dance partner and want to convince someone to dance with me on a Friday night, I contemplate two options. The first is that I can go to the local dance club and find someone there who will agree to dance with me, perhaps because he is looking to satisfy a similar appetite he has for dancing. This would involve engaging with him on a personal level, probably making some small talk, and generally acknowledging him as a person with his own goals and reasons for dancing. The alternative is to leaf through the classifieds section of the club's newsletter and find somebody who is advertising to hire himself out as a dance partner. I take this option because I'm short on time, and I never was a fan of small talk anyway. It's convenient to me because as the client, I can get straight down to the business of dancing and bracket away the particular personhood of my dance partner as something I needn't engage with. It suits me to hire his body in this way, as I could hire a car to drive for a weekend. Once I've paid him the money for a certain number of hours, I know that I will be entitled to use his body to polka with for the duration of that time.

Does this not mirror the way in which the sexual appetite leads to objectification and commodification on the account given above? If it does, it seems we are either forced to concede that there is nothing particularly problematic about prostitution, or that paying somebody to be a dance partner could lead to exactly the same kind of problem as prostitution does. If we want to take seriously the intuition that there is something different about sex and

prostitution, then we should try to identify some key differences between sex and activities like dancing which share the feature that the desire in each case is for a certain use of another person's body as a thing.

One way of drawing out a difference between dancing and sex is to consider the mechanisms a person would have to use in order to coerce another into dancing or having sex with him. Getting somebody to dance with you against his will would require psychological coercion by means of intimidation such as physical or psychological torture or threats, in order to 'persuade' him to dance with you. These tactics, however brutal, work on the assumption that the dancer is an agent who makes decisions based on certain motives or reasons. The aim of the intimidation tactics is to force the dancer's balance of reasons in favour of performing the task at hand. We can still say that the intimidated dancer decides (or capitulates) to dance with the coercer, even though it is strictly speaking against his will to do so. In this sense, the mechanism involved is one of manipulation of the dancer's decision-making as an agent. This kind of coercion certainly violates Kant's imperative to never treat another merely as a means, and insofar as the dancer is being treated as a mere tool to the end of the coercer, Kant would condemn this as treating the dancer in a way that subordinates his full humanity. But what is clear is that the coercer cannot treat the dancer as a *mere* object to be owned and directly controlled, because he must pay attention to the dancer's own agency in order to successfully manipulate it towards his own ends.

Sex differs here, because it clearly is possible in some cases for a coercer to achieve his end of sexual satisfaction by pure physical force – by raping his victim. Here, the mechanism by which the end is forcibly secured needn't pay any regard to the agency of the person who is raped, so it is compatible for the coercer to view the victim's body as a mere object, comparable to any other non-agential thing one might possess. Of course, this may not apply for every case. For instance, a client may require for his sexual satisfaction that the sex worker

present herself as though she is enjoying the encounter, and engaging in it of her own choice regardless of the money. In order to achieve this by force, the client would clearly have to use similar intimidation tactics to those discussed above. But the point I wish to make is that the mere fact that it is possible, given the nature of the act and the object of desire involved, that the object of sexual satisfaction be procured by pure physical force with no regard to the agency of the victim, differentiates sex and prostitution in some respect from other services such as dancing.

There is a problem, however, that this criterion does not pick out sex on its own as a special case. It would also capture activities like that performed by the hypothetical colonoscopy artist suggested by Martha Nussbaum¹⁹ as an example of a bodily service that is intimately invasive without causing the same concerns that prostitution does. The colonoscopy artist gets paid to have the latest colonoscopy equipment tested on her. Nussbaum's point of course is precisely that the two activities are comparable, and that we only judge them differently because of the social stigma attached to sex. But if we want to find a principled distinction between these activities, we will have to dig a little further. One suggestion that has been made to distinguish between prostitution and colonoscopy artistry, among other bodily services, is that it is not essential to the task that the colonoscopy artist be a person. If the technology existed to make a robot with all the relevant features for the test, then it would make no difference to the tester whether they use a real live person or the lifelike robot for the test. There may even be many reasons to prefer the robot, such as protecting the human test subject from any risk of harm. The same can be said of dancing, where if I could procure a sophisticated dance robot, this would be just as good to me as hiring a person as my dance partner, their skill levels being equal. For most seeking sex from prostitution, however, it does seem integral to the task of achieving sexual satisfaction from a sex worker that the worker be a real live person, rather than a super-realistic sex robot.

¹⁹ Nussbaum (1998)

On this view, what creates a problem is the fact that in seeking to pay somebody for sex, one is deliberately seeking out a person rather than an object to do this with. The goal that the client has in mind is precisely a certain use of a person. This is contrasted to the colonoscopy tester or my dancing example, where the relevant goals are to test the equipment and for me to get my kicks from dancing, respectively. Though people can play the role of being a means to these ends, they could just as well be substituted by the right kind of sophisticated robot without affecting the achievement of the goal. Substitute a sophisticated robot into a sexual interaction, however, and the goal of gaining sexual gratification from a person is frustrated.

We may well accept the basic premise of this line of argument. But it is then puzzling as to why this aspect of sex and prostitution should cause a problem. Going back to our Kantian toolkit, we can immediately condemn the principle of setting as one's goal the use of another person as a mere means to the satisfaction of an appetite. But if we re-examine the colonoscopy artist and dancer cases, it is not clear that these would always escape Kantian condemnation either. Although they don't have as their goal the use of a person in the same way, in cases where these activities use a person rather than a robot, that person is also vulnerable to being treated as a *mere* means to the intended end. This would seem then to be a fairly weak distinction between sex and these other activities. The second oddity with this line of argument is that if we're worried about people being treated in a way that degrades their humanity by reducing them to mere objects, then why should we think it makes it *less*, rather than *more* problematic if the person providing a certain service could just as easily be replaced by a robot? It seems we've now turned the original worry on its head, from being that the object of desire may as well be a mere thing, to being that the object of desire must be not merely a thing but a person.

And yet, there is something in both of these suggestions that strikes a chord. There is clearly something about the close relation between the body and the person that raises concerns when either the material ‘thing-like’ aspect of the body is dissociated from and given precedence over the agential qualities of the person, or when another is specifically coveted with the intention of using the *person* in a thing-like way. Prostitution seems to be special in combining elements of both suggestions explored above, and this distinguishes it from more banal activities such as dancing. The combination is somewhat paradoxical – there is a strong tendency in the desire to treat its object as a mere thing to be wholly subsumed under one’s own physical control, yet it is necessary to satisfying the desire that this specifically be the body of another person. This begins to look as though it will take us full circle back to the Kantian worry about persons being subordinated as objects to the desires of another. But to jump there would be too simplistic, not least because this would again lead us away from a specific point about sex and prostitution to a much more general principle about the right and wrong ways to treat people. And there are many wrong ways to allow oneself to be treated that don’t justify interference by others, let alone regulation or prohibition under law. Nevertheless, it indicates that there is a particular tendency in the very nature of sex, which is amplified by the addition of money, that leads to reasonable concerns about the kind of control that people can subject themselves to when offering their body for the use of another for sex.

Viewed this way, we can see how sex is particularly vulnerable to being construed as a commodity in the sense that monetary transactions in sex are treated on the model of a property exchange, as described under point (i) prostitution as body selling. This is because if a client desires something that can be regarded as a mere object over which to gain control, but one that must deliberately be sought from a person, there is no great leap to treating people as owners of their bodies with the power to grant others control over them for a certain price. In some sense, for the client to gain direct access to and control over the sex worker’s body as if it is in the client’s possession would be the most direct

way of satisfying the client's desire in the body of the sex worker as an object.²⁰ In what follows, I will explore the idea that subjecting sex to a monetary transaction within the framework of common market expectations about paying for possession of a thing brings up a series of challenges for liberal principles. Important questions arise about the extent to which a person can willingly sign away control of her own body and demand that her choice be formally recognised under law.

On the other hand, the aspect of the client's desire that is explicitly directed towards a certain type of interaction not with an inanimate body, but with a living person, necessarily brings with it the possibility of recognising that person as a full agent in her own right, with her own sexual desires and control over her own sexual life. There is nothing in the desire of the client or in the interaction itself which precludes the possibility of any instance of prostitution being characterised along the model of a service contract as described in point (ii). Given that under normal circumstances, consensual sex between two adults involves this mutual recognition of autonomy, manifested in the act of gaining consent from one another, it seems clear that the addition of payment for the act needn't necessarily change this fact, as the institution of money makes room for this kind of transaction in the service contract.

In the absence of any particular rules governing the mode of money exchange upon which prostitution must be carried out, then, it seems there is an indeterminacy as to how prostitution as a class of transaction is defined or characterised as a whole, and it remains open as to how each individual prostitution transaction is undertaken. I take this indeterminacy to be a problem

²⁰ Sex is not unique in this respect, as there are other activities that demonstrate the same tension between the use of the body as a possession and the specific desire that the objectified body belong to a person. Commercial surrogacy can be seen to present this combination, where the body and the purpose to which it is put can be conceptually abstracted from the personhood of the surrogate mother, and physical coercion could suffice to forcibly impregnate a woman and make her carry it to term. Though in one sense this is an activity that could be carried out by a machine if a sophisticated foetus incubator could be developed, it is plausible to think that surrogacy through a person, rather than a machine would still be more highly prized as a method of providing the baby with an 'authentic' pregnancy, rather than a mechanical one, much in the way prostitution is held distinct from sex with super-realistic sex dolls.

in two senses. First, in the sense of a puzzle to be solved – this indeterminacy challenges us to consider how and why the kind of ownership we have over our own bodies differs to the kind of ownership we can have over property, and the different ways in which these may be permissibly transacted. Second, the indeterminacy itself presents a moral and political problem. I will suggest in the following chapters that treating the body as property in transactions like those of body-selling is morally questionable in a way that is politically relevant given a liberal concern for protecting the autonomy of individuals. If prostitution contains the inherent indeterminacy of form suggested above, then prostitution as a class of activity remains problematic as long as the indeterminacy persists and the possibility remains open of individual transactions being carried out on the model of body-selling. For now, I hope to have shown that there are adequate grounds to frame the problematic of prostitution in terms of this indeterminacy of form, and the consequences this has for the legitimacy of engaging in prostitution from the point of view of autonomy. The following chapters will take up the challenge posed by this indeterminacy – to investigate the ways in which the type of ownership we have over our own bodies is, and isn't, like the ownership we can have over other objects, and in what ways this may become the concern of the state within a political liberal framework.

CHAPTER TWO

THE BODY AS PROPERTY?

Having set up the indeterminacy problem within prostitution regarding whether the commercial transaction is characterised as service-provision or as body-selling, the next question to answer is: what is wrong with body-selling? In order to answer this question, we need to tease out the distinction between property rights and bodily rights, in order to find out what kind of ownership we have over our own bodies. Clarifying the nature of bodily self-ownership will shed some light on whether this kind of ownership includes the right to sell or to hire out one's body in the same contractual terms that one can sell or hire a piece of property one owns, such as a car or apartment. The focus will be on the kind of case in which a person willingly wishes to alienate her body as though it is property in this way. There is no doubt that there are current markets in sex based on exploitation and slavery, in which girls' and women's bodies are traded against their will as the property of pimps. This sort of trade in persons is obviously wrong, but the multitude of wrongs involved make it harder to isolate any wrong specific to prostitution, as opposed to other similar forms of forced slavery and physical abuse. Focussing instead on the hypothesis of a free agent who wishes to sell her body as property will help us to abstract away from contingent problems of domination and harm arising from prostitution and hone in on the core nature of the act itself. Another advantage of this approach is that it immediately brings out one of the key puzzles of prostitution for liberals. If liberal principles demand that agents be left free to act as they please short of causing harm to others, then if an agent makes a free and informed choice to engage in an activity which is deemed to carry some risk of harm to herself or threat to her autonomy, what reason could there be to prevent her from doing so?

I shall begin by taking a closer look at a Kantian account of the grounding of property rights and the supposed incompatibility of having property rights in

one's body. This account is of particular interest because it grounds both institutional property rights and natural bodily rights in the need to enact our autonomous nature, but suggests that attributing property rights over the body would be incompatible with the full and equal freedom of all. So if prostitution causes concerns about autonomy by blurring the lines between treating the body as a person and treating the body as property, then this Kantian line of reasoning provides a good starting point from which to investigate this problem.

I. A KANTIAN DISTINCTION BETWEEN THE BODY AND PROPERTY

Barbara Herman, who suggests that it might after all be worth thinking about Kant on sex and marriage²¹, elucidates Kant's argument for property rights in terms of a public institution providing a necessary solution to an otherwise unsolvable moral problem. The problem Kant identifies is this: In order to exercise our full autonomous nature as rational beings, we need to be able to claim things in the world as our own property. This requires using force to exclude others from using the things we want to (e.g. chasing others off a field we have cultivated to grow crops). But this use of force is illegitimate, as it is incompatible with the full and equal freedom of others, and so it lacks authority. In order to establish property rights that depend on authority rather than force, "We need an institution of property – conventions, conditions of enforcement – because there is no natural "right way" to allocate possession."²² We might reconstruct this argument as follows:

- (1) Exclusion by force of anyone from use of anything is wrong.

- (2) Without the possibility of rightful exclusion, secure use is impossible (morally impermissible).

²¹ Herman (2002).

²² Herman (2002) p.67

- (3) Since effective agency requires secure use (possession), a system of rights and coercive enforcement that defines conditions of legitimate possession and use is necessary and justified.

A puzzle in this argument is the step from (2) to (3), where we can ask why the implementation of a public institution of property is the necessary condition of legitimate possession. Indeed Arthur Ripstein points out that we can ask why a different Kantian option for defending rightful exclusion of others from something in the state of nature couldn't apply for property, namely the concept of 'hindering a hindrance to freedom'²³. The idea is that, in the state of nature, if somebody tries to interfere with you by, for example, trying to cut off your hand, you have a right to prevent them from doing so by force on the basis that the other person is attempting to hinder your freedom, which is contrary to the principle of the full liberty of each compatible with the equal liberty of all. So hindering this attempt at a hindrance of freedom by force presents no problem in terms of hindering the attacker's freedom. Ripstein points out that we might ask why this doesn't apply to property as well – if I need to claim property in order to exert my full freedom, why could I not defend my exclusion of others from it by force along the same lines?

An illuminating response to this question is provided by Japa Pallikkathayil²⁴, who argues that property rights suffer from three problems outside the context of civil society: (i) an indeterminacy regarding what one must do to acquire a property right and regarding what counts as interference with a property right; (ii) a problem of adjudicating for each case where reasonable disagreement arises as to whether principles of fair acquisition or protection from damage have been breached; (iii) each person would lack the assurance that others will abide by these rules. These problems make the universalization of claims to property and invoking a principle of 'hindering a hindrance to freedom' problematic, if not impossible without an institution laying down determinate rules for the acquisition

²³ Ripstein (2009)

²⁴ Pallikkathayil (Forthcoming)

and protection of property. As Herman indicates, public rules are required to determine property rights because the question of how property rights are shaped is to some extent up for grabs.

On the face of it, bodily rights do not seem to face this problem, because on Kant's view, the innate right to freedom necessitates the right to one's own body, as it is our body that anchors us in the world and allows us to act on our will. So there is no need to create a determinate system for the acquisition of bodily rights, because there are already naturally determinate rules for this.

Granting it is already naturally determinate what counts as our own body, we can still ask whether the rights we hold over our naturally determined bodily boundaries could be the same, or similar to property rights, including, for example, transfer rights. On the Kantian account, because property rights are acquired rights, in order to have some property right over one's body, one would have to actively lay claim to it as one's property at some point. If it were possible to do this, in order to be consistent with the equal freedom of others, it would have to be possible in principle for others to gain the same property rights in your body. But this possibility would be inconsistent with the innate bodily rights one has via the innate right to freedom²⁵. So Pallikkathayil argues that the Kantian view of bodily rights grounded in the innate right to freedom excludes the possibility of having property rights in your body.

For Kantians, bodily remain fundamentally grounded in our status as free beings and the innate right to freedom, and as such the main core of how bodily rights are conceived and protected is not 'up for grabs' as in the property case. On the basis of her claim that having a property right in your body is inconsistent with having an innate bodily right to it, Pallikkathayil concludes that this means we have no direct right to transfer parts of our bodies to others. It might be possible to claim a property right in a body part that had been alienated from

²⁵ *Ibid* pp.14-15

one's body, if rules were in place to determine what counts as alienation, but this would involve a two-step process of first removing the part from one's body, and then claiming it as one's property within the relevant framework of property rights.

This account grounds the separation of bodies and property firmly in the concept of the innate right to freedom, and by positing a model of having property rights in the body as in tension with this grounding. Only by alienating an organ or appendage as no longer part of your body could you then claim a property right in it, at which point there is a public framework of property rights within which you could legitimately transfer it to somebody else. While it is part of your body, however, it is deemed to be inextricably linked with your person, and nobody can claim control rights over your person because this is incompatible with the full and equal freedom of all. Even if you were to willingly grant this type of control over your being to another person, this for Kant would be impermissible because the bodies of persons are not the kinds of things it is permissible to sell, even if the body in question is your own. To do so would be to degrade your own moral status as a free and equal being. To recap, if I had property rights in my body, then it would have to be possible, in principle, for anyone else to claim property rights in my body. As such, any innate right to my body, and thus to the instrument that makes it uniquely possible for me to exercise my freedom, would be undermined.

Kant's wider views about the impermissibility of acting on sexual desire aside, if we consider the relevance of this view for prostitution, we can see how it presents a case against treating bodies as the kinds of thing that can be bought or sold on form (i) of prostitution as body selling outlined in chapter one. Though one might be able to get around the Kantian rules by alienating parts of one's body, the type of body selling that prostitution would involve could not be achieved by alienating a part along these lines, as sex involves use of the body as a whole, or at least use of an attached body part. So this brings us towards

suggesting that there may be legitimate reasons based on a concern for autonomy to worry about prostitution if it contains this possibility, even when this is undertaken entirely voluntarily.

However, there are problematic gaps in this account. While Pallikkathayil's argument provides plausible grounds for there being a distinction between property rights over external objects and the kinds of rights we have over our own bodies, one might still question why innate bodily rights must exclude the possibility of transferring control of one's body or body parts to somebody else, as if it were one's property. There would seem to be no tension on the reasons given between the principle of innate and equal liberty for all, and a claim that each person has innate property rights over his own body from birth. In order to exclude this possibility, a further argument would be required to show that transferring one's bodily rights to another person is incompatible with autonomy.

In order to address this question adequately, it will be worth taking a more careful look at the differences and similarities between bodily rights and property rights, and how both are linked to the autonomous expression of personhood. Particular attention will be paid to the ways that property exchanges and bodily interactions affect the pattern of claims and obligations people hold against each other when they enter into certain agreements together. The aim will be to draw out the implications of carrying out prostitution modelled on hiring a body just as one might hire a piece of property to see what goes wrong and in what way. This will provide some further insight into the specific ways that a person puts herself at risk when she sells or hires her body out as property, whether this be risk of harm or threat of diminished autonomy. And this, in turn, will provide a suggestion of what kinds of reasons there could be from a politically liberal perspective to regulate or prohibit these kinds of body transactions.

II. OWNERSHIP AS A CLUSTER CONCEPT

While it is clear from the Kantian discussion that the rights we have over our bodies are not all simply the very same as property rights, we must still take seriously the suggestion that we own our bodies in a relevantly similar way to the way in which we own property. Whether we take the phrase ‘bodily self-ownership’ as indicating that some of the very same claims involved in property ownership apply to bodily ownership, or whether we take it to denote an analogical relation between the claims we have over property and those we have over our bodies, the idea that we have some kind of ownership over our bodies plays a powerful intuitive role in notions of freedom and self-determination.

To take a trivial example, if I own my shoes and my bag, I may customise my bag to match my shoes. I may also paint my fingernails to match my shoes and bag. In doing so, I seem to treat my fingernails as objects in the same way as my bag and shoes in some respects, both in my concern for the appearance of these objects and in exercising my power to control or modify their appearance. If I am going to a party with a friend of mine, I might also want his shoes, bag and fingernails to match mine, but I may not paint his shoes, customise his bag, or apply polish to his fingernails without his permission. If I try to do so, he might well complain “get off my bag!” or “get off my fingernails!” – they are his bag and his fingernails, and he has the exclusive right to determine what colour they be painted, if any, just as I have an exclusive right to determine the colour of my shoes, bag and fingernails, because they are mine.

The distinction is intuitive: when it comes to deciding what happens to things like shoes, bags, or fingernails, the person who has the power to make those decisions is the owner of those things. It might sound odd to say that I am the owner of my fingernails, but we readily engage in the language of ownership in our everyday interactions. Let’s imagine some teenagers in an art class. One of them, Jenny, asks the teacher, “Miss, may I do some fingernail art?” The teacher

might reply, “That depends, whose fingernails are you going to be painting?” If Jenny responds with “I am going to paint Max’s fingernails”, we can imagine the teacher replying “Well, make sure you get his permission first, but if he says no just paint your own.” We could just as well substitute the word ‘fingernails’ here for ‘pencil case’ and the exchange would sound as natural. This is because the teacher has overall authority over the activities that are carried out in the classroom under her supervision, but when it comes to certain permissible actions being carried out on pencil cases or on fingernails, it matters whom those pencil cases or fingernails belong to. It matters because the owners of those things have the last word as to what is done to the objects they own or the body parts which are theirs.

So in some cases and with respect to some actions, at least, the idea of ownership over our bodies, or parts thereof, can be understood in the same way as ownership over property. There is at least some common ground between what it means for those fingernails to belong to Max (rather than Jenny) and for that pencil case to belong to Max (rather than Jenny), and what kinds of constraints Max’s ownership of those things places on the actions of other people. However, if we press a bit further, we begin to see some obvious ways in which pencil cases and fingernails differ.

We can easily imagine a trade in pencil cases, whereby Jenny sells her pencil case to Max, so that Max becomes the owner of the pencil case. Having acquired the pencil case, Max may now do with it whatever he wishes. It would seem odd, though, to suggest a similar trade in fingernails, so that Jenny can buy Max’s fingernails, and thereby acquire all the same powers of exclusive use that Max acquired over Jenny’s pencil case. Admittedly, the case is complicated somewhat by the fact that Max’s fingernails are attached to his fingers, and that if Jenny wanted to remove Max’s fingernails to physically take them into her possession, this would cause Max some pain and distress. But even if the putative sale were made on the condition that Max’s fingernails would remain attached to

his hands, it wouldn't seem quite right to say that those things attached to Max's hands are now Jenny's fingernails. Rather, we find the language of permission more appropriate here. If Max cedes some control over his nails to Jenny in return for a sum of money, we are inclined to say that Max has given Jenny permission to use his nails in a certain way, perhaps to paint them whenever she likes. But even with this permission granted, we would still say that those are Max's fingernails. And if they remain Max's fingernails, he retains the power to decide whom he gives permission to paint them to. So if he tires of Jenny constantly painting his nails, he can revoke the permission he gave her to paint them whenever she likes. If Max sells his pencil case to Jenny, however, he cannot claim it back after the sale if he wants to regain control of it.

But what if Max explicitly wanted to sell his nails in the very same way he can sell his pencil case? Perhaps he could demand a higher price for them this way, or perhaps he just doesn't want the bother of ever having to think about what happens to his nails again. Would it be permissible, or even possible, for Max to give Jenny the same kind of ownership rights over his fingernails as he can give her over his pencil case? Even if a condition of non-removal of the fingernails from Max's hands were built into the sale contract, what the sale would mean for Max is that he would no longer have the power to grant or revoke permissions as regards what happens to his nails. That power would be transferred to Jenny, and Max would have no right to claim it back.

Does the kind of ownership we have over our bodies include the power to sell or rent parts of our bodies in this way? I suggest the answer is no. A plausible overview of the differences between trades in things like pencil cases and powers over body parts runs as follows. If Max sells his pencil case to Jenny, giving her exclusive use of it, and then changes his mind, he has no claim to take it back. If Max accepts money from Jenny to grant her exclusive use of his nails as regards their painting, and then changes his mind, he retains the right to claim back control over the way his nails are painted. If he has accepted money from Jenny in

return for her having this power over his nails, he may be obliged to compensate her by paying some or all of it back. However, Jenny would have no claim to forcibly carry on painting Max's nails against his will, as she would to retain possession of the pencil case if Max had sold that to her.

The challenge is to explain why this is by fleshing out a fuller account of the ways in which bodily self-ownership and property ownership overlap, and in what ways they differ. This should help to clarify why rights of bodily-self ownership are held to be inalienable in the sense introduced above. In turn, this will enable us to pinpoint how and why things go wrong when a person relinquishes certain ownership claims over her body to another person. The need for an explanation is especially pressing in cases where agents declare a voluntary intention to alienate claims over their bodies in just this way. The puzzle here can be seen in these terms: if an agent wants to sell or rent his body as a piece of property, what reasons are there for him to be denied the right to do so? Does having autonomous control or ownership over our bodies include the right to freely transact with our bodies in this way, or are there legitimate concerns about this way of ceding control over our bodies that merit restricting these transactions?

I shall begin with a suggestion from Thomson that ownership is “a cluster of claims, privileges and powers” in regard to a thing²⁶, and that a useful distinction can be made within this cluster concept by using the term ‘First Property’ for our bodies and ‘Second Property’ for the other things we own. I shall take this distinction as my starting point, and investigate by way of example which clusters of claims, privileges and powers are involved in First Property and Second Property. The cluster of First Property will differ in some fundamental ways from the cluster of Second Property. Furthermore, there will be varying sets of claims, privileges and powers according to different types of ownership one can have over different types of Second Property, according to whether one owns a listed building, for example, or a bar of chocolate. If we wanted to represent this idea

²⁶ Thomson (1990)

visually, we might draw a Venn diagram with several circles that overlap at different points, and some circles contained entirely within others.

As indicated above, I will argue that one fundamental area in which the ownership clusters of First Property and Second Property differ is in the power to alienate or relinquish all claims, privileges and powers over the respective property. Ownership over First Property lacks this power, while ownership over Second Property includes it. An analysis drawing out the implications of renting a piece of property and a comparison with a parallel 'body rental' will suggest why this is. Working through examples, we will see that we lose track of certain moral wrongs if we treat transactions involving use of a person's body on the same model as a property rental. Understanding the nature of these wrongs and how they might be explained by the significance of First Property and Second Property claims to the security and autonomy of individuals will then allow us to more clearly consider to what extent activities that trade the body as property present a legitimate concern within a politically liberal framework. This latter question will provide the focus of Chapter Three.

III. RENTALS IN FIRST AND SECOND PROPERTY

The first task at hand is to identify the relevant characteristics of the clusters of property ownership and bodily ownership, and to tease out the fundamental distinctions between the two. At the end of Thomson's chapter on First Property, she leaves us with an open question:

"There are differences as well as similarities between ownership of the likes of a typewriter on the one hand and ownership of one's body on the other. There is a lot of me left if I sell my typewriter: all of me is left. What is there left to me if I sell my body? My soul? Anything at all? On some views, I just am my body, so to sell my body is to sell myself. On *any* view, I am more intimately related to my body than I am to my typewriter.

To mark the similarities, I will say that people own their bodies. To mark the differences, I will say that people's bodies are their First Property, whereas everything else that they own – their houses, typewriters, and shoes – is their Second Property.”²⁷

The question, “What is there left to me if I sell my body?” is slightly opaque, but we can understand the force behind it better if we rephrase it in the following terms. If I give up all claims over my body by selling it the way I might a typewriter, what moral status can I continue to have as a person? Earlier in the chapter, Thomson considers what it would be like for a person to lack the basic claims of First Property, which include claims against Trespass. Trespass, as Thomson uses the term, is a particular wrong identified as “a claim-infringing bodily intrusion or invasion”²⁸. The case she imagines is where a person covets somebody else's shoes. We are to suppose that agent A has Second Property claims over his shoes, but lacks First Property claims against Trespass. In this case, if agent B wants to take possession of A's shoes, B will infringe a claim of A's if he steals them. Given that A lacks claims against Trespass, however, it looks like B can instead legitimately kill A, after which he can claim the now ownerless shoes²⁹. Thomson tells us this shows that A's moral status would be very thin if he lacked claims against Trespass, which I take it form part of the core claims of First Property.

Clearly, if I sell my body to someone else, then I too will subsequently lack any claims against Trespass. The new owner of my body will now have claims against others that they not interfere with my (now his) body, but if he chooses to destroy the body, or grant somebody else permission to do so, it looks like I would have no claim against such action. That is if the sale is modelled on exactly the same principles as the sale of a typewriter. So what is left of me if I sell my body this way? Well, I will have a very thin moral status, and this will put me in a precarious situation as regards my very existence. I take it that I would not cease

²⁷ Thomson (1990) p.226

²⁸ *Ibid.* p.205

²⁹ *Ibid.* p.212

to exist as a person having merely sold my body, indeed I would still be attached to that body. I would, however, have lost all control over matters to do with my survival. Furthermore, the new owner of my body would have control over every physical manifestation of my inner mental life. Imagine he wanted to use my body as a smiling statue in a play he was putting on, and I felt like crying. He would presumably have a claim against me that I not make this body shed tears, just as he has a claim against anyone not to turn on the water feature in his garden if he wants it to remain switched off. We can see then that very little indeed is left of me if I sell my body – I am deprived of any guarantee of continued existence from one minute to the next, and I lack the power to express my inner mental life or show myself to the world in any way, for the only way we can do this is through our bodies. From the point of view of others, I may as well have vanished. I may still exist, but I can no longer continue to co-exist with other people.³⁰

What does this show us about body selling? Well, it certainly shows that selling one's body in this most complete, and drastic way has bad consequences for the person whose body is sold, and that it is probably a very bad idea to enter into a sale of this sort. In fact, it even seems like a self-defeating move if the seller's motive for the sale is purely monetary. Because as we saw above, once his body has been sold, the seller would lack the power to use his body to access and use the money he had acquired through the sale. But none of this yet shows that body selling must be outlawed. After all, people do lots of things that involve putting their own bodies at risk, and we tend to think that rational adults who understand the risks involved should have the freedom to do these things, even if we think them reckless. So if a person, let's call him Bob, insisted that he wanted to sell his body in this way, having read and understood the above, would we have good

³⁰ Note that this conclusion doesn't rely on any particular view of the relation between body and person. If there is a soul inside the body, having sold the body in this way, the still-embodied soul will have no way of communicating with other embodied souls. If I *am* just my body, then I will have made a grave mistake in thinking that I could sell my body as distinct from myself, and the constraints placed by the new owner on the actions of my body will in fact be constraints on my actions as a person. In either case, I will be cut off from expressing myself and engaging with other people.

reason to prevent him from doing so? If we did step in and block the sale, the reason we would offer him would presumably be something like “it’s for your own good that we’re stopping you from doing this.” In that case, Bob might well complain that we were acting paternalistically in restricting his free and fully informed decision to sell his body. The charge of paternalism is one that will have to be met when it comes to preventing free agents from choosing to sell their bodies in this way, which exposes them to great risk of danger, and will be investigated in more depth in chapter three.

The second objection to the picture I have presented of Bob selling his body does not rely on crying paternalism. A proponent of body-selling prostitution may well accept that the wholesale forfeiture of claims laid out in the Bob example will indeed turn out very badly for Bob, and that this may be severe enough to warrant interfering to stop him engaging in such a transaction. However, she will point out that this is due mainly to the fact that he is selling his body forever, and with no conditions placed on what use it may be put to by the new owner. But of course body selling in prostitution would not work like this, but rather on the model of a body rental. Just as when you hire a car there is a limit to the duration of the rental period and several conditions placed on the use of the vehicle, a sex worker will typically allocate her client a set timeframe for the transaction, and certain uses of the sex worker’s body will be ruled out. In this way, the risks of harm to the body-renter are minimized, and she retains a significant amount of personal control over her own body. The rental contract will merely secure terms of use and provide the client with a guarantee that he will have the required level of control over the rented body for his own ends. After all, the very purpose of contracts is to bind both parties to agreement over the provision of some good or service and provide security for each party against the other changing her mind. So what good reasons could there be against contracting use of one’s body to another party on the same model as a car rental? Is it permissible to treat our bodies as property in this way?

Let's compare the cases to see where they come apart. We will begin to see the differences most clearly in cases where the terms of the contract are breached. The first case of breach will be where the client uses the rented object in a way that breaches the agreed terms and conditions of the rental. The second case will be where the owner changes her mind about the terms and conditions, and attempts to prevent the client from proceeding with the rental as originally agreed.

We'll begin with a car rental. Jenny rents her car to Max for the day, on the condition that Max not let anybody else drive the car. Shortly after picking up Jenny's car, Max goes out driving with his friend Beth, and decides to let her drive for half an hour. No damage is sustained to the car. If Max has wronged Jenny, what is the nature of this wrong? I suggest that the wrong that Max has done to Jenny is explained by the fact that he gave Jenny his word that he would not let anybody else drive the car, and he has broken that agreement. When Jenny rented the car to Max, she gave him the power and privilege to control the car for the day in exchange for his word that he would not transfer that power and privilege to anyone else. And when Max gave Jenny his word, he created an obligation on his part to stick by it, and gave Jenny a claim against him that he not allow others to use the car that was placed in his power for the day. The wrong here is the wrong of a broken agreement.

Has Beth wronged Jenny? If Beth had simply taken Jenny's car from its parking spot and driven it around for half an hour without her permission, then Beth would have violated a property claim of Jenny's that nobody interfere with her car. So we might think that Beth has violated the exact same property claim of Jenny's in the case where Max lets her drive the car, and has wronged Jenny in this respect. Is this right? It might matter whether Beth knows that Max has agreed not to let anybody else drive the car. If she is aware of this fact and still takes the wheel, we might think that her act of driving the car is more blameworthy than if she lacks knowledge of the contractual terms. But even if Beth knows that Max is not supposed to let her drive the car, what is the nature of

the wrong she commits when she drives it? I suggest that it is not the same wrong that Beth would commit were she to steal the car from Jenny's driveway to take it for a quick ride. Instead, if Beth commits a wrong when she drives the car, it is the wrong of knowingly assisting Max in breaking the terms of the agreement.

One way of understanding this is to construe the rental in the following terms. When Jenny rents the car to Max, she delegates to Max a certain power over her property, which is the power to control who can permissibly interfere with the car. Jenny as the owner of the car has a general claim against others interfering with it, which she can waive with regard to specific individuals by giving them permission to use the car. When she rents the car to Max, she delegates this power to him while the car is in his possession. Hence the importance of the terms and conditions. They are essentially of the form: I am transferring this power to you on the condition that you use it in certain ways.

If this is the case, then we can think of the claims that hold against Beth as follows. Jenny's having exclusive ownership of the car includes a claim that holds against Beth (and all others) that they not interfere with her car. Jenny as the owner has the power to waive this claim as it pertains to specific individuals to whom she grants consent to use the car. When Jenny rents the car to Max, she not only waives this claim as it pertains to him, but she also entrusts him with the power to grant and refuse permission to others to use the car. That is, Jenny entrusts Max with the power to waive the claims against interference with the property that hold against all others. When Max hires the car, it is thus in his possession in the sense that he has acquired relevant control rights and powers over it. Though Jenny has entrusted these powers to Max, she may include a clause stipulating that he must agree not to use these powers to allow anybody else to use the car.

When Max gives Beth permission to drive the car, he is therefore exercising a power that he has been entrusted with, but has promised not to use. If

Beth knows that Max has made this promise, she does something wrong when she drives the car insofar as she is complicit in the breaking of Max's promise. But, I suggest, she violates no property claim of Jenny's, because Jenny has delegated the power to waive such claims to Max, and Max has waived this claim in regard to Beth. If Beth wrongs Jenny, it would be insofar as Jenny has a claim against all people that they not act in any way as to help Max break his promise to her. I am sceptical as to whether such claims are included in the morality of promising, but whether or not they are is not crucial to the matter at hand. The main point I think we should take from this case is that Beth does not violate any property claim of Jenny's when Max gives Beth permission to drive Jenny's car. Rather, the wrong that has been committed is Max's wrong of breaking his agreement by abusing the powers he has been granted over the car.

If we now compare a similar case to an example of body renting, we'll start to see where body ownership and property ownership come apart. Here we'll suppose that Alice has agreed to rent her body to Oliver, on the agreement that Oliver may have sex with Alice's body, but may not permit anybody else to touch it. Furthermore, to more closely mirror the car rental case, we'll suppose that Alice will take a sedative and be unconscious for the duration of the rental³¹. During that time, Oliver's friend Thomas asks to use Alice's body for sex. Oliver tells Thomas that Alice asked him not to let anybody else use her body in that way, but tells Thomas that he may, and that he is willing to take full responsibility for this. Who has wronged Alice in this case? If we follow the car model above, we'll say that Oliver has wronged Alice by breaking their agreement, and that we may disapprove of Thomas for playing a part in the breaking of that agreement, but that Thomas commits no separate wrong of violating some claim of Alice's over her own body. Rather, Alice has delegated the power of control over her

³¹ This clearly is not an accurate representation of how a prostitution encounter would standardly be carried out, even if we accept the characterization of prostitution as body-selling. However, if prostitution becomes problematic when both parties consider the transaction to be one of body-selling, then it seems plausible that the sex worker would take herself to retain the ability to exercise her ownership claims if these had been transferred to the client. The hypothesis of Alice being unconscious simply allows us to model this disempowerment abstracted for the moment from other issues that may contribute to this, such as psychological or physical coercion.

body to Oliver on the condition that he use this power only in certain ways, and the responsibility for abuse of this power lies fundamentally with Oliver. On this account, the wrong that Thomas commits (if any) would not be the same wrong as he would commit if he came across Alice's unconscious body when it was not rented out to Oliver and decided to have sex with it, even though he knew that Alice did not want anybody interfering with her body that day.

This account clearly does not adequately explain the wrong of this act. Oliver cannot take responsibility for Thomas having sex with Alice's body in the same way that Max can take responsibility for Beth driving Jenny's car. So when Thomas has sex with Alice while she is unconscious, knowing that she intended to rent her body exclusively to Oliver, Thomas wrongs Alice in just the way he would if he came across and had sex with Alice's unconscious body on any other day without her permission. Following Thomson's terminology, Thomas directly wrongs Alice by infringing a bodily claim she holds against all others that they not commit Trespass.

What explains the difference between these two cases? I suggest it is the different ways that claims are forfeited over the 'property' in question in each case. In the car-rental case, a piece of Second Property is handed over to the control of another person in such a way that all power to determine what happens to the car is placed in the hands of the renter, under an agreement as to how the renter will use those powers. But if you share the intuition that Thomas directly wrongs Alice in the way that Beth does not directly wrong Jenny, then the forfeiture of powers over a body must differ. My suggestion for how it differs is this. Though Alice consents to certain uses of her body by Oliver, she does not forfeit or delegate power over what use the body is put to during that time. Rather, it seems that at most, Alice waives a specific claim in regard only to Oliver, and retains all her general claims against all others with regard to use of or interference with her body. This would explain why Oliver cannot take responsibility for Thomas using Alice's body in the same way that Max can take responsibility for Beth using

Jenny's car, because he has not been entrusted with the relevant powers to do so. So the difference seems to be that while the car rental example involves the delegation of some powers over the car, a case involving use of the body at most can involve the owner waiving specific claims in relation to a specific individual.

This indicates one way in which Second Property and First Property come apart as regards owners contracting for use of their property to others. The claims that each owner holds over the 'property' in question may be the same in terms of claims against interference, exclusive control rights, etc., but there is a crucial difference in the way that these claims can be waived or forfeited. The detail, however, is still unclear, and the above examples may leave some unconvinced, relying as they do on a pull of intuitions. The distinction will become clearer, I believe, when we consider the second case of breach of contract, in which the owner changes her mind about the terms and the conditions of the rental halfway through.

To return to Jenny and Max, we'll imagine that Max has rented the car in order to drive from London to Oxford, and that Jenny has agreed to Max making this journey with the rented car. Both parties have signed the contract, and Max has paid the money for this rental. Shortly after Max has set off, however, he receives a phone call from Jenny demanding that he not take the car out of London after all, because she is uncomfortable at the thought of it being driven on the motorway. If Max ignores Jenny's request and drives the car to Oxford regardless, has he wronged her by infringing any claim of hers? I believe the answer is no. Having delegated power over the car to Max under those terms, Jenny has no claim to demand it back until the contractual period is over. If Jenny is really in great distress at the thought of her car being driven on the motorway, it may be insensitive of Max to take it anyway, but he would not infringe any property claim of Jenny's in doing so.

If we compare this to the body rental case, we will again get a different answer. This time awake, Alice has agreed to rent her body to Oliver for 20 minutes so that he may use it for sex. However, shortly into the encounter, Alice becomes uncomfortable with it and changes her mind. She tells Oliver this and asks him to stop. As in the car rental case, both parties have signed the contract, and Oliver has paid the money for this rental. Does Oliver wrong Alice if he carries on regardless? I believe the answer is yes, and he wrongs her in a very serious way. This is because when Alice agreed to Oliver using her body for sex, she forfeited a claim with regard to Oliver that he not interfere with her body in that specific way. However, Alice crucially retained the power to reinstate that claim against Oliver. When she changes her mind about the interaction, she therefore legitimately reinstates the claim she holds against him that he not interfere with her body. So if he carries on despite her complaints, he infringes this claim, and commits the grave Trespass of rape.

If contracting out the use of one's body differs in this way from contracting out pieces of Second Property for use by others, then the two types of transaction are significantly different in nature. With rental contracts for Second Property, the owner of the property can be held to the terms of the contract so that despite her complaints, Jenny will have no claim against Max's use of the car within the agreed terms³². With First Property, however, it looks like the client cannot legitimately hold the owner of the body in question to the terms of the contract in order to demand specific performance, as to do so would violate an important claim of hers. In this respect, then, contracting use of the body must follow the model of service provision, rather than property exchange or rental, because it

³² At least not in the sense of having a claim within the framework of her property rights over the car. There may, however, be situations in which there would be an obligation on Max to return the car, for instance if Jenny urgently needed the car to take an injured friend to hospital. In cases like this, however, we can understand the obligation as stemming from general duties one might have to help others. So that there would be a duty on Max as the person in possession of the car to use it to help a person in need, as it is within his power to do so. Jenny, knowing that Max could help by returning the car, may have an obligation to request that he help in this way, and Max may do wrong if he decides not to help, but the wrong would not be a violation of Jenny's property rights, but rather a wrong of not fulfilling a duty to help another when it is in his power to do so.

seems that we start to lose track of some serious wrongs when the body is ‘rented’ in the same way as a piece of property.

IV. CONSENT, DISSENT & THE OPERATION OF TRESPASS CLAIMS

There is a question to be raised about this account though. It might be suggested that the difference lies not in some fundamental distinction between the ways in which claims can be alienated over First and Second Property, but rather that there are other reasons that determine the permissibility of what is done to a piece of property or a body. For example, one might argue that cars are generally of little value, so can be used and manipulated by people in various ways without problem. The bodies of persons, however, have some important value such that some uses of a person’s body are just plain wrong, regardless of who may have ostensibly granted permission for it. But this needn’t be a feature about bodies in particular, as there are examples of other types of Second Property for which this also applies. Take, for instance, a listed building. An owner of a listed building may rent it out for somebody else to live in, but may not grant the tenants permission to renovate the building in a way that alters its original character. If the tenants do so, they will have committed a wrong, regardless of what the landlord may have told them they were permitted to do, just as we want to say that Thomas has committed a wrong regardless of whether Alice purports to have yielded control rights over her body.

To separate these two cases and tease out the relevant distinctions here, let’s consider a less morally loaded example for the body-rental case. Suppose that Alice agrees to Oliver using her sedated body for an art installation he is creating, and for which he wants a live human body to manipulate into spontaneous poses. Alice agrees that Oliver may use her body in whichever way he may be artistically inclined. She also owns a listed building, which she agrees Oliver may also use and manipulate however he likes for his art installation. The critic might ask here,

isn't the difference just that Alice cannot give permission for Oliver to do something wrong, whether it is to the building or to her body? In a sense, the answer to this question is yes, but this relies on an understanding of the differences between the ways in which the claims of bodily ownership and property ownership operate in each case. In the case of the listed building, Alice's ownership of the building does not include the power to alter it in a way that changes its historical features. This is what explains the ineffectiveness of the permission she might think she gives to another person to paint the front of the house, for instance. It is not the case that Alice has this power but lacks the power to alienate it, but simply that the power is not included in the ownership cluster for a listed building. If we refer back to section I of this chapter, we can explain this by reference to the fact that property ownership rights arise as an institutional construct, and what goes into any given ownership cluster for Second Property is partly 'up for grabs'. Though it may be necessary in order for individuals to be able to enact their autonomy for each to be able to claim secure use of some property, the specific set of powers and claims an individual can have over different types of property can to a certain extent reasonably be shaped by reference to other values in the public interest. So, for example, regulation restricting the renovation or destruction of listed buildings, even where these are privately owned, may be justified by a public interest in protecting cultural heritage. In this case, the power to paint the front of her house was never included in Alice's ownership cluster over the house, and this is what explains her inability to grant this power to anybody else.

Contrast this to the cluster of claims, privileges and powers that Alice has over her own body, and a clear difference emerges. Unlike for the listed building, Alice does have the relevant powers to determine what be done to her body to cover pretty much any use it might be put to. As we saw above, Alice can waive any claim to non-interference in respect of a specific person or act by consenting to it. Considered individually, the waiving of such claims presents no particular problem. But when we consider the case above in which Alice grants Oliver carte

blanche to do as he likes with her body while she is sedated, this again strikes us as problematic. Again, to compare to the building, if Alice has the power to invite anybody she likes into her building, there seems to be no problem with her renting the building to tenants and granting them the power to invite anybody they like into it during their tenancy. But it does not seem that Alice can grant Oliver similar power over her body, as suggested above. And the explanation for what goes wrong if Oliver were to grant another intrusive access to Alice's body is not simply that certain intrusive acts would be wrong per se, but that the wrong is explained by virtue of the fact that such intrusions violate a bodily trespass claim of Alice's which she has not waived.

But, it might be argued, couldn't we conceive of Alice's expression to Oliver, "do whatever you like with my body" to express not a delegation of powers to him, but rather that whatever Oliver chooses to do with her body, she has waived that specific claim with regard to him. So Oliver still has no power of control over which claims are waived, it is just that Alice has chosen to waive all claims in respect of Oliver simultaneously. This would seem to fit the way in which we said that bodily claims must function, and yet still leave Alice in a position that is equally as vulnerable as the one in which it was supposed she had 'rented' her body to Oliver by delegating control over which bodily claims of hers could be waived. And in this sense, is there much difference at all between Alice's body and the rental car?

This last question prompts us to return to the very first scenario in which it was stipulated that Alice would be unconscious for the duration of the 'rental'. This was supposed in order to more closely mirror the car rental case, and because it presents a plausible illustration of a way in which it is possible to really treat the body as alienable in a very similar way to property. It seemed plausible not only that people could in fact behave and interact in this way, but also that it could well come under the sphere of legitimate things that Alice could do with her body to grant Oliver permission to use it in the way specified while she was

unconscious. However, if the last case of breach indicated to us that one of the crucial aspects of First Property claims is that a person must retain the power to reinstate any claims she may have previously waived, then we may well question whether Alice can legitimately grant anybody access to her unconscious body after all. The above case showed us that if Alice objects to a certain act being done to her body, she must retain the power to reinstate her claim against that act being done to her. If she is unconscious, she clearly lacks the ability to object to anything, not only in the sense of expressing objection to what is being done, but also in the sense that she has no experience that she could find objectionable.

So we might think that there is no problem here to worry about, because nothing is being done against her will, her will being momentarily dormant, so to speak. But this cannot capture the core concern about how Alice's body is put to use, because if we think back to the first case of breach of contract, in which Oliver allowed Thomas to have sex with Alice, then we can see that in that case, there was also no experience for Alice which she would have *found* objectionable. She may not even ever find out about what was done to her body by Thomas while she was unconscious. If she never finds out, someone might say, "well where's the harm?" And as liberals, aren't we supposed to worry most about harm done to others? This would be an uncomfortable conclusion, to say the least. But the question prompts us to provide more detail as to how claims against Trespass work, and how First Property Trespass differs from trespass on Second Property.

We have already established that claims to Second Property include general claims against all others that they not interfere with your property, which can be forfeited by the owner giving others permission to use the property, or selling it completely. Claims to First Property similarly include claims against all others that they not interfere with your body, which can be waived by the owner consenting to certain acts being done to or with her body by certain people. If we take this simple description at face value, though, there will be a great many acts that end up being labelled as Trespass. For instance, it seems plausible within this

framework that I have a general claim against all others that they not stroke my arm. And I can of course waive this claim by giving someone permission to do so. But if I am on a packed rush hour tube in London, and a stranger brushes against my arm as they edge past me to leave the tube, have they done wrong by committing Trespass against me?

It would seem overly stringent to understand infringements of bodily claims in this way. A more plausible suggestion is that a person who brushes my arm does something wrong if, when they brush my arm, I ask them to stop doing so and they carry on regardless. So while it is true that I hold general claims against Trespass, these claims become relevant to determining whether an act constitutes a wrong insofar as an agent enforces those claims against another. Trespass claims instate a general presumption against the permissibility of interfering with the body of another, but just as this presumption of impermissibility can be overturned by the individual in question consenting to a certain act, so it can be cemented by the individual expressing dissent towards a certain act. If another person strokes my arm to catch my attention, and I turn and smile at them, telling them to carry on, they have done me no wrong. If they stroke my arm, I ask them not to, and they carry on, they have done me wrong by infringing a claim that I am explicitly exercising against them at that point in time. The complication arises if they stroke my arm, I complain, they immediately pull their hand away from me, and I feel violated for having been touched in this way. If we think that the person who touched me when it was welcome without asking did no wrong before it was clear to them that I consented, in what way could the second person have done me wrong before I dissented? One suggestion is this. Trespass claims create a presumption that one must not interfere with the bodies of others, although the permissibility of each specific act of bodily interference depends on whether the person whose body is touched dissents or consents to that act, even if the explicit expression comes after the initial touch. So when you touch my arm uninvited and I say “get off, don’t touch me!”, that makes your

touching me an act of Trespass *from the very beginning*. But if I turn and smile at you and invite you to carry on, then no Trespass has been committed at all.

One might think this requires us all to be mind readers in order to make sure we never commit these wrongs. But it perhaps just stresses the need for clear communication in our physical interactions with others, and an intuitive understanding of nuanced social situations and relationships. This is messy, but so are most human interactions and relationships. It has the advantage that it can explain why a stranger does me no wrong when he brushes against my arm on a busy tube. The fact that I have put myself on the tube during the busy rush hour implies that I understand that this level of touching may be unavoidable, and that I am at least willing to tolerate it as one of the things that goes along with being on a busy tube. Likewise, if I am watching a film with a close friend and she strokes my arm to get my attention to see if I want a cup of tea, she will have an idea from the nature of our friendship and past behaviour patterns that I am very unlikely to object to this. Change the situation to a quiet street and a stranger who strokes my arm to get my attention, if I object to this, I may well tell him “get your hand off my arm, you have no right to touch me”. He has committed Trespass even if his intentions were innocuous because there was a presumption that each holds claims against bodily touching, and no indication that this intrusion would be welcome. Though the very same act would not have been Trespass if I did not object or dissent to it, when the stranger touched my arm, he took a risk that his act would be one of Trespass. Without any prior knowledge of my attitudes towards being touched in this way, and no other indicators that I may be prepared to tolerate this as there are in the tube case, even a stranger would be able to know that the risk that I would react negatively to such touching is fairly high, and we could hold him blameworthy accordingly.

But having cashed out Trespass claims in this way, we are still left to answer the question of why it would matter if something was done to Alice’s body while she was unconscious, if no harm was done and she never found out about it.

Though there is no consent in this case, there is clearly no dissent either, as Alice remains unaware of what is done to her body. If there is simply a presumption against bodily interference that is made concrete when an agent dissents, then without this dissent, one might compare the case of Thomas touching Alice to that of the stranger brushing against my arm on the tube. Without consent or dissent, it seems if Thomas gets away with it, then no Trespass has been committed. After all, it is possible that Alice could wake up and then consent to Thomas having sex with her body, such that the act would never have been one of Trespass from the beginning. In that sense, the moral permissibility of the act would be indeterminate until Alice decrees either consent or dissent, and remain indeterminate if she never finds out.

This too is an uncomfortable conclusion, and one that we need not endorse. For if the powers of consent and dissent can make such a difference to the moral permissibility of an act done to a body, then it is surely of great importance that it be possible for these powers to be exercised in each case. The main point of having these bodily claims is not *simply* to protect us from interference from others, but to give each person the power to determine the permissibility of acts done to her, and thus retain meaningful autonomy over what she does with her body, and what is done to it. In light of this, if we think back to the Thomas case, we shouldn't think of the wrong he does as simply consisting in having sex with Alice without her consent, but rather that he had sex with her while she was incapacitated with regard to use of her powers of consent or dissent. The phrase 'he took advantage of her' is appropriate here, as he took advantage of the opportunity to use Alice's body at a time when there was no possibility of her making it clear to him that his act was permitted or not. To do so is to subvert this system of moral powers to one's own advantage, at the expense of another person's bodily boundaries. It is not the same wrong as raping a conscious person against her will, but that is not to say that it is any less wrong.

Having found that it is of great importance to the moral significance of bodily claims against Trespass that agents retain the power to consent or dissent to certain acts being done to them, then we may well question the legitimacy of any agreement between Alice and Oliver, in which she agrees to *carte blanche* use of her unconscious body. For if we think it of central importance that Alice retain the power to reinstate her claim against interference in the case where she is awake, then surely something important is lost from the interaction when Alice is unconscious and that power is shut off. We might, however, think that when Alice agrees to a very specific use of her body beforehand, this makes the terms clear enough so that Oliver's use of Alice's body is cemented as a permissible act, because he has Alice's assurance beforehand that she is happily forfeiting a specific claim against him, and that she is not concerned by the fact that she will have no experience of the act and no ability to dissent to it while it is underway³³.

We've now got a clearer view of the similarities between property claims and bodily claims, as well as some fundamental differences between the two when it comes to the way that claims and powers over the property in question can be waived or forfeited. It seems that there is good reason to think that agents open themselves to the risk of being wronged in certain ways if they trade in their bodies in the same way one can trade in a piece of property. But we can still ask, what if Alice explicitly states that she wishes the agreement over use of her body to be conducted under a contract of the same type as the car rental, with the same implications for breach of contract? What are the reasons for denying Alice the power to dispose over her body in this way? The above discussion has shown how the alienation or delegation of Second Property claims differs from agreements for use of First Property by others. It has been suggested that when an owner rents her Second Property to somebody else, this involves a delegation of the owner's powers over that piece of property to the renter, on the agreement that the renter will refrain from exercising these powers in certain ways. When it comes to First Property, however, we lose track of certain serious moral wrongs if we follow this

³³ If we excluded this possibility, then we would run into difficulties around the moral permissibility of surgeons performing operations on patients even with the patient's consent.

model, and place under threat the very function of bodily powers that is integral to retaining autonomous control over our bodies. A better explanation for the way in which an owner of First Property contracts use of her body to another person is simply through the forfeiture of certain specific claims, where the owner retains the power to reinstate those claims at any time.

But Alice still has a legitimate challenge, which is to say that if she knows that renting her body in this way subjects her to the risk of harm and poses a threat to her autonomy by denying her the central moral powers of consent and dissent, but still wishes to proceed with this, is this not a restriction of the freedom she can exercise over her own body? Two options are available here in response to the challenge. The first is to say that respect for autonomy demands that we prevent agents from alienating power over their bodies in this way, because this decision is one that undermines autonomy. The opposite response also seems plausible though, which is to say that if we respect the autonomy of individuals, we should respect any autonomous choice they make which concerns the use of their own body, even if this is a free choice to relinquish some or all of their autonomy. It is not immediately clear which option we should endorse within a politically liberal framework. The next chapter attempts to answer this question.

CHAPTER THREE

OWNERSHIP, AUTONOMY, AND VOLUNTARY SLAVERY

So far in the investigation into what is wrong with body selling, I have put forward some considerations in favour of three claims. First I suggested that we should follow Thomson and view ownership as a cluster concept denoting a set of claims, privileges and powers over a thing. Given that there are relevant similarities between the kinds of claims, privileges and powers that we have over our bodies and those we have over property, and that there are many ways in which we can treat our bodies as things, the concept of ‘bodily self-ownership’ can play an illuminating role in discourse around freedom and self-determination. The purpose of comparing bodily ownership with property ownership is not only to identify broad similarities, but rather to draw out some fundamental differences between these two clusters, despite the fact that they share some integral features. The significance of these differences bears out most importantly in cases where people decide to subject their own bodies to the market, by making their body available to others for money. This is where the boundary between inanimate objects and bodies can blur in the ways both bodies and objects are treated as commodities. Gaining greater clarity on the relevant notion of autonomy that underpins bodily ownership will provide guidance on how these transactions should be treated under law.

Second, by working through examples, I suggested that we lose track of certain wrongs, including very serious ones, if we treat the body exactly like a piece of property. This happens when we try to model bodily transactions on the very same principles as property transactions such as rental, and draw out the implications of this in cases of breach of contract. Furthermore, the point at which we lost track of those wrongs in the examples shed some light on a core dissimilarity between the clusters of property ownership and bodily ownership. This was that something went wrong on the model of ‘body rental’ when this was

taken to involve the owner of the body alienating control of her claims, powers and privileges over her body to somebody else. In contrast, no parallel problem arose in the case of a property owner alienating this power over an object such as her car. This gave rise to the third claim, that the ownership clusters governing property and one's body differ most significantly in respect of the power to alienate control of all claims, privileges and powers over the thing in question. The search for an explanation of what went wrong when the body was exchanged as property showed us something important about the way in which claims against Trespass function and become morally relevant – that was through the 'owner' of the body enacting the moral powers of consent or dissent to certain actions. It seems to be crucial to our concept of bodily ownership that we retain these powers of control over our body, but not so for Second Property.

I left the previous chapter on a question, however, and that was what reasons there could be for denying a person the right to treat her body exactly as a piece of property by entering into agreements whereby the power of control over her body is transferred to another person. So far, I have shown that these transactions risk turning out very badly for the person who rents her body. But what if a person is aware of all these risks beforehand, and nevertheless insists that she wishes to alienate power over her body in just this way? What reasons could there be for preventing her from doing so? This is the question I set out to answer in this chapter. I will approach the question from a political, rather than moral aspect. That is, I will not attempt to provide a full account of what wrong an agent commits, if any, in treating her own body this way, or what wrong a client commits, if any, in participating in such contracts where they are willingly offered (and where the interaction goes happily for both 'owner' and client).

Instead, I will focus on the political question of what reasons there could be for the state to refuse to uphold agreements in which the body is treated exactly as property in this way. A person who is aware of all the risks and wishes to use her body in this way might complain if she is barred from doing so on the grounds

that it is risky. Her complaint here would be of paternalism, that her freedom was being unjustly curtailed because it is ‘for her own good’. The challenge as I see it is to meet this objection by finding reasons on which a state could justify denying individuals the right to transfer ownership of their bodies to others. More precisely, this will involve investigating more closely the link between body ownership and autonomy, in order to see what this tells us what we should take to be the relevant notion of autonomy from a liberal political point of view. The answer I will suggest is that the decision to deny individuals this right *is* paternalistic, but that this decision of the state’s involves a minimal kind of paternalism that is bound up in the justification of the very purpose of the state in the first place.

This way of framing the role of legitimate political authority also further cements the distinction between bodily and property ownership. I suggest that the need for an institution of property rights arises from the very same basic assumptions about our interests that ground bodily rights. However, the nature of property and its relation to our agency is such that the cluster of property ownership is far more flexible than the core cluster of bodily rights. As illustrated with the example of restrictions on the use of listed buildings, there are many forms that a legitimate institution of property could take, though it is necessary that there be *some* configuration of property rights under law to determine rules for acquisition, transfer and alienation of property. In short, we can understand the role of liberal political authority as stemming from a need to ensure that the power of individuals to enforce certain basic claims, privileges and powers as regard their bodies is protected. Establishing the core cluster of bodily rights is the first step here, and the need for property arises as a secondary aspect to this. In this sense, Thomson’s terms ‘First Property’ and ‘Second Property’³⁴ are again particularly apt – the requirement for a core of bodily self-ownership comes prior to the subsequent question of what else we can and need to own, and what shape that ownership will take.

³⁴ Thomson (1990)

I. THE PARALLEL GROUNDING OF BODILY AND PROPERTY OWNERSHIP

It will be useful to begin with a recap of the main similarities between bodily ownership and property ownership. As I suggested in chapter two through the comparison of fingernails and pencil cases, it seems to be a basic feature of owning something that one has the power and privilege to decide what happens to it, in particular when it comes to the question of others using the object in question. So when you own something, this places limits on what others may do with that piece of property, and places them under an obligation not to interfere with your property (which you as the owner can waive). If we value individual freedom, it is clear why it would be important for individuals to be attributed these powers over their own bodies. For as we saw in the preceding discussion of Thomson's account of Trespass claims, if we lacked claims against bodily interference from others, then our ability to enact our agency would be under constant threat. So it seems that if we care about having a choice in what we do, then we must care about having this kind of power of control over our bodies, and claims against others that they not interfere with our bodies. Put very roughly, we want to have this kind of control over our bodies so that we can do the things we want to do. After all, being the embodied beings that we are, there is only a very limited range of pastimes one could engage in if one lacked control of one's own body or any assurance that others would respect one's exclusive claims to control that body.

If we now consider the reasons we value having ownership over property, they boil down to very much the same thing. This is most clearly seen for the most basic forms of property – food, shelter, warm clothes – the essential purpose of which is to protect our bodies from the elements and ensure we can survive, to carry on doing whatever it is we want to do with our bodies. But beyond this, the value of even relatively frivolous items of property such as the pannier bag I attach to my bicycle can be explained in the same way. My pannier bag enables me to do some of the things I want to do, like carrying my books as I cycle to campus, and

part of it being my property means that I have some assurance that others will not snatch it off my bicycle when I'm stopped at traffic lights, preventing me from getting my books to campus. Having the power to use certain items in the world, and holding claims against others that they not interfere with those items thus in a way extends a person's secured sphere of agency.

The idea of property rights paralleling bodily rights in this way is apparent in Kantian literature, where the emphasis is on the importance of the entitlement to set one's own ends, and the roles that bodily rights and property rights play in this. Arthur Ripstein sums this up as follows:

“Your body is your person, and it constrains others because it is that through which you act, your capacity to set and pursue purposes, and any interference with your body interferes with that capacity. Your property constrains others because it comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, he thereby interferes with your purposiveness.”³⁵

“Your basic right to your property is the right that you be the one who determines how it will be used.”³⁶

I do not intend to follow an entirely Kantian account of bodily rights and property rights, partly because I do not want to commit to any metaphysical claim as to whether the body simply is the person. Part of the motivation for embarking on this analysis and framing it in terms of a comparison between bodily ownership and property ownership is the fact that we can and sometimes do treat our bodies *as though* they are separate entities which can be alienated in the same way that property can. On the question of alienation, Ripstein says the following:

“Your rights to property thus parallel your right to your own person, but because property is something that exists in a different location from you, your right to it can be violated when you are not in possession of it, and

³⁵ Ripstein (2009) p.91

³⁶ Ibid p.95

further, because it is separate, you can alienate it, either by abandoning it or by transferring it to another person via contract.”³⁷

This is not so much an explanation of why property is alienable while the body is not rather than a statement of fact that property is separate from you. The reasoning seems to be that you are your body, followed by the assumption that you cannot alienate yourself. Property being separate from you, however, is alienable because separate.

But why should we accept this simple story? We saw in the previous chapter that there was a sense in which Alice could treat her body as though it were alienable from herself, in the sense of transferring the power of control of all claims, privileges and powers over her body to Oliver. This mirrored the way in which a piece of property can be alienated. The comparison was perhaps closest when we stipulated that Alice was unconscious during the period of alienation. In this case, just like a piece of property that goes out of one’s sight, Alice would not be aware of what was happening to her body during that time, and would have no way of exerting her control over it. But Alice could also treat her body this way while fully conscious, if we understood the transaction as involving the alienation of those claims to control. So if it is possible to treat our bodies as alienable in this way, we should offer some explanation as to why this should not be allowed beyond the bare claim that your body simply is your person.

The above reservations notwithstanding, this Kantian view is useful to bear in mind the core similarity that our basic interest in owning property is grounded in the same way as our basic interest in having exclusive use and power over our own bodies, and that is to be able to make free choices as to how to use our bodies and our things without interference from others. Furthermore, having such claims over our bodies is prior to having such claims over property, because as we saw in the previous chapter, if I lacked such claims over my body, then all anybody would need to do to take my shoes would be to kill me.

³⁷ Ibid p.88

So where does this get us? Well, we can see that if we value individual freedom, then we will want to have these basic claims to our bodies protected, and we will also want some way of coming to own property and securing that ownership so that we can do various things that require using things other than our own bodies. Furthermore, having more property will enlarge a person's sphere of agency in terms of increasing the range of possible actions available to her. If I own a boat, I will be entitled to go boating on the public waterways on a sunny summer's day. If I don't own a boat, I will have no such entitlement. We could well frame a desire to acquire more property as driven by an inclination to gain more freedom, in this sense of increasing the number of actions that I am entitled to decide to take.

Suppose Alice really wants a boat, but she doesn't have the money to buy one. Alice's desire for the boat is particularly urgent, and she decides that there are two best options available to her to get the cash together to buy it. They both involve Oliver. The first option is to have sex with Oliver for money, on the model of a service-contract, where specific performance cannot be enforced. Oliver has agreed to pay 70% of the boat's value for this service. The second option is to rent her body to Oliver on exactly the same principles as the car rental, where she alienates control of all claims, privileges and powers over her body to him, perhaps in exchange for his word that he will only use them in certain ways. Oliver has agreed to pay 100% of the boat's value for this transaction. I have said that having a basic cluster of ownership claims over my body is prior to being able to have property claims. Alice's property claims rest on shaky ground if she has no guarantee of the safety of her body, which is after all what she uses to control her property. So it would probably be a bad idea to sell her body in order to get some more property. But it is not immediately obvious why short-term transactions on the body-rental model carried out in order to secure more property would be such a bad choice. In Alice's case, this choice seems to be motivated for a desire to increase her sphere of freedom. Although the

body-rental transaction involves relinquishing some freedom of control over her body for a short time, this is done for the sake of widening her sphere of freedom in the long term. On the face of it, it looks comparable to the idea of investing a sum of money into something in order to get bigger returns in the future. We normally take this to be a rational decision involving a judgement of risk and reward. So if we start from the assumption that we value freedom and ground some basic bodily ownership claims on this basis, with property ownership arising as an extension from this, what goes wrong if an individual like Alice seeks to alienate some of her basic bodily ownership claims in return for gaining greater freedom through having more property? And would we be wrong to stop her from doing so?

II. BODY OWNERSHIP, AUTONOMY, AND LIBERAL AUTHORITY

This is where the question of the nature of political justification becomes most relevant. The reason to start at the very beginning of the story of state legitimacy is twofold. First, we are not concerned with merely private agreements between individuals but rather with transactions involving at least two parties agreeing to bind themselves to certain conditions. In the kinds of cases that we're most concerned with, where a person wishes to enter an agreement to rent her body out on the same terms as a piece of property, we can see how the state might get involved as arbitrator even if no formal written contract were involved. This would happen in cases of breach like the one discussed in the previous chapter.

There, Alice 'rented' her body to Oliver on the agreement that he may have sex with it for half an hour. Alice then changed her mind shortly after the interaction had begun, but Oliver carried on regardless, as per the terms of their original agreement. If Alice were to press charges against Oliver for rape, Oliver might well plead in his defence that Alice had delegated powers of control of the relevant claims over her body to him, and so he did no wrong in carrying on using those powers in the way they had previously agreed he would. In such a case, the

state judiciary would be faced with a decision – it can either uphold agreements of the body renting type and judge that Oliver has done no wrong, or it can refuse to acknowledge the initial agreement as valid, thus refusing to sanction the right of individuals to alienate power over their bodies in this way. In refusing to acknowledge the alienation of bodily powers, the state would recognise Alice’s ongoing claim against bodily interference. It would judge that consent for a certain act had been given by Alice at the outset of the interaction, thus waiving her claim against Oliver that he not interfere with her body in that way. But when she changed her mind and dissented, she reinstated her claim against Oliver that he not interfere with her body. It is this power to dissent that would not be attributed to Alice if the transaction were taken to involve a delegation of her powers over her body to Oliver on the model of renting a piece of property.

We are back to the question here of whether bodily self-ownership includes the right to transfer ownership powers over the body to another person, but more precisely whether the state should attribute such transfer rights to individuals if its primary concern is to preserve individual freedom. At the extreme libertarian end of the scale, Robert Nozick³⁸ argued that full ownership rights must include transfer rights, and so full self-ownership must include the right to transfer this ownership to somebody else. Any restriction on this would, for Nozick, count as a restriction on the freedom of the self-owning individual. The assertion that full freedom requires individuals to be able to choose to become a slave is puzzling, and appears contradictory to some liberals (to be discussed below). The question turns upon the view of autonomy one takes – whether the state must protect the *having* of effective autonomy or the *exercise* of autonomy³⁹. So we see again that a full understanding of the extent and operation of the powers involved in bodily self-ownership will rest on a relevant understanding of autonomy. I suggest that we can hone in on the relevant notion of autonomy by taking a closer look at the form of the justification for state authority in social contract theory.

³⁸ Nozick (1974)

³⁹ Vallentyne (2011)

The reason for going back to the story of the hypothetical beginnings of the state is that it starts with the same assumption that we found lay at the heart of the need for a basic cluster of bodily ownership claims and subsequent property ownership claims. That is that there is an assumption of the value of the free choice of the individual which underpins the justification for the very existence of a state authority, and further informs us as to what shape the institutions established by that authority can take.

The first step here is to understand the problem that social contract theories seek to solve. In the most basic terms, the common starting point seems to be this: in the state of nature, people are free to act as they like, with no laws or coercive power placing constraints on what they are allowed to do. Lacking any such constraints on people's actions, however, makes living in the state of nature fairly dangerous, as there are no assurances against others interfering with either your body or the things you want to claim possession of. Each person must rely on her own brute force to protect her own person and any things she wishes to retain control over in the state of nature. From here, theorists hypothesise that given the option, rational people in this precarious state would make the free choice to implement some system of governance whereby laws are agreed upon, and some body of authority is given coercive power to enforce these laws and ensure everybody abides by them. But to see this as merely a trade-off between liberty and safety, with one of these values losing out to the other, is too simplistic. For Rousseau, for example, the challenge was to find a solution to achieve security without any loss of freedom:

“The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.’ This is the fundamental problem of which the social contract provides the solution.”⁴⁰

⁴⁰ Rousseau (1973) pp.190-191

Why think, as Rousseau did, that full freedom of the individual must be preserved at all costs, and how could this possibly be achieved? Isn't it enough to conceive of the choice between liberty and safety as a necessary trade-off, and then hypothesise the weighting that rational individuals would give to each of these values? It is important to bear in mind the form of the justification given here. The argument does not move from the fact that there is or was a necessary choice to be made between competing systems, to the conclusion that the one chosen is justified as the best (or least bad) among all possible alternatives. Rather, the purpose of the hypothetical choice model is to indicate that rational agents, given the freedom to choose, would opt for certain forms of government over others, and it is those forms of government that could be rationally chosen which are considered justified on the very grounds that they have the possibility of being chosen. So the value in the free choice grounds the value and legitimacy of what can be chosen. If we start by identifying free choice as the criterion by which coercive authority can be justified, and build up from there, then we can see that there would be something oddly self-defeating in ending up with a system that failed to preserve this free choice of individuals. If the possibility of free choice is our basic criterion for justifying authority, and from this we end up justifying an authority that diminishes the power of free choice, then we may well wonder why we cared about free choice so much in the first place. Such a system of justification would be pragmatically self-defeating⁴¹.

So there we have an answer as to why the solution to the state of nature problem should be to find a form of government that protects individuals while leaving them as free as they were before. But it is still mysterious as to how this can be done. After all, the mechanism by which safety is ensured will presumably be a coercive one setting some rules by which individuals must abide, and either forcibly preventing individuals from breaking those rules, or punishing them when they do so. In what sense, then, could any system of government that preserves the safety of its subjects also preserve the full freedom of each? The answer, I believe,

⁴¹ Munoz-Dardé (2009)

lies in a certain conception of what the core freedom of the individual consists in, and this is where the theory links back to our original question. Instead of embarking on a full-blown analysis of how the state preserves this freedom of the individual, I believe we can learn something significant from investigating what reasons there are to prevent an individual from alienating her claims over her body as if it were a piece of property she owned.

As we saw, if Alice wants to temporarily alienate her body in order to enlarge her sphere of freedom by gaining more property, then an immediate answer might be that any restriction on Alice's ability to do this would be a restriction on her freedom. Such restrictive state action would look suspect on the model of justification above. But then again, if the state upholds her ability to do so, and Alice subsequently changes her mind about the terms of the alienation, the state will then be restricting her free choice to decide what happens to her body during the contractual period. We seem to find ourselves in a bit of a bind – whichever option the state takes as regards these contracts, it will be committed to restricting Alice's free choice under some conditions. So which matters more? Is it Alice's ability to exercise a free choice to alienate her body, or is it the security to have on-going power of free choice over her body protected by the state?

This is of course the form of the dilemma that underlies the puzzle of voluntary slavery. As mentioned above, Nozick sees nothing particularly puzzling in this choice, as he takes it to be an instance of an individual exercising a free choice with regard to something he has full and exclusive ownership powers over. But other liberal heavyweights, including Rousseau and Mill, purport to find a contradiction inherent in this 'choice'. On this, Mill says:

“But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that

he should be free not to be free. It is not freedom to be allowed to alienate his freedom.”⁴²

Rousseau, on similar lines, declares:

“Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other, unlimited obedience. Is it not clear that we can be under no obligation to a person from whom we have the right to exact everything? Does not this condition alone, in the absence of equivalence or exchange, in itself involve the nullity of the act?”⁴³

It is fairly difficult to decipher the exact shape and force of the argument in each of these passages, not least because both Mill and Rousseau respectively take the point they are making to be “apparent” and “clear”. Mill especially appears to think there is a straight contradiction in an individual using his freedom to alienate his freedom of choice. However, as we have seen with Alice, there are ways of conceiving of such a choice that make rational sense, especially when done on the grounds of gaining greater freedom in the long run through having a greater share of material goods. So what reasons are there actually for refusing individuals this choice?

If we start from the beginnings of social contract theory again, we can construct a form of justification for refusing to uphold this choice of the individual, which does not rely on declaring the choice contradictory, but nevertheless captures something that both Mill and Rousseau were concerned with. Recall that the state of nature hypothesis began by attributing to individuals a basic interest in having the power to make a free choice. There is a recognition that the power of individuals to make free choices is under constant threat from others in the state of nature. So from here arises the hypothesis of a system that can be freely chosen that implements security in order to protect the freedom of individuals, while crucially leaving individuals as free as they were before.

⁴² Mill (1972) p.157

⁴³ Rousseau (1973) p.186

From the point of view of the state, the options for dealing with body-rental or slavery contracts are as follows. The first option is to commit to upholding the individual's right to enter into such agreements, thereby committing itself to overriding the complaints of the voluntary slave or body-renter who changes her mind during the contractual period. The second option is to refuse to uphold the initial contract, and commit to providing protection from unwanted bodily interference for Alice or the voluntary slave, should either of them object to what is being done to them, regardless of what might have been agreed beforehand. If we refer back to the form of justification explored above, we now have a criterion by which to choose between these two options. The original problem was to find a way of securing both the safety and freedom of individuals, and the state is supposed to provide the solution to that problem. So we can ask which decision allows the state to best preserve the safety and freedom of the individual concerned in this case.

This can be drawn out most clearly if we recall that this is best conceived as a question of enforcement of an agreement. Enforcement of a body-selling contract in the case of owner-breach such as Alice's means leaving Alice unprotected from rape when she changes her mind about having sex with Oliver. This is because under the terms of the contract, Oliver would be considered as using Alice's body under terms she had agreed to, and so there would be no threat of punishment for Oliver for proceeding as per those terms. In that instance, Alice loses the guarantee of protection of her powers of control over her own body normally accorded to her under the law of the state. The result of this is that she is left in danger of something very bad happening to her – namely that Oliver has sex with her against her will. For the duration of the contractual period then, in relation to Oliver and that act, Alice finds herself back in a similar state as she would be in the state of nature, with no guarantee beyond her own brute force that another person will not interfere with her body in a way she objects to.

The alternative is for the state to refuse to uphold the contract, and to make it clear that Alice's power of control over what happens to her body will be upheld regardless of anything she might have agreed beforehand. This prevents Alice from the precarious situation described above, thus better protecting her from danger, but it does so at the cost of denying her the free choice to be bound to the contract in the first place. However, we should notice that this is not a choice that Alice would be able to make in the state of nature. That is because contracts require recognition and enforcement of the contractual terms by some authority. Without state enforcement, such agreements would be no more than personal pledges between two people without any assurance that either would keep their word. It is part of the value of the contract, and part of the reason why Alice might be able to procure a higher price for specifically renting her body in this way, that there is this assurance that both parties will be bound to the terms of the agreement by the enforcement of some authority. So if the state refuses to recognise such agreements as valid, it does not deny Alice any free choice that she would have otherwise had.

Comparing the two options in this way allows us to see which can best be justified if we view the purpose of the state to solve the problem of how to secure both the safety and freedom of individuals. Enforcing such contracts will leave an individual in a situation in which they are both open to significant danger and lack the power to make free choices as to what happens to their bodies for a certain period of time. Refusing to enforce those contracts will not restrict the sphere of choices that the individual would have had in the state of nature, and it will preserve the individual's on-going safety and freedom of choice as concerns interference with her body by others. It seems then that if we take seriously a form of justification of the legitimacy of state authority that is based on finding value in the free choice of the individual, and arises from a fundamental concern for preserving this freedom of individuals by securing their safety, then one of the consequences will be that a legitimate state authority will not sanction transactions in which one individual relinquishes power of control over her body to another,

because it will not recognise the terms of these agreements when called upon to enforce them by one of the parties involved in the agreement.

Furthermore, this conclusion again puts the spotlight on what kind of claims, privileges and powers are fundamental to the core of bodily self-ownership, and the way in which these ownership powers operate. If state authority is justified by its role in securing the conditions under which individuals can retain their freedom without the threat of unwanted interference from others, then a minimum requirement for such conditions will be that the state protects the claims, powers, and privilege of each individual to prevent others from interfering with her body in ways she objects to. Part of this will involve always attributing to individuals the moral powers to consent or dissent to acts that interfere with their bodies, and defining offences of Trespass in relation to the autonomous operation of these powers. This, I suggest, is a crucial aspect of how we should understand autonomy, whether we are talking about individual autonomy in general, or particular terms like 'sexual autonomy'. I take it that to specify sexual autonomy is merely to emphasise the way in which individuals have this relevant kind of autonomous power over acts done to or with their body that are of a sexual nature. It does not pick out a sphere of autonomy that is different in kind to the general term 'autonomy'.

If we accept the above, we can justify an authority's decision to refuse to uphold agreements like voluntary slavery or body-selling contracts which involve an agent alienating his power over his own body to another, on the grounds that upholding such contracts would be a failure of the authority to fulfil its primary role of securing conditions of safety and autonomy for each individual. And from the form of justification discussed above, the individual has no claim on that authority that it should take positive action to widen the individual's sphere of choices beyond the core cluster of bodily ownership claims by committing itself to enforcing such contracts. Given that the reasons adduced for considering all such contracts null and void rely on a basic concern for the safety and freedom of the

individual concerned, we might well call this ruling paternalistic. But if it is, this is a non-problematic form of paternalism, as we see that state authority is justified from the very beginning of the story, precisely because the need for a state authority arises from the grounding assumption that individuals have a basic interest in being protected in this way.

Having clarified this relevant notion of autonomy from the political perspective, this can again help to clarify a key difference between ownership of objects, as opposed to bodies. We saw above that both bodily and property ownership share a common grounding in our status as autonomous beings, and our need to be able to enact our autonomy in a world populated by others. We found reasons in social contract theory to defend a liberal view on which part of the role of state authority is to ensure that each individual retains power over their bodily ownership claims, in terms of determining the permissibility of others interfering with his own body. In chapter two, it was also suggested (via Kant) that a requirement for an institution of property arises out of a necessity for individuals to be able to enact their autonomous nature in a way that is compatible with the full and equal freedom of all. There was a suggestion there that due to the institutional grounding of these kinds of property rights, the way in which clusters of property ownership of things can be determined is ‘up for grabs’ in a way that the cluster of bodily ownership is not. We can now see more clearly why this is, and it lies in the different relations between First and Second Property and our very ability to enact our autonomy. Relinquishing ownership powers over any one piece of Second Property does not affect the individual’s core powers to control what does and does not happen to him and his body. It does not eliminate the individual’s power to dissent to all future unwanted interference and thereby threaten his safety in the same way that selling himself, or his body, into slavery would.

CONCLUSION

This thesis began with an analysis of prostitution, in an attempt to identify and explore some of the main philosophical problems that it poses. It was suggested that there is something in the nature of both sex and money that distinguishes prostitution from other bodily services in the potential it has for the transaction to be characterised as an exchange of the body as property, rather than a service carried out by a person with the use of her body. On the other hand, there is nothing inherent in the activity that precludes it from being characterised and carried out as a service like any other. Prostitution, it was claimed, thus inhabits a grey area between property exchange and bodily service, prompting us to investigate what kind of ownership we can have over our bodies, through an analysis of where bodily rights and property rights overlap, and where they come apart. This was undertaken in chapter two, which in particular explored the implications of attempting to ‘rent’ one’s body as one might rent out a car, in order to tease out the different ways in which one can forfeit claims to property and claims to control of one’s body. There, I identified a key difference between the way in which property ownership and bodily ownership claims can be waived, and suggested that retaining on-going powers of consent and dissent over what happens to our bodies is crucially linked to our moral status in a way that is not the case for property.

But this left us with a question – if an agent makes an autonomous choice to alienate some of her bodily claims in the same way that she could alienate claims over a piece of property, what reasons could there be from a liberal point of view to justify preventing her from doing so, if she is aware this threatens her moral status and puts her at risk of harm? Chapter three sought to answer this question by investigating more closely the relation between ownership and autonomy, and identifying the relevant notion of autonomy which a liberal state’s authority consists in protecting. This, in turn, helped to clarify the limits of bodily ownership in terms of the kinds of powers over their bodies that individuals can be

allowed to transfer to other people. Transfer rights are thus not included in the kind of ownership we have over our own bodies, and the relevant notion of autonomy that a liberal state must protect is that individuals must retain powers of control over their own bodies, including the ability to operate the moral powers of consent and dissent to determine which actions may permissibly be carried out to or with their bodies.

The point of these theoretical investigations, which at points may have seemed at a remove from the original actual activity of prostitution, was to gain a better sense of the core philosophical puzzles buried at the heart of the activity. On reflection, it seems there *is* something special about sex that yields reasons to worry about the potential threat it poses to autonomy when one person pays another for sex. This lies in the paradoxical tendency of sexual desire to treat the bodies specifically of persons as mere objects for the satisfaction of that desire, and the way in which this tendency is amplified by expectations about what powers are gained over such objects by exchanging money for sex. For this reason, there is a threat inherent in prostitution that the bodies of sex workers be treated as objects to be transacted with as property. It is beyond the scope of this thesis to go on to decide exactly what the appropriate legislative response to this problem would be, but it provides a more robust theoretical basis from which to consider such questions of policy-making. I will close here with a few suggestions of the direction this may take.

Given the nature of the problem identified, it would be easy to point out that under current UK law, the body is *not* considered property that can be owned and transferred in the same sense as other objects. But this in itself does not make the problem obsolete. For the threat posed in prostitution is not simply a matter of whether prostitution transactions can in fact be carried out and recognised under law as property transactions involving the body, but rather a matter of the attitudes of each party involved, and the extent to which the sex worker becomes disempowered to exercise the relevant powers of control over her body during the

transaction. It would seem plausible to suggest that this tendency is influenced by informal market norms and expectations around this bodily trade.

It seems clear that where regulation of prostitution is minimal at most, there is wide scope for market norms to dictate certain unwritten rules for the transaction which may not be recognised in law as valid contractual terms, but which can nevertheless influence the shape of transactions without ever facing legal challenge. Market norms can thus undermine the autonomy of those involved in the trade in the relevant sense, by weakening their power to retain control over their bodily claims, and making it less likely that these be properly enforced. This in turn opens the door to a great deal of potential harm. The harm, however, is in a sense a secondary problem. For it is the initial undermining of autonomy in the relevant sense with which a legitimate state authority should be concerned. It is this autonomous exercise of bodily ownership claims that allows an individual to determine what acts of bodily interference and harm become a concern of the authority in the first place.

There are several factors we can pick out as feeding into market expectations, and creating market norms that may designate prostitution transactions as ones involving the alienation of powers over the sex worker's body in this autonomy-undermining way. The first two were suggested in chapter one, namely the wider meaning of money and its implications for the powers a client can buy with it. Second was the somewhat paradoxical nature of sexual desire, which on the one hand has a tendency towards strong objectification in viewing the body of the other as a thing to be consumed by the sexual appetite, but on the other hand, at least in prostitution, insists that its object must be the body of another – the very thing by which that person enacts her autonomous personality in the world. Other factors could be added to the list as well, such as a wider culture of men's entitlement to women's bodies, social expectations that women be subservient to men's desires, low conviction rates for rape and sexual assault that are likely to make victims of assault less likely to report the crime, and general

misconceptions about what constitutes sexual assault or rape. We could add to this list wider attitudes towards prostitution that lead to the marginalisation and shaming of sex workers, and the fact that many sex workers are from poor socio-economic backgrounds, with very few other options for stable work available to them⁴⁴.

Apart from the point about sexual desire, these are all contingent empirical claims about the way things are now, with some being more open to change than others⁴⁵. The point of raising these, however, is not to argue simply that prostitution would be fine in itself if we lived in some ideal society without these shortcomings, and it is *merely* as a result of these social factors that prostitution becomes problematic. Rather, as I suggested in chapter one, prostitution by its nature already has the potential to be characterised as the kind of transaction that involves trading in the body on the model of a property exchange, and this in itself raises certain deep problems and challenges to notions of autonomy, bodily ownership, and the ways in which we can interact with others and grant them access to or powers over our bodies. This was presented as an indeterminacy – that in the absence of other factors such as regulation to stipulate which model of transaction prostitution must be carried out on, it would be indeterminate how prostitution as an activity is characterised, and open to being carried out on either model in each individual case, depending mainly on the attitudes of the participants to the encounter. Wider socio-economic background conditions are relevant insofar as they contribute to weighting the probability of the transaction being carried out in either of these two ways. The factors listed

⁴⁴ Although in theory the problem inherent in prostitution is gender-neutral, it seems that this comes out as a gendered problem once the background social conditions are taken into account. These are such that the weighting of balance in favour of the transaction coming out as body-selling is influenced most greatly by gender issues – namely those which pertain to the status of women in society, and the skewed power balance in which men, in general, hold power over women. That is not to say, however, that transactions involving male sex workers would be immune to this problem. It is still plausible that given the relevant attitudes, a male sex worker could engage in a transaction in which his powers over his body are alienated to the client in the same way, whether the client be male or female.

⁴⁵ It should also be noted that the analysis of the meaning of money falls under the category of contingent empirical factor, though it ought to be distinguished from other factors such as the wider social attitudes towards women and women's bodies in that it is in itself morally neutral.

above are just some of those that may contribute to increasing the probability that the parties involved in prostitution will view the transaction as one of body-selling, but the list should be taken as suggestive, and certainly not exhaustive.

Having a better handle on the way in which these contingent factors contribute to the problem of prostitution – by weighting the indeterminacy in favour of problematic, body-selling transactions – as well as clearer notion of the exact concern this raises for a liberal authority concerned with protecting autonomy, points towards what form a solution to this problem might take. The aim for legislation in this area would be to eradicate transactions of the body-selling kind, and ensure that if prostitution does happen, it is carried out as a personal service where each party respects the autonomy and body-ownership claims of the other, and sex workers in particular feel secure in their right to operate their powers of consent or dissent to any act at any point in the transaction. Given that the inherent tendency in prostitution towards this is fuelled by background social conditions feeding into expectations about the form of prostitution transactions, it would seem that legislation would have to be directed towards changing both these background social conditions and affecting the attitudes of those who participate in prostitution. Not only this, but it would also be important to ensure that the industry remain stable by not feeding back into problematic social attitudes towards gender and sex relations (in the words of Debra Satz, not becoming a ‘theatre of inequality’⁴⁶).

It is an immensely complex question whether or how this could be achieved effectively, and not one which can be covered here. A suggestion of a potential solution, though, might be found in a surprising source – back to Herman’s suggestion that it might be worth thinking about Kant on sex and marriage⁴⁷. Kant finds a similar objectification problem in acting on sexual desire in general that I have argued becomes relevantly problematic in prostitution. Given that due to our nature, we cannot avoid engaging in sex, Kant argues that

⁴⁶ Satz (2010)

⁴⁷ Herman (1993)

we need an institutional solution in marriage to secure a public identity for husband and wife which ensures that when each acts on sexual desire, they do so within a formalized relationship in which each recognises the autonomous status and rights of the other. This thus blocks husband and wife from regarding the other *merely* as an object subordinated to the sexual desire, even when that tendency is still present. It strikes me as an interesting line to pursue, to see whether we might find a similar solution for legislation of prostitution by implementing regulatory measures to secure publicly recognised identities for sex workers that work in a similar way, by securing a culture in which the autonomous status of sex workers is recognised and taken as given in all situations. This, as I said, is beyond the scope of this thesis. But by clarifying the underlying problematic of prostitution, I hope to have provided some guidance as to the kinds of responses that are most appropriate to the problem of prostitution.

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