Exploitation, Vulnerability, and the Body

A Philosophical Examination of Commercial Surrogacy



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Abstract

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A Philosophical Examination of Commercial Surrogacy

Since its inception, surrogacy has generated substantial debate in the philosophical literature. India has been host to a lucrative transnational surrogacy industry, where Indian women of low socioeconomic status serve as surrogates for predominantly wealthy foreigners. This thesis examines whether Indian commercial surrogacy is typically exploitative, and what, if anything, follows from this. I develop and defend a working account of exploitation focused on the unfair use of vulnerability: A exploits B when A takes unfair advantage of B's vulnerability. I define vulnerability according to a conception of justice, endorsing the capabilities approach as a working definition, due to the way in which it is able to reflect the plurality of disadvantage, and coheres particularly well with the experience of Indian surrogates. I bring this definition of exploitation to bear on the Indian surrogacy industry, suggesting that the situation therein constitutes wrongful exploitation. I argue that Indian surrogacy is typically *ex ante* harmfully exploitative according to Alan Wertheimer's influential definition, and therefore merits intervention by his own lights. Following this, I consider what remains wrongful about mutually advantageous exploitation, if the element of harm were to be removed. I give three arguments for intervening in wrongful exploitation in the absence of such harm. First, I make a consequentialist argument, suggesting that in light of exploitation's suboptimal nature as a mode of exchange, arguments for permitting mutually advantageous exploitation actually turn out to fall short in their welfarist aims, and intervention into exploitation plausibly produces better long term consequences. Following this, I make a non-consequentialist argument focusing on use of vulnerability, and the unfair advantage this generates. The use of vulnerability in this way is wrongful insofar as it trades on an objectionable and rectifiable injustice, and inflicts a status harm on the vulnerable, rendering exploitation inimical to ideals of relational equality. My third and final argument for intervention into mutually advantageous exploitation employs Clare Chambers' social constructivist approach, suggesting that when a "free choice" is influenced by prior injustice, and results in further disadvantage, there are reasons to intervene. Lastly, I suggest that the embodiment aspect of the *nature of the labour* in transactions such as surrogacy make them of special concern, and the exploitation of this type of labour particularly pernicious.

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Introduction

> Once embryo transfer technology is developed, the surrogate industry could look for breeders – not only in poverty-stricken parts of the United States, but in the Third World as well. There, perhaps one tenth the current fee could be paid women, Stehura speculated…once it is possible to have what Stehura calls an "authentic" surrogate – a woman into whom an embryo is transferred and who herself contributes none of the child's genes – clients will find the breeder's IQ and skin colour immaterial…Using Third World women as surrogates, Stehura maintained, would benefit them because the women would earn money with which to raise their other children.[1]

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> Their education ranged from illiterate to high-school educated, with the average having attended some middle school. The median family income is about $60 per month. If we compare that to the official poverty line in India, thirty-four of my interviewees reported family income below or around the poverty line. For most of the surrogates' families, the money earned through surrogacy was equivalent to almost five years of total family income, especially since many of the surrogates had husbands who were either in informal contract work or were unemployed.[2]

The first quote is taken from Gena Corea's feminist investigation into reproductive technologies. Writing in 1985, Corea suggests that new technologies, such as artificial insemination, medically induced ovulation, in vitro fertilisation (IVF), and surrogacy were reducing "women to Matter."[3] The quote displayed from Corea's work arises from her discussion with John Stehura, the president of The Bionetics Foundation Inc., which assisted with the arrangement of early surrogate pregnancies. Stehura is eerily prescient in his suggestion that women in less economically developed countries could be employed as surrogates and paid a lower fee, as a means of reducing the costs of surrogacy to consumers. Indeed, India has emerged as a leader of commercial surrogacy

[1] Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1985), p. 215.
[2] Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', *Signs* 35, no. 4 (2010): 969–92, https://doi.org/10.1086/651043, p. 974.
[3] Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, p. 2.

arrangements, partly as a result of the relatively low-cost nature of its assisted reproductive technology (ART) services. The total cost of surrogacy in India can be around £18,000, of which the surrogate typically receives around £4,000.[4] There is no legally enshrined minimum wage for surrogacy, so the fees paid to surrogates vary. Surrogacy in India is about a third of the price of surrogacy in America, which costs around $80,000 (£60,000), with American surrogates typically receiving $35-40,000 (£26-30,000).[5] Commercial Surrogacy is not legal in the UK, but surrogacy is permitted on an altruistic basis, where surrogates are reimbursed reasonable costs.[6]

John Stehura's estimation that poor women in the developing world would benefit from surrogacy arrangements, as they could use the money for their own needs, encapsulates the prominent view that Indian surrogacy is a "win-win" scenario, alleviating both poverty and childlessness. The second quote displayed above describes the typical financial and educational circumstances of Indian surrogates. It is taken from the work of the ethnographer, Amrita Pande, who has conducted extensive research into surrogacy arrangements in India. The Indian surrogacy industry will be the focus of the empirical component of this thesis, due to its status as the largest industry, and it exhibiting various features that lend themselves to ethical examination. Together, the two quotes are intended to highlight the socioeconomic imperative that seems to characterise the surrogacy transaction, and, as I will argue in this thesis, comprises the exploitation.

Since its inception, commercial surrogacy has generated considerable debate in the philosophical literature, from feminist condemnations of the practice as medical

[4] Julie Bindel, 'Outsourcing Pregnancy: A Visit to India's Surrogacy Clinics | Julie Bindel', *The Guardian*, 1 April 2016, sec. Global development, http://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel.
[5] 'Surrogacy Fees & Costs', Surrogacy America, accessed 3 January 2018, https://www.surrogacyamerica.com/prospective-parents/surrogacy-cost-fees.
[6] 'Surrogacy Arrangements Act 1985', Text, accessed 16 June 2016, http://www.legislation.gov.uk/ukpga/1985/49.

violence against women,[7] to commodification critiques which assert that commercial surrogacy arrangements fail to adequately value reproductive labour.[8] The Indian surrogacy industry has received substantial media attention, with commentators highlighting the poverty of surrogates and its unregulated nature as key concerns.[9] Perhaps in response to this attention, the Indian government has significantly altered its position on surrogacy since I began writing this thesis. In 2015, the government submitted an affidavit to the Supreme Court stating that it does not support commercial surrogacy, and proposed a change in the law. A new draft of the Assisted Reproductive Techniques Regulation Bill bans all surrogacy on a commercial basis, permitting only altruistic surrogacy to Indian couples on a case-by-case basis.[10]

Commercial surrogacy, the practice of paying another woman to carry a baby to term, raises a multitude of ethical concerns. This thesis is centred on exploring the following core question: is commercial surrogacy exploitative? In particular, I consider whether the Indian commercial surrogacy industry is *typically* exploitative of the women who become surrogates. This question entails various further questions, which I also address. What is exploitation? If there is no general consensus, what is the best way to define exploitation for the purposes of my investigation? If exploitation typically involves the unfair use of vulnerability, what is vulnerability? How do the facts of the Indian case satisfy the exploitation condition I have defended? What follows from the admission of exploitation? Is exploitation necessarily wrongful? Is it wrongful in a way that justifies

[7] Janice G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle Over Women's Freedom* (Melbourne: Spinifex Press, 1995).
[8] Elizabeth S. Anderson, 'Is Women's Labor a Commodity?', *Philosophy & Public Affairs* 19, no. 1 (1990): 71–92.
[9] 'Indian Surrogate Mothers Grab Last Chance to Make Babies Ahead of Impending Ban', *Reuters*, 19 January 2017, https://www.reuters.com/article/us-india-women-surrogacy/indian-surrogate-mothers-grab-last-chance-to-make-babies-ahead-of-impending-ban-idUSKBN1530FL.
[10] 'No Commercial Surrogacy, Only for Needy Indian Couples, Govt Tells SC', *The Indian Express* (blog), 29 October 2015, http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/.

regulatory interference? Why the special concern for this particular case of exploitation, when there exist many exploitative practices and jobs?

The practice of commercial surrogacy relates to myriad wider concerns. What ought to be the proper limits of the market? What, if anything, is wrong with allocating certain goods according to market norms? Do we own our bodies? Does commercial surrogacy subordinate women? Does there exist a 'right' to have biological children? Does this right entail a further right to access the means to have biological children? In metaphysical terms, does a mother contain a foetus, or is it a part of her? Commercial surrogacy raises more questions than I could possibly attempt to answer in this thesis. I raise these questions in order to set them aside, and put the limits of my own investigation into perspective.

The key focus of my investigation is the economic exploitation of surrogates. I have not focused on surrogacy's exploitation of surrogates *qua* women, as some feminists have. One reason for this analysis not being explicitly gendered is that the dominant literature within analytic philosophy that engages with surrogacy in relation to the concept of exploitation does not seem to invoke gender-specific arguments. Rightly or wrongly, patriarchal social construction appears to have been abstracted away in many analyses, in favour of focusing on the economic conditions that might motivate the transaction.

Similarly, I set aside the idea that there is a 'right' to have children, which, as I will suggest, requires more elaboration and defence than is possible to undertake in this thesis. While not quite invoking the idea of a right to have children, Stephen Wilkinson suggests that in considering policy proposals in response to surrogacy, we must consider the welfare-implications of prohibiting international commercial surrogacy on several different groups:

> First, there are the surrogates themselves (and their families). If their plight is as desperate as exploitation-critics suppose, then there is every chance that prohibition will substantially harm women who would otherwise have earned money from surrogacy…Second, there are prospective commissioning parents. Prohibiting international commercial surrogacy would prevent some of these people from having their own children. Third, prohibiting international commercial surrogacy may result in, and indeed is designed to result in, many possible future children not being born (the children who would have been born through international surrogacy) most of whom would have had worthwhile lives. While it would be going too far to say that this group (the merely possible future children) would be harmed, governments should, at the very least, be cautious about using legal prohibition to prevent people from coming to exist in cases where: (a) the child would be wanted by its parents; (b) the parents can afford to take care of the child and are capable of providing him or her with a decent home; and (c) the child would have a reasonable quality of life.[11]

I am sceptical that the ethics of surrogacy should be reduced to a welfarist calculation, and even if it should, I question whether the interests of parents and potential children should be given significant weight in relation to those of the surrogates. Ultimately, I believe that the exploitation of surrogates is the salient concern, and will argue that there turn out to be both welfarist and deontological reasons to intervene in exploitative practices, rather than permit them. However, I will not in this thesis argue for my view that considerations of exploitation *outweigh* other considerations bearing on the ethics and regulation of commercial surrogacy.

Nevertheless, I would like to briefly raise some doubts regarding the salience of the 'right to have children,' and the welfare-implications for possible future children, to an analysis of the ethics of surrogacy. Establishing the relevance of these considerations would at least require substantial further clarification and argumentation. For example, it is not clear why a right to have children should mean a right to have one's own *biological* children. Secondly, in the context of overpopulation, climate change, and competition for scarce resources, it would be difficult to argue for the prioritisation of such a right when it comes into conflict with other interests.

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[11] Stephen Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements', *Journal of Applied Philosophy* 33, no. 2 (1 May 2016): 125–45, https://doi.org/10.1111/japp.12138, p. 137.

Further, would such a right create a claim of assistance from society? If so, how would such a claim of assistance be fulfilled? Crucially, against whom it this claim staked? Indeed, defending such a right to have children or advocating for the inclusion of future children in a welfarist analysis of surrogacy policy might have unpalatable implications in terms of laying the foundation for generating conflicts with women's rights. Women's bodies, after all, will be the arenas in which such rights and welfare considerations for possible future children are contested. To illustrate, it may be useful to invoke Judith Jarvis Thomson's famous distinction between having a right to life and having a right to be given the things necessary for sustaining life. Thomson makes this distinction in order to suggest that there are constraints on what we might reasonably be able to claim from other individuals. In particular, she invokes this distinction in order to claim that while having a right to life, foetuses do not have the right to the things necessary for sustaining life, i.e. unrestricted access to women's bodies. Indeed, "no person is morally required to make large sacrifices to sustain the life of another who has no right to demand them."[12] Analogously, a right to have children might be distinguished from a right to be given access to the means necessary to have children. If the means necessary to have children include exploitative access to other people's bodies through surrogacy arrangements, this might cast doubt on the reasonableness of such a claim.

Commodification is another issue that arises in relation to commercial surrogacy, which I also set aside, except insofar as it bears on my analysis of exploitation. The issue of 'commodification' relates to the application of market norms to spheres of human activity that might not normally be considered in this light. Commodification is often used pejoratively in ordinary language, to indicate disapproval with the expansion of the market sphere, such as in discussions surrounding the 'commodification of higher education.' Indeed, the Oxford English dictionary defines the verb 'commodify' as to

[12] Judith Jarvis Thomson, 'A Defense of Abortion', *Philosophy and Public Affairs* 1, no. 1 (1971): 47–66, p. 61.

"turn into or treat as a *mere* commodity,"[13] indicating that to treat something as a commodity is to value it *less*.

Elizabeth Anderson has set out one of the most detailed commodification objections against surrogacy. She offers a theory about what entities are properly regarded as commodities, arguing that children and women's reproductive capacities are not.[14] Anderson's core argument is that "when women's labor is treated as a commodity, the women who perform it are degraded," [15] and the children are reduced to commodities. Degradation, in this sense, "occurs when something is treated in accordance with a lower mode of valuation than is proper to it. We value things not just "more" or "less," but in qualitatively higher and lower ways. To love or respect someone is to value her in a higher way than one would if one merely used her."[16] Many of Anderson's arguments about the commodification of children are less relevant in the context of gestational IVF surrogacy, where the surrogate is not genetically related to the baby. This is because Anderson argues that surrogacy substitutes parental norms for market norms, and that this is degrading.

According to Anderson's commodification critique, "the application of commercial norms to women's labor reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use."[17] This, she argues, happens in three ways:

> First, by requiring the surrogate mother to repress whatever parental love she feels for the child, these norms convert women's labor into a form of alienated labor. Second, by manipulating and denying legitimacy to the surrogate mother's evolving perspective on her own pregnancy, the norms of the market degrade her. Third, by taking advantage of the surrogate mother's noncommercial motivations without offering anything but what the norms of commerce demand

[13] 'Commodify | Definition of Commodify in English by Oxford Dictionaries', accessed 29 November 2017, https://en.oxforddictionaries.com/definition/commodify.
[14] Anderson, 'Is Women's Labor a Commodity?'.
[15] Anderson, p. 75.
[16] Anderson, p. 77.
[17] Anderson, p. 80.

> in return, these norms leave her open to exploitation. The fact that these problems arise in the attempt to commercialize the labor of bearing children shows that women's labor is not properly regarded as a commodity.[18]

It is not just commercial norms that can have this effect, however. A mother may, for many reasons, not have parental love for, or feel bonded to her foetus, so it is not clear why commercial norms may be necessary, or peculiar, in relation to this. Further, her first two arguments hold even in altruistic surrogacy which does not involve commodification, or when a mother goes through with an unwanted pregnancy in order to give the child up for adoption. In these cases a mother is also required to suppress her own feelings towards her pregnancy. Her perspective on her own pregnancy is also manipulated, in altruistic surrogacy, as she is still giving the baby away, albeit not for a price. There doesn't seem to be anything unique about these concerns, in relation to *commodification*.

Anderson is also wary of altruistic surrogacy, given surrogates' emotional vulnerabilities, citing research which shows that "many surrogate mothers see pregnancy as a way to feel "adequate," "appreciated," or "special.""[19] Even if Anderson does believe altruistic surrogacy is problematic, it remains likely that she would agree it is bad in a different way to commercial surrogacy. In this case, it is still not clear what distinct effect the commercialisation aspect has. Why exactly is commodification bad if her above arguments hold in altruistic surrogacy and adoption too?

The third is the only argument that appeals directly to the issue of monetary payment. Expanding upon this point, Anderson claims:

> A kind of exploitation occurs when one party to a transaction is oriented toward the exchange of "gift" values, while the other party operates in accordance with the norms of the market exchange of commodities. Gift values, which include

[18] Anderson, p. 81.
[19] Anderson, p. 85.

> love, gratitude, and appreciation of others, cannot be bought or obtained through piecemeal calculations of individual advantage.[20]

Giving such gift values requires the

> repudiation of a self-interested attitude, a willingness to give gifts to others without demanding some specific equivalent good in return each time one gives.[21]

Here, Anderson appears to be invoking the issue of incommensurability; the surrogate's reproductive labour and what this brings is a "gift" value, while payment is a norm of market exchange, and exchanging one for the other results in a kind of exploitation. This could be because no price could possibly be fair, when the two goods are incommensurable, as one is a "gift." Yet seemingly incommensurable goods on this "gift" analysis are routinely exchanged; reverends, counsellors, and doctors are all paid salaries, while dealing in what could be interpreted as "gift values." As Anderson does not specify in detail what a "gift" value is, it is possible that it features in these other tolerated exchanges, and it seems she would not object to such exchanges, despite their satisfying the "gift" relationship condition.

The general idea behind the commodification objection tends to be that market norms should not be applied to certain spheres of life. The reason for this is that they 'degrade' in some way, either because monetary payment can never be sufficient, or because the very idea of offering monetary payment for a gift is contradictory. Vida Panitch sums up the commodification objection in its various iterations the following way: "commercial surrogacy is wrong because it involves the assignment of a market value to a good of inherent worth, and thereby reduces a human agent to the dollar value

[20] Anderson, p. 84.
[21] Anderson, p. 85.

of her body parts."[22] Through being outlined in this pithy universalised way, a number of unresolved questions surrounding the commodification view are brought into focus. What is the *inherent worth* of reproductive labour and pregnancy? This is a highly personal endeavour that each woman is likely to view differently. Anderson's moralised approach may not cohere with how many women view their pregnancies. Labelling reproductive labour as a gift relationship, therefore, requires justification, as there are likely to be myriad reasons that women become pregnant, unrelated to this idea of "gift."

Often, therefore, commodification concerns rest on controversial assumptions about value, in particular, how we ought to appropriately value reproductive labour, for which there is no forthcoming consensus. I wish to suggest that a reason as to why commodification is generally viewed as bad is, in part, and implicitly at least, to do with the potential for *exploitation* when a good or service becomes a commodity. In part for this reason, I focus on the exploitation objection to surrogacy, though, if successful, my approach can help bolster commodification arguments, and so the two objections remain related. Crucially, the matter of payment is central to the issue of commodification. This is what turns the reproductive labour into a *commodity*. Rather than this monetary value being at odds with the labour's inherent value, as commodification arguments propose, I propose that the concern about payment has to do with the repercussions of a good being supplied and distributed according to the market. One of the core problems related to the market, therefore, is the potential for exploitation. Exploitation is primed to occur in markets operating under imperfect conditions, including those of inequality. What may be driving commodification arguments, therefore, are latent concerns about inequality and exploitation, which come into the fore when a good is allocated according to market norms.

[22] Vida Panitch, 'Global Surrogacy: Exploitation to Empowerment', *Journal of Global Ethics* 9, no. 3 (December 2013): 329–43, https://doi.org/10.1080/17449626.2013.818390, p. 340.

Debra Satz has similarly criticised Anderson's commodification critique, as well as other arguments that suggest there is "something *essential* about reproductive labor that singles it out for differential treatment."[23] Rather, it is her suggestion that "the strongest argument against contract pregnancy that depends on the asymmetry thesis is derived from considerations of gender equality." [24] The asymmetry thesis is Satz's conceptualisation of the idea that "there ought to be an asymmetry between our treatment of markets in reproductive labor and our treatment of markets in other forms of labor,"[25] that seems to lie behind the commodification critique. Thus, for Satz, "it is the background gender inequality that makes the commodification of women's attributes especially objectionable."[26] She argues that "in our society such contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal status of women."[27]

While this may be the case, Satz's argument crucially neglects the backdrop of pervasive economic inequality, which also contributes to the way in which such contracts are set to occur. Despite writing in 2010 when the trans-national surrogacy industry was booming, there is no mention of economic inequality as a driver to the transaction. Yet, it seems that Satz does recognise this as an issue – she accepts that commercial surrogacy could be permissible under conditions of gender equality, but that even in such circumstances, it is important to ensure that women are not selling their reproductive labour out of extreme vulnerability.[28] My analysis transcends Satz's line of argument, therefore, and claims that under a backdrop of economic inequality, surrogacy is problematic for this kind of equality too. The discussion is no longer situated in the

[23] Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford: Oxford University Press, 2010), p. 127.
[24] Satz, p. 128.
[25] Satz, p. 115.
[26] Satz, p. 128.
[27] Satz.
[28] Satz, p. 131.

conditional tense, as I will show that the present situation in India *is* a paradigmatic case of women selling their labour out of extreme vulnerability, something Satz warns against but does not address. Gender, too, is an important consideration, and it would be instructive to see how these two considerations intersect to create a distinct wrong. However, an explicitly gendered or racialised approach, which accounts for the socially contingent reasons as to why India came to flourish as a surrogacy destination, is beyond the scope of this investigation.

Dominant philosophical analyses of commercial surrogacy have focused on the practice in abstraction, pointing to the potential for exploitation under certain circumstances, [29] where these 'certain circumstances' have been hypothetical. In considering whether commercial surrogacy should be banned if deemed exploitative, Alan Wertheimer questions whether such a ban would actually have egalitarian consequences, as "we have no empirical evidence to support the claim that the permissibility of surrogacy would reinforce or perpetuate social inequalities." [30] Wertheimer's statement appears less plausible now that we have a wealth of empirical evidence to suggest that India has become a hotspot for surrogacy due to its ability to provide a ready supply of surrogates at a significantly lower cost than the West. An appropriately comprehensive exploitation analysis of surrogacy must be sensitive to this new empirical reality. Facts presented by the Indian case, therefore, allow us to challenge hypothesised, abstract analyses such as Wertheimer's, which appeal to the unknown nature of the demographics of surrogacy, and thus avoid levelling a conclusive exploitation charge.

[29] Alan Wertheimer, 'Two Questions about Surrogacy and Exploitation', *Philosophy & Public Affairs*, 1992, 211–239.
[30] Wertheimer, p. 238.

Other analyses are rooted in ideal theory, assuming just background social arrangements.[31] Writing slightly before the boom in Indian surrogacy, Cécile Fabre notes that her account being located in ideal theory isn't problematic because "under current, non-ideal conditions, although most surrogate mothers are less well off than commissioning parents, they are not, in fact, poor."[32] It will be shown that Indian surrogates *would* fit the description of poor that calls into question the value of Fabre's ideal theorising on this matter. While more recently philosophers such as Anne Phillips,[33] Vida Panitch,[34] [35] Stephen Wilkinson,[36] [37] and Alison Bailey[38] have explored the Indian commercial surrogacy industry in relation to exploitation, none have surveyed the empirical literature to quite the extent I seek to, in order to build their case. Further, as I will show, theorists such as Panitch and Wilkinson come to rather different conclusions about what follows from establishing that commercial surrogacy arrangements in India are typically exploitative.

There are four major original contributions of this thesis. The first is the extent to which the empirical literature on surrogacy in India has been reviewed, and brought to bear on a philosophical exploration of surrogacy in relation to exploitation. The second major original contribution is the way in which a 'middle ground' is identified between divergent theories of exploitation. I suggest that even apparently conflicting accounts share a focus on vulnerability as exploitation's key component. The third major contribution is the way in which I advance the case for regulatory interference in

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[31] Cécile Fabre, *Whose Body Is It Anyway?: Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2008).
[32] Fabre, p. 188.
[33] Anne Phillips, *Our Bodies: Whose Property?* (Princeton: Princeton University Press, 2013).
[34] Vida Panitch, 'Exploitation, Justice, and Parity in International Clinical Research: Exploitation, Justice and Parity in Clinical Research', *Journal of Applied Philosophy* 30, no. 4 (November 2013): 304–18, https://doi.org/10.1111/japp.12040.
[35] Panitch, 'Global Surrogacy'.
[36] Stephen Wilkinson, 'The Exploitation Argument against Commercial Surrogacy', *Bioethics* 17, no. 2 (2003): 169–187.
[37] Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements'.
[38] Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy', *Hypatia* 26, no. 4 (1 November 2011): 715–41, https://doi.org/10.1111/j.1527-2001.2011.01168.x.

exploitative surrogacy, and exploitation more generally. Other theorists have acknowledged the exploitative and even coercive nature of Indian surrogacy arrangements, yet fall shy of advocating intervention, arguing that exploitative surrogacy serves as a best possible option under non-ideal constraints.[39] [40] [41] By contrast, I dismantle various assumptions contained within the view that such arrangements would turn out to be mutually beneficial and should be permitted for this reason. In doing so, I provide arguments for seeking to limit exploitation, where possible, grounded in liberal principles of equality, justice, and welfare. The fourth and final major contribution of this thesis is the exploration of the *nature of the labour* of commercial surrogacy. The tangible aspects of what this labour actually involves are ordinarily abstracted away in thought experiments that focus on whether consent is forthcoming, or whether the exchange is fair. In the final chapter of this thesis, however, I consider in detail what might be peculiar about this kind of labour, and what might justify its differential treatment.

The argument of the thesis

In Chapter One, "Commercial Surrogacy in India," I draw upon the ethnographic and empirical research on surrogacy in India, identifying various morally salient features of the Indian context, suggesting that these prepare the ground for analysing surrogacy through the lens of exploitation. In particular, I identify background injustice, in regards to severe material deprivation, and the subsequent vulnerability and weak bargaining positions of the surrogates, as setting the scene for exploitation to occur. As well as this, I point to the use of various harmful medical practices, as well as the use of surrogacy hostels, which I will later argue render the exploitation involved in commercial surrogacy

[39] Panitch, 'Global Surrogacy'.
[40] Wilkinson, 'The Exploitation Argument against Commercial Surrogacy'.
[41] Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements'.

harmful, rather than mutually advantageous, on the distinction put forward by Alan Wertheimer.

In Chapter Two, "Exploitation: A Theoretical Analysis," I undertake a conceptual analysis of exploitation, drawing out its key elements, through an exploration of the literature. I come to defend the following account: *A exploits B when A takes unfair advantage of B's vulnerability*. Crucially, vulnerability is defined according to a conception of justice. That is, vulnerability is the result of failures of the state in discharging duties of institutional justice. I have chosen to define vulnerability this way due to the way in which it coheres with the empirical reality, whereby vulnerability, and therefore exploitability, appear to be largely results of structural and background injustice. This analysis of exploitation is contained to market transactions involving vulnerability that results from failures in institutional justice, therefore, rather than including the vulnerability involved in interpersonal and romantic relationships, say. I attempt to find consensus between transactional accounts of exploitation, which maintain that exploitation is consensual, and structural accounts of exploitation, which hold that exploitation necessarily involves forceful transfer. I suggest that there is a way in which both accounts are right, and we must distinguish two senses of voluntariness to understand this. Further, I suggest that a vulnerability-based account is able to reflect the defect in choice and reference to background injustice advocated by structural accounts, as such background injustice is a prime cause of vulnerability. A vulnerability-focused account also retains some attractive features of transactional accounts, including ostensible consent, and the absence of 'force.'

In Chapter Three, "Vulnerability and Exploitation," I disentangle a debate between Robert Goodin and Mikhail Valdman in order to show that even purportedly contrasting analyses of exploitation depend, in part, on the concept of vulnerability. For this reason, vulnerability is worth taking seriously in a working definition of exploitation

that does not require resolution of all underlying philosophical disagreements. Following this, I engage in a conceptual analysis of vulnerability, beginning with its ordinary language use. I endorse the capabilities approach as a working definition of vulnerability, arguing that viewing vulnerability in this way captures the wrongfulness of various aspects of exploitation, particularly its relationship with injustice.

In Chapter Four, "Surrogacy as Harmful Exploitation," I draw upon the facts of the case to suggest that surrogacy constitutes harmful exploitation according to the harmful/mutually advantageous distinction put forward by Alan Wertheimer. Building upon the empirical analysis of Chapter One, I present evidence that suggests surrogacy is typically *ex ante* net harmful to surrogates. Factors contributing to surrogacy's status as harmful exploitation include the lack of informed consent given by surrogates at several stages of the process, the nature of various medical practices used, which go against accepted protocol, and the use of surrogacy hostels. In light of these practices, and in the absence of a restructuring of current surrogacy arrangements, surrogacy in India can be conceived as typically *ex ante* harmful, and Wertheimer would be forced to concede that it constitutes harmful exploitation of a sort that generates reasons for intervention.

In Chapter Five, "Surrogacy as Wrongful Exploitation," I imagine what might remain problematic about the situation if the harms outlined in Chapter Four were removed by better regulation, say, and surrogacy were rendered a case of mutually advantageous exploitation, rather than harmful exploitation. I put forward a case for intervening in mutually advantageous exploitation, arguing that exploitation remains wrongful. I provide three arguments for the wrongfulness of mutually advantageous exploitation, which are then taken to motivate justification for intervention. First, I make a consequentialist argument, suggesting that arguments for permitting mutually beneficial exploitation turn out to fall short in their own welfarist aims. Following this, I make a non-consequentialist argument focusing on exploitation's unfair use of vulnerability. The

use of vulnerability in this way is wrongful insofar as it trades on an objectionable and rectifiable injustice, and inflicts a status harm on the vulnerable, rendering exploitation inimical to ideals of relational equality. My final argument for intervention into mutually advantageous exploitation employs Clare Chambers' social constructivist approach, suggesting that when a "free choice" is influenced by prior injustice, and results in further disadvantage, there are reasons to intervene.

Finally, in Chapter Six, "Body Exceptionalism and Embodied Labour," I defend the thesis that the body is special and should not be treated as an ordinary material resource. While my account of exploitation arguably captures a wide range of commercial practices, I suggest that the embodiment aspect of the *nature of the labour* in transactions such as surrogacy make them of special concern, and the exploitation of this type of labour particularly pernicious. This has to do, firstly, with the special status of the body and the heightened loss of autonomy that embodied labour appears to involve. Secondly, embodied labour typically places further constraints on existing corporeal vulnerability, a universal state we all experience as embodied beings, as our body is our main and vital resource. Treating embodied labour in the same way as ordinary labour crucially neglects the inherent frailty and vulnerability of the human body, and the strains that embodied labour inevitably places upon it. In instances of exploitation of embodied labour, therefore, where the contract has been entered into from a position of vulnerability, we should be particularly concerned when this type of vulnerability intersects with and impacts upon universal corporeal vulnerability.

Chapter One

Commercial Surrogacy in India

1.1 Introduction

I suggest that various features of the Indian commercial surrogacy industry lend it to an exploitation analysis. In this chapter, I draw upon empirical data, investigative journalism, and ethnographic research to supply an illustration of the Indian commercial surrogacy industry. I outline a number of morally salient features of the situation in order to provide an empirical foundation for my subsequent exploitation and embodied labour analyses of commercial surrogacy. In particular, I explore the socioeconomic background of surrogates, legal issues surrounding the contract, recruitment of surrogates, the use of surrogacy hostels, and the nature of the labour, including the medical practices used by clinics. There will be numerous features of the situation that may make it appear objectionable, but the analysis of this will not occur until later chapters. For now, I provide a descriptive account of the industry, as well introducing the lines of analysis that I will follow in later sections where I examine the industry in relation to the concept of exploitation.

My empirical investigation into surrogacy relies on the three main ethnographers working in the area. While there are also important pieces of investigative journalism that inform my thesis, as well as research into the medical practices used in Indian surrogacy, I mainly draw upon the research of Amrita Pande, Daisy Deomampo, and Sharmila Rudrappa to explore the background circumstances of the transaction, and of surrogates' socioeconomic status. The surrogates these ethnographers interview plausibly comprise a

fairly representative sample of Indian surrogates, due to their each undertaking their research in a typical surrogacy hostel, in varying locations. Primary research in this area remains relatively limited due to the sensitive nature of surrogacy, rendering it difficult for researchers to gain access to. Clinics are keen to maintain their privacy, while surrogates themselves are a vulnerable population with whom it may be difficult to gain ethics approval to conduct research. My doctoral funding award from the Wellcome Trust included funds to travel to India on a hypothesis-generating trip. While it would have been near impossible for me as a doctoral researcher to gain ethics approval to interview surrogates, I was instead able to gain ethics approval to conduct interviews with academics, researchers, NGO workers, and a prominent surrogacy lawyer. Such individuals are considered to be "elite professional participants," due to their senior status, and ethics approval for their research participation is easier to obtain due to their ability to give informed consent to participate, and low risk of being harmed by participation.[42] The individuals I interviewed were experts in their field, holding privileged access to information that was of relevance to my research. The interviews grounded my approach in the reality of the Indian situation, giving rise to suggestions of Indian research to consider, and information on the workings of Indian law. The outcomes of the interviews can be seen in the inclusion of certain research that I shall not make explicit in order to preserve the anonymity of the participants.

1.2 Background

Commercial surrogacy involves a financial contract between a surrogate and the intended parent(s) to carry a baby to term. In traditional surrogacy, the surrogate's egg is used,

[42] 'Permission and Approval: Key Questions', accessed 1 December 2017, http://www.ethicsguidebook.ac.uk/Permission-and-approval-Key-questions-79.

making her the genetic mother. In gestational surrogacy, the surrogate has no genetic relationship with the child, since both gametes come from the commissioning couple or are sourced elsewhere, with assisted reproduction techniques used to implant the resulting embryo. It has been suggested that the development of gestational surrogacy has led to the popularity of transnational surrogacy, as the genetic make-up of the surrogate is no longer of key importance, allowing for the womb and gestational capacities to be separated from the person: "in traditional surrogacy, the surrogate provides the genetic material as well as the womb. The intended parents, therefore, are more likely to emphasize the 'right' genetic makeup, such as race, physical characteristics, intelligence. In gestational surrogacy, however, the surrogate's genetic makeup becomes irrelevant for the commissioning couple as she provides only her womb. Not surprisingly, gestational surrogacy has a big role to play in the growing popularity of transnational surrogacy."[43]

Negotiating surrogacy on a commercial basis is illegal in the UK under the Surrogacy Arrangements Act (1985).[44] Altruistic surrogacy is legal, however, and surrogates may be compensated for reasonable expenses.[45] Surrogacy legislation in the UK was developed in accordance with findings from the Warnock Committee. This committee was established in 1982 and led by philosopher Dame Mary Warnock "to consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical, and legal implications of these developments; and to make recommendations."[46] The inquiry concluded that the danger

[43] Amrita Pande, 'Transnational Commercial Surrogacy in India: Gifts for Global Sisters?', *Symposium: Cross-Border Reproductive Care – Ethical, Legal, and Socio-Cultural Perspectives* 23, no. 5 (November 2011): 618–25, https://doi.org/10.1016/j.rbmo.2011.07.007.
[44] 'Surrogacy Arrangements Act 1985'.
[45] 'Legalities | Surrogacy UK', accessed 16 June 2016, http://www.surrogacyuk.org/legalities.
[46] Großbritannien and Mary Warnock, eds., *Report of the Committee of Inquiry into Human Fertilisation and Embryology, Department of Health and Social Security* (London: HMSO, 1984), p. 4.

of exploitation outweighed the potential benefits of commercial surrogacy. It stated that treating people as means to one's own ends becomes "positively exploitative when financial interests are involved."[47] It allowed that surrogacy could be undertaken on a private altruistic basis.[48] Countries that permit surrogacy on a commercial basis include Ukraine, Russia, Mexico, Poland and Georgia.[49]

1.3 The Indian Context

India has emerged as a 'leader' of commercial surrogacy, with the Confederation of Indian Industry predicting the industry now generates US$2.3 billion annually.[50] In order to understand how a transnational commercial surrogacy industry came to flourish, it is necessary to locate surrogacy in India's wider medical tourism agenda.

Dominated by the private sector, India's health care industry is growing at an annual rate of almost 15%.[51] Spending 4.7% of GDP on healthcare, public investment into health care in India is among the lowest in the world.[52] Commentators suggest that the state is retreating from its responsibility to provide healthcare services by subsidising private investment in healthcare services. In order to attract foreign capital, the Indian government actively promotes medical tourism, with assisted reproductive services being a key aspect of this. It does this through providing financial incentives to private hospitals, reducing import tariffs for medical equipment, and expediting medical visas

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47 Großbritannien and Warnock, p. 46.
48 Großbritannien and Warnock.
49 Helier Cheung BBC News, 'Surrogate Babies: Where Can You Have Them, and Is It Legal?', BBC News, accessed 16 June 2016, http://www.bbc.co.uk/news/world-28679020.
50 Priya Shetty, 'India's Unregulated Surrogacy Industry', *The Lancet* 380, no. 9854 (n.d.): 1633–34, https://doi.org/10.1016/S0140-6736(12)61933-3.
51 'India Slashes Health Budget, Already Among World's Lowest: Report', NDTV.com, accessed 16 June 2016, http://www.ndtv.com/india-news/india-slashes-health-budget-already-among-worlds-lowest-report-717235.
52 'Health Expenditure, Total (% of GDP) | Data | Table', accessed 16 June 2016, http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS.

and joint insurance collaborations in order to facilitate medical travel.[53] Commercial surrogacy was legalised in 2002, but is regulated only by non-binding guidelines, issued by the Indian Council of Medical Research (ICMR) in 2005. There are currently no laws regulating the procedures, the contract, or the surrogate-client relationship, which has allowed clinics to work informally, following their own rules. As a consequence, "intended parents are able to take advantage of the client-friendly policies of private clinics and hospitals, where doctors are willing to offer options and services that are banned or heavily regulated in other parts of the world."[54]

During the writing of this thesis, the Indian government's position on surrogacy has dramatically shifted, coinciding with the increased scholarship in this area, suggesting the possible influence of academic and increased media attention. In November 2015, the Government of India, Ministry of Health and Family Welfare, issued a notice to stop the commissioning of surrogacy in India by foreign nationals and Overseas Citizen of India (OCI) cardholders. The Ministry of Health and Family Welfare stated that it has undertaken the policy decision "not to support commercial surrogacy," in consultation with various other ministries and government departments. It further stated that the enactment of the latest proposed ART Bill is under consideration, and until the enactment of this legislation, it issues instructions of immediate effect to ART clinics, and other government departments. These instructions include a policy not to issue visas to foreign nationals intending to visit India for commissioning surrogacy, as well as a ban on issuing exit visas to children born through surrogacy to foreign nationals. This has

[53] Maya Unnithan, 'Infertility and Assisted Reproductive Technologies (ARTs) in a Globalising India: Ethics, Medicalisation and Agency', *Asian Bioethics Review* 2, no. 1 (6 July 2011): 3–18.
[54] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India* (New York: Columbia University Press, 2014).

resulted in effectively banning transnational surrogacy in India, permitting only surrogacy for married Indian couples.[55]

A 2016 draft Surrogacy Regulation Bill is currently being mooted which would legally prohibit anyone but infertile Indian couples who have been married for at least five years undertaking surrogacy. Furthermore, both the couple and the surrogate would be required to obtain eligibility certificates for participation in surrogacy, granted by local authorities, which will be regulating the clinics. Finally, the Bill proposes that no payment other than reasonable medical expenses can be paid to the surrogate mother. It would therefore effectively prohibit commercial surrogacy, replacing it with a locally regulated altruistic model.[56] At the point of writing it is not clear whether the Bill will pass.

The language and content of the Bill suggests that addressing exploitation of surrogates was a key motivating factor in its development. Indeed, Part VII specifically outlines the "prohibition of commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy,"[57] and the term 'exploitation' features seven times in the Bill. In the following section, I set out various features of the situation, which I take to be morally salient, and critical to an ethical examination of the surrogacy industry. I come to argue that these factors make an exploitation lens a suitable tool in examining the industry. It does not affect the argument I intend to make that India has now declared a ban on international surrogacy. Indeed, India's decision may even serve to support my argument that the empirical reality suggests Indian surrogacy arrangements are typically exploitative. Exploring the various background conditions at work in the Indian context should also serve to shed light on India's decision to take action to ban international surrogacy, particularly if exploitation has been its concern.

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[55] 'Govt Bans Commercial Surrogacy in India; Also Prohibits Import of "human Embryo" except for Research Purposes', accessed 27 October 2017, http://www.pharmabiz.com/NewsDetails.aspx?aid=91582&sid=1.
[56] 'PRS | Bill Track | The Surrogacy (Regulation) Bill, 2016', accessed 27 October 2017, http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/.
[57] 'PRS | Bill Track | The Surrogacy (Regulation) Bill, 2016'.

1.4 Morally Salient Features of the Situation

1.4.1 Background of surrogates

The Indian surrogacy industry is characterised by wealthy international clients procuring the services of Indian surrogates who are comparatively and absolutely less well off. Amrita Pande, one of the leading ethnographers in this area, has conducted extensive fieldwork in Anand, Gujarat, a city considered the global surrogacy capital. She found that 34 of the 42 surrogates that she interviewed (80.9% per cent) reported family income below or around the poverty line,[58] and "all but one reported acute financial desperation."[59] Pande also found that for most of the surrogate's families, the money earned through surrogacy was "equivalent to almost five years of total family income."[60] Such statistics illustrate the profound poverty of the women who are choosing to become surrogates, and their palpable financial motivations.

In a country with high levels of poverty and limited social security, surrogacy has become an alluring choice for women with limited earning options. The World Bank estimates that 21.3% of the population lives below the poverty line, that is, below US$1.90 a day. Pande notes that of the women she interviewed, most "were driven to surrogacy because of financial desperation, often compounded by a medical emergency and an urgent need for liquid cash."[61] In her six years of fieldwork, she only came across two women who identified as middle class. One surrogate remarks, "this is not work, this is majboori [a compulsion]. Where we are now, it can't possibly get any worse…it's just something we have to do to survive. When we heard of surrogacy, we didn't have any clothes to wear after the rains—just one pair that used to get wet—and the roof of our

[58] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 974.
[59] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 20.
[60] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 974.
[61] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 20.

house had collapsed. What were we to do?"[62] Another surrogate told Pande she had to convince the doctor to let her be a surrogate while she was still breastfeeding her own baby, as there was no money in the house to buy milk: "I am doing this basically for my daughters; both will be old enough to be sent to school next year. I want them to be educated, maybe become teachers or air hostesses? I don't want them to grow up and be like me – illiterate and desperate."[63]

Pande's other findings about the women's backgrounds revealed that fourteen were "housewives," two "worked at home," and the others worked at schools, clinics, farms and stores. Their education ranged from illiterate to high school level, with the average being middle school level.[64] Many of their husbands were either in informal work such as rickshaw pullers, factory workers, and stall workers, or unemployed. Research by Daisy Deomampo, another ethnographer working in the area of Indian commercial surrogacy, appears to corroborate Pande's findings: "in general the surrogates and egg donors who participated in my study had low rates of access to education; many stopped school by seventh grade."[65]

Interviewing surrogates from four different surrogacy clinics, Tulsi Patel and Sunita Reddy also found that surrogates' "primary motives were the meager earnings of their husbands, debts, and family responsibilities. Other reasons included domestic violence and alcoholism."[66] A doctor interviewed also "stated that the main reason surrogates come forward is because of financial hardship."[67] Corroborating this, a surrogacy agent said the following about surrogates: "they are really needy, poor and

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62 Pande, Amrita, p. 134.
63 Pande, 'Transnational Commercial Surrogacy in India: Gifts for Global Sisters?', p. 622.
64 Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*., p. 20.
65 Daisy Deomampo, 'Transnational Surrogacy in India: Interrogating Power and Women's Agency', *Frontiers: A Journal of Women Studies* 34, no. 3 (January 2013): 167–88, https://doi.org/10.5250/fronjwomestud.34.3.0167, p. 177.
66 Sunita Reddy and Tulsi Patel, '"There Are Many Eggs in My Body": Medical Markets and Commodified Bodies in India', *Global Bioethics* 26, no. 3–4 (2 October 2015): 218–31, https://doi.org/10.1080/11287462.2015.1112625, p. 221.
67 Reddy and Patel, p. 228.

helpless. Many women want to commit suicide because of financial burdens. In the last 3 years at least three to four hundred women have approached me."[68]

Pande notes that these women are not the "poorest of poor." This is because surrogacy agencies require "an ideal reproductive worker."[69] This means their health cannot be overly compromised by poverty – they cannot be severely malnourished or underweight. However, while surrogates may not be the "poorest of the poor," they are still poor to the extent that they lack basic capabilities,[70] which I come to argue, comprises their vulnerability. This vulnerability, I will argue in Chapter Three, is a key aspect of their condition, which leaves them susceptible to exploitation.

The previous ICMR ART guidelines provided just a few stipulations for surrogacy candidates. They state that a surrogate mother must not be over 45 years of age, must have been tested for HIV before embryo transfer, and can only be a surrogate up to three times.[71] Clinics have adopted their own informal guidelines, however, to aid the surrogacy process. The clinic that was the focus of Pande's research adopted the following informal rules for selecting surrogates: "the woman should not be older than forty, should be medically fit, and have a healthy uterus; she should be married with at least one healthy child; and, finally, she should have her husband's consent."[72]

Another salient feature of the surrogates' backgrounds is that for almost all, this is their first contact with the medicalisation of pregnancy, as hospital births are not the norm in India. India's maternal mortality rate is high, with the latest World Bank models showing that there are an estimated 174 deaths per 100,000 live births in India,

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[68] Reddy and Patel, p. 221.
[69] Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (New York: New York University Press, 2015), p. 42.
[70] In terms of Amartya Sen and Martha Nussbaum's capabilities approach to justice.
[71] 'The Assisted Reproductive Technologies Regulation Bill' (Indian Council of Medical Research, 2010), p. 69.
[72] Amrita Pande, "'At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India', *Feminist Studies* 36, no. 2 (2010): 292–312, p. 296.

contrasted with 9 per 100,000 in the United Kingdom.[73] While surrogates receive hospital care for surrogate pregnancies and so wouldn't face this maternal mortality rate during surrogacy, this is likely to be the rate they faced during their own pregnancies, further highlighting their unfavourable background circumstances. India is ranked first in a 2010 Save the Children report on maternal deaths, with more than 68,000 women dying each year from complications during or after childbirth. These deaths are partly due to the lack of qualified care, as data show only 13% of low-income women give birth in a formal facility.[74] Researchers have commented upon the irony "that a country that has the highest absolute number of maternal deaths and only 51 doctors for every 100,000 people is focusing on providing birth-related services to international patients."[75]

1.4.2 History of sterilisation

The fact that most surrogates have had a home birth prior to becoming surrogates is of note for another reason. It indicates their position in a social class, a class that has also historically been subject to fertility control. The ethnographer, Sharmila Rudrappa, who has also conducted extensive fieldwork with surrogates in India, notes that India's history of *fertility control* and *fertility assistance* are connected. Rudrappa locates surrogacy in the history of medical interventions in order to "reveal the long-term patterns of control over working-class women's bodies."[76] Most of the surrogates Rudrappa interviewed had themselves been sterilised. Pande notes that of the surrogates she interviewed, 13 of the 20 that practiced some form of contraception were in fact sterilised.[77] This fits into a

[73] 'Maternal Mortality Ratio (Modeled Estimate, per 100,000 Live Births) | Data | Table', accessed 18 June 2016, http://data.worldbank.org/indicator/SH.STA.MMRT.
[74] Tracy Geoghegan and Save the Children (U.S.), *Women on the Front Lines of Health Care State of the World's Mothers 2010* (Westport, CT: Save the Children, 2010), http://www.reliefweb.int/rw/lib.nsf/db900sid/SMAR-8554YX/$file/savethechildren_SWM%202010.pdf?openelement.
[75] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 35.
[76] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, p. 24.
[77] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 112.

wider trend: 37% of married women in India opted for tubal litigation between 2005-6, and sterilization is the most prevalent form of "contraception" among rural women and those with lower levels of education.[78]

The prevalence of sterilisation as a form of birth control is located in India's history of population control programmes.[79] After its independence from Britain in 1947, concerns about population size and a desire to modernise led India to implement what would become the largest state-sponsored family planning programme in the world.[80] India's population control programme was shaped and influenced by public and private institutions from the global north, including the Rockefeller Foundation, the United States Agency for International Development (USAID), the World Bank, and the United Nations Population Fund (UNFPA). It is suggested that the greatest foreign involvement in India's population agenda "came after the drought and the economic crisis of 1966 when India was pressured by the World Bank to intensify fertility reduction efforts along with a move towards economic liberalisation."[81] As a response, the voluntary family planning scheme became incentive and target-driven. To encourage acceptance, between 1975-1977, during the National Emergency, "men from impoverished communities were rounded up and coercively sterilised."[82]Also during this time, methods of birth control such as intrauterine devices (IUDs) and long-acting hormone-based contraception such as anti-fertility vaccines were aggressively propagated.[83] Such contraceptives had side effects that weren't adequately explained to women, and in many cases IUDs were implanted wrongly. Long-term and more invasive contraceptive methods were pushed as

[78] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, p. 25.
[79] Rudrappa, p. 26.
[80] Rosanna Ledbetter, 'Thirty Years of Family Planning in India', *Asian Survey* 24, no. 7 (1 July 1984): 736–58, https://doi.org/10.2307/2644186.
[81] Nilanjana Chatterjee and Nancy E. Riley, 'Planning an Indian Modernity: The Gendered Politics of Fertility Control', *Signs* 26, no. 3 (2001): 811–45.
[82] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, p. 30.
[83] Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control* (Cambridge, MA: South End Press, 1995).

the requirements of the pill regimen were seen to be "beyond the powers of mind and discipline of illiterate Indian housewives."[84]

This approach to population control does not appear to have been relegated to the past. In 2012, the UK gave India £166m to fund a sterilisation programme, which predominantly targeted the poor. It was reported that people were threatened with losing their ration cards if they did not undergo sterilisation, or were incentivised to participate by being given 600 rupees (around £7) and a sari. Some states reportedly also ran lotteries in which people could win cars and fridges.[85] Indeed, it was reported in October 2016 that such state-run sterilisation camps still exist.[86] It is no coincidence, therefore, that many of the women who are choosing to become surrogates have also been sterilised under India's population control programmes. Indian surrogates occupy a historically targeted position in society. Forced sterilisation underlines the disadvantage faced by this section of the population, and is relevant to the assessment of surrogacy, because it further supports the idea that surrogates are vulnerable, a status that I argue is key to their exploitation.

1.4.3 The Contract

Another morally salient feature of the situation is the surrogacy contract itself, in particular, its content, and how it is understood by the surrogates. As aforementioned, the lack of a formal law means that clinics are free to follow their own rules, resulting in contracts that prioritise the ease of the transaction, rather than enshrining protection for surrogates. The absence of a law means that the surrogate is not afforded legal protection

[84] G. Narayana and John F. Kantner, *Doing the Needful: The Dilemma of India's Population Policy* (Boulder, CO: Westview, 1992), p. 111.
[85] Gethin Chamberlain, 'UK Aid Helps to Fund Forced Sterilisation of India's Poor', *The Guardian*, 15 April 2012, sec. World news, https://www.theguardian.com/world/2012/apr/15/uk-aid-forced-sterilisation-india.
[86] Vidhi Doshi, 'Will the Closure of India's Sterilisation Camps End Botched Operations?', *The Guardian*, 26 October 2016, sec. Global development, http://www.theguardian.com/global-development/2016/oct/26/will-closure-india-sterilisation-camps-end-botched-operations-supreme-court.

in the event that the pregnancy affects her own health. Further, if the pregnancy results in a miscarriage or deformity of the infant, there is nothing in the law to ensure the surrogate receives the promised amount at the end of the surrogacy.[87]

Pande found that the surrogacy contract is in English, a language almost none of the surrogates can read.[88] Some essential points of the contract are translated for them, and one surrogate states that:

> "the only thing they told me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection."

Whilst another adds,

> "We were told that if anything happens to the child, it's not our responsibility but if anything happens to me, we can't hold anyone responsible."[89]

Another surrogate opines:

> "What do I understand of surrogacy? I just know that it's his [the intended father's] sperm that is put in me and from that a son is born. I need regular injections and medicines for that. When I came here they made me do some paperwork. It said that I know what I am doing and we take full responsibility. They asked my husband to sign as well. My husband understands all this much better. I think he read the whole contract and all the papers."[90]

Another surrogate describes her first day at the clinic, appearing to defer responsibility about understanding the process to her broker:

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[87] The Hindu, "Law silent on protecting right of surrogates," March 24, 2012: http://www.thehindu.com/news/cities/Hyderabad/article3213040.ece.
[88] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 976.
[89] Pande, p. 977.
[90] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 49.

> "I was so scared that I was shivering. She [the broker] took care of everything – from hearing what the doctor had to say, following all the names of medicines, understanding what injection has to be given to me and when."[91]

Pande speaks to another surrogate, four months after she has had the embryo transfer:

> "When I came here the first time Doctor Madam explained to me what surrogacy is but I didn't really understand. My sister-in-law told me a few things as well, you know, about how the baby will be made. [She giggles.] I don't know if the egg is mine or not, I wasn't involved in the paperwork either."[92]

Throughout Pande's interviews there are instances of the surrogate not understanding the contract or the process:

> "I am not sure what the contract says since my husband read and signed the contract. I only passed middle school but he went to college…No Divya *didi* [elder sister] hasn't explained anything to me. Well, I am illiterate, I guess that's why?"[93]

> "I agreed to do this without knowing much about it. At the clinic the nurse told me that there is nothing immoral about surrogacy. But even when I was getting the seed [embryo] transferred I had no idea what was going on."[94]

A doctor recounts how she describes surrogacy to the women at her clinic:

> "I had to educate them about everything because, you see, all these women are poor illiterate villagers. I told them, "You have to do nothing. It's not your baby. You are just providing it a home in your womb for nine months because it doesn't have a house of its own. If some child comes to stay with you for just nine months what will you do? You will take care of it even more because it is someone else's. This is the same thing. You will take care of the baby for nine months and then give it to its mother. And for that you will be paid.""[95]

These excerpts from Pande's in-depth interviews show that the surrogacy procedure has been described in an oversimplified manner, to surrogates who are largely

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[91] Pande, Amrita, p. 51.
[92] Pande, Amrita, p. 54.
[93] Pande, Amrita, p. 55.
[94] Pande, Amrita, p. 58.
[95] Pande, "'At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India', p. 308.

uneducated. There is no mention of the various risks associated with pregnancy and surrogacy, and various surrogates' comments indicate that they do not understand the procedure, and have waived the clinic's responsibility for their well-being, if something were to go wrong.

Research by Daisy Deomampo echoes Pande's findings. Deomampo found that nearly all the surrogates she interviewed (35 total) "reported a lack of transparency and power in negotiating contracts."[96] One surrogate interviewed felt she could not speak up during the contract negotiation process, and was not allowed time to read it in full:

> "I wanted one copy for myself, but I didn't dare to ask for one. In fact I don't prefer to sign any contract without knowing it in detail but . . . one page was also blank which I signed and also the amount was not filled in. And most importantly she didn't give us a chance to read the agreement. She was turning the pages very fast. If she had let me read the document, I would have read it quickly because I can read English and I can read fast."[97]

Deomampo observed this inability to speak up recurrently: "this came up again and again in interviews: surrogates would not confront doctors and lawyers on crucial issues related to their payment for fear of losing their contract. They said that doctors often hinted at an ample supply of women ready and willing to take their place as surrogates."[98]

Pande notes that, culturally, doctors are viewed as "life-giving, miracle-working gods in India. This deification gets amplified in situations of death and birth."[99] This cultural doctrine, combined with the perceived fear of being replaced by another surrogate, may help to explain the deference to doctors exhibited by surrogates who do not understand the procedure. The mystery surrounding the process experienced by surrogates has important ethical implications. Surrogates' lack of understanding raises issues to do with informed consent, which is arguably lacking in a situation rife with

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[96] Deomampo, 'Transnational Surrogacy in India', p. 176.
[97] Deomampo.
[98] Deomampo.
[99] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 84.

information failures, where the contract, procedure, and associated risks are not adequately understood. I will draw upon this feature later on in Chapter Four where I characterise surrogacy in India as a case of harmful exploitation, following Alan Wertheimer's distinction between harmful and mutually advantageous exploitation.

1.4.4 Brokers

A further distinguishing and morally salient feature of the Indian situation is the use of brokers and other recruitment strategies by clinics. Pande distinguishes between three types of surrogates that she came across during her research. First, the women who stated they became surrogates entirely of their own accord. These women had heard about surrogacy from sources such as the media, and had proactively made enquiries at a clinic. Second, there were women who Pande described as having "no control over the recruitment process."[100] These women were systematically recruited by brokers in the surrogacy trade, and will be the focus of this section. Pande found that over half of the surrogates she interviewed were sourced this way.[101] The third group – women who had been "convinced" by various family members, will be discussed in section 1.4.5.

In her interviews with the second group, those "pushed into surrogacy by brokers," Pande found that "all four were initially very reluctant to get involved in such a stigmatised occupation."[102] The brokers Pande identified were nurses at the clinic. This runs contrary to the ART guidelines from the ICMR, which prohibit clinics from advertising for surrogates, and state that the responsibility for sourcing a suitable

[100] Pande, Amrita, p. 39.
[101] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 975.
[102] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India.*, p. 46.

surrogate rests with the couple or a semen bank.[103] The broker, Vimla, a nurse and broker in the trade, brought the following two women to the clinic:

> "It sounded so wrong. But she [the broker] knows my situation and was able to convince me…She knows my husband is a rickshaw puller and earns according to the day."[104] – Regina

> "How can a widow get pregnant, that too with some stranger's baby? I did not want to do this but Vimla [the broker] convinced me…she is the one who eventually got me here."[105] – Yashoda

Vimla had come to Yashoda's village in search of eligible women, heard about Yashoda being a widow and knocked on her door. Another surrogate recounted being targeted by a broker when she went to have a second pregnancy aborted due to financial strain:

> "When Jayati [a nurse at the clinic and an informal broker] heard that I am getting the cutting [abortion] done because I can't afford to feed another child, she told me about surrogacy. She told me there is nothing immoral about it, so I agreed."[106]

Brokers are typically paid a substantial brokerage fee, and in exchange, take responsibility for the process:

> "Of course I had to pay a lot of money to her as a brokerage fee."[107] – Regina

> "I had to pay Rs 10,000 to her as brokerage fee [$200]."[108] – Yashoda

> "Mona heard about surrogacy from one of her neighbours – a surrogacy broker. She charged Mona Rs 10,000 [$200] for bringing her to the clinic. Mona recalls her first day at the clinic:

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[103] "Code of Practice, Ethical Considerations and Legal Issues," accessed July 6, 2016, http://icmr.nic.in/art/Chapter_3.pdf.
[104] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 47.
[105] Pande, Amrita, p. 48.
[106] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 977.
[107] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 47.
[108] Pande, Amrita, p. 48.

> "I was so scared I was shivering. She [the broker] took care of everything – from hearing what the doctor had to say, following all the names of medicines, understanding what injection has to be given to me and when.""[109]

I will come to suggest that the presence of brokers supports the exploitation charge. The use of brokers appears to follow a pattern of persuading women in need of money, constructing their choice to enter into surrogacy. This reinforces the idea that surrogates are vulnerable, the key element of exploitation.

1.4.5 Familial Pressure

The recruitment process can be viewed as problematic in another way, through the lens of familial pressure. This, in turn, highlights an element of subordination, bearing out the vulnerability analysis I will provide.

Evidence suggests that control and influence can also be exercised by family members in a way that contributes to the exploitation of surrogates. Pande's interviews with surrogates reveal the influence that family members have had on surrogates' decisions to enter into surrogacy, and the control they exert over surrogates' financial gains. Pande observes how one surrogate, Panna, did not want to become a surrogate, but was persuaded to visit a clinic by her sister-in-law:

> "I don't know where my husband and my sister-in-law heard about this [surrogacy] but once they had the idea of making me a surrogate, they just would not give up. When I refused, my husband came to [the] clinic and met up with Doctor Madam instead. He came home and told me about the other women at the clinic, and told me it looked safe. But even when they [her sister-in-law and her husband] were putting me in the auto-rickshaw and I was on my way to the clinic, I was crying."[110]

Another woman interviewed by Pande, Hasomati, was persuaded to become a surrogate by her sister-in-law, who reasoned that Hasomati needed the money, raising concerns

[109] Pande, Amrita, p. 51.
[110] Pande, Amrita, p. 53.

such as Hasomati's lack of earnings, and upcoming costs such as a house and her son's entry into high school and need for tuition.[111] Although Hosmati was sceptical, she felt forced to comply:

> "I was so scared. I didn't want to do all this. But my husband agreed, so I had to come with them to the clinic."[112]

Another surrogate, Sudha, was persuaded by her sister-in-law who was a broker at a surrogacy hostel. The broker offered Sudha a discounted brokerage fee of $100:

> "What could I have done? She is the only one I know in the city and when she asked me to do this, I had to agree. I know we need the money but I really didn't want to do this."[113]

Puja, a surrogate in a similar situation tells Pande:

> "I agreed to come to the clinic because I am scared of my sister-in-law."[114]

It was also found that women "convinced" into surrogacy by relatives had their finances controlled by said relatives. Panna, a surrogate mentioned earlier who was persuaded by her sister-in-law, informs Pande that she should talk to her husband or sister-in-law if she wants to find out more, as Panna does not understand and "wasn't involved in the paperwork."[115] Pande finds that her sister-in-law seems to be in charge of the finances and intends to use the money to pay back some debt and start a small family business in garments: "Panna does not seem to be aware of these plans."[116] Similarly, Sudha's

[111] Pande, Amrita, p. 55.
[112] Pande, Amrita.
[113] Pande, Amrita, p. 56.
[114] Pande, Amrita, p. 56.
[115] Pande, Amrita, p. 54.
[116] Pande, Amrita.

husband manages the finances and "Sudha has not seen a single rupee of the money she has earned."[117]

Pande's research into familial pressure suggests that there are a wide range of factors that can contribute to exploitative circumstances. The fact that these women are susceptible to being influenced and pressured in this way serves to highlight a further dimension of their vulnerability, a status that is key to the exploitation analysis I will defend.

1.4.6 Surrogacy Hostels

Many clinics have surrogacy hostels where surrogates stay for the duration of their pregnancy. In the Anand clinic that was the focus of her research, Pande found that surrogates live in groups of eight to a room and "the rooms are lined with single iron beds with barely enough space to walk in between."[118] In some clinics, surrogates were not allowed to climb stairs to ensure the safety of the foetus, and had to wait for nurses to operate the elevator, so they had "nothing to do the whole day except pace back and forth on the same floor."[119] In June 2017, raids of ART centres in Hyderabad, India, found 45 surrogates housed in two top floors of one clinic, and 50 in another. Police and District Medical Officers (DMO) described the women as being "holed up" and "illegally confined."[120] The surrogates told police they weren't being forced into surrogacy, but they reportedly had not been allowed out for the duration of their pregnancy.[121]

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[117] Pande, Amrita.
[118] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 981.
[119] Pande.
[120] 'Hyderabad Police Raid Infertility Centre, Rescue 45 "captive" Surrogate Mothers', The News Minute, 18 June 2017, http://www.thenewsminute.com/article/hyderabad-police-raid-infertility-centre-rescue-45-captive-surrogate-mothers-63826.
[121] 'Hyderabad Raid on Surrogacy Clinic Highlights a Legal Void', FIT, accessed 4 December 2017, https://www.thequint.com/health/2017/06/22/surrogacy-clinic-raid-in-hyderabad.

In the hostels, surrogates follow a strict diet, alongside vitamins and various medicines. One surrogate remarks, "everything works like clockwork. We wake up at 8 a.m., have tea, take our medicines and injections, and go back to sleep until noon."[122]

As well as benefitting the clinics, which can control surrogates' food intake and activities for the duration of their pregnancy, hostels in India serve a dual function. Many surrogates are particularly willing to stay in hostels in order to hide their pregnancy from the outside world, as surrogacy, due to its association with sex work, is stigmatised in India. Researchers point out that although there is limited exploration of the psychological outcomes for surrogates, the stigma of surrogacy and the use of hostels may have damaging psychological effects: "a surrogate may experience conflicting pressures over the social mores of pregnancy. She may be subject to the strain of having to live in secrecy, concoct stories about her pregnancy, or move away from home so as to conceal her pregnancy if it cannot be construed as legitimate in her social setting. In the social milieu to which the surrogates generally belong, the process of pregnancy and childbirth is very much a social, rather than an exclusively personal, event. Uprooting the surrogate from her family and children during pregnancy may adversely affect both her own psychological health and that of her children."[123]

While hostels may serve to shield surrogates from the stigma associated with surrogacy, I will suggest that it remains that they potentially also constrain surrogates in a way that compounds the exploitation, due to the loss of autonomy involved. In Chapter Four, I suggest that the use of hostels contributes to making the exploitation net harmful, on Wertheimer's analysis.

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[122] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 983.
[123] G. Palattiyil et al., 'Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work', *International Social Work* 53, no. 5 (1 September 2010): 686–700, https://doi.org/10.1177/0020872810372157, p. 691.

1.4.7 Nature of the Labour

> "When he cries I want to start crying as well. It's hard for me not to be attached. I have felt him growing and moving inside me. I have gone through stomachaches, back aches and over five months of loss of appetite. I have taken nearly 200 injections in my first month here. All this has not been easy."[124]

> "I have had a lifetime worth of injections [hormones] pumped into me. Some big ones in my hips hurt so much. In the beginning I had about twenty to twenty-five pills almost every day. I feel bloated all the time."[125]

An issue that is often abstracted away in discussions on the ethical permissibility of commercial surrogacy is the nature of the labour itself. Surrogacy is considered to be a job like any other in many dominant philosophical treatments of the practice, where the focus is the terms of the contract. The physical aspects of what surrogates experience as part of the labour is discarded in pursuit of a universalisable analysis of the conditions necessary for exploitation. For instance, the fact that surrogates perform this bodily service non-stop and are never off duty, so to speak, is a peculiarity to consider.

Furthermore, clinics in India are found to routinely use a range of controversial medical practices, such as foetal reduction, which involves the selective abortion of foetuses after numerous embryos successfully take. Scott Carney, an investigative journalist, found that in cases where three or more embryos take, the Akanksha clinic selectively aborts specific embryos to bring down the total to more manageable levels, often without explaining to surrogates what is happening.[126] This corroborates the earlier observation of the lack of informed consent along various stages of the process.

As well as this, surrogacy in India involves the routine use of Caesarean sections for ease of delivery, a practice with specific risks and harms, often undertaken without consent. In Chapter Four I expand upon this and argue that these two practices and their

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[124] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 148.
[125] Pande, "'At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India', p. 298.
[126] Scott Carney, *The Red Market* (New York: Harper Collins, 2011), p. 148.

associated harms and risks of harm provide grounds for considering surrogacy in India to be a case of harmful exploitation, on Wertheimer's analysis. Further, in Chapter Six, I advance the idea that the embodied nature of the labour, and the corresponding loss of bodily autonomy this involves, serve to compound the exploitation.

Alan Wertheimer notes that there are certain objective harms associated with surrogacy: "the risk of physical harm or death resulting from the pregnancy or the delivery, restraints on the surrogate's choices during pregnancy, and the inconvenience and discomfort associated with a normal pregnancy."[127] Restraints on choices and discomfort both appear to be inherent to the pregnancy, and so are harms likely to be experienced by almost all surrogates. The Indian context features additional risks and harms, however. As the focus is on delivering the best service to customers, the surrogates themselves appear to be deprioritised. This can be seen in the use of controversial medical practices such as implanting multiple embryos at once for increased success and subsequent commercial viability, and routinely using cesarean sections for convenient delivery. There have been instances of Indian surrogates developing complications and dying, but fortunately these are a rarity. What is more widespread, however, is the routine use of such contentious medical practices, which, I argue, present serious tangible harms.

1.4.8 Long-term impact of surrogacy

It is also necessary to consider the long-term impact of surrogacy. Has it provided the route out of poverty that proponents of its beneficial nature presume? Pande encountered surrogates multiple times during her periodic visits to clinics, as they were undergoing surrogacy multiple times: "three of the five women had been surrogates

[127] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 216.

more than once, and two were pregnant for the third time."[128] This could be taken to indicate that undertaking surrogacy just once did not provide a route out of financial difficulty. In a section in the book entitled "Where Did All the Money Go?" Pande revisits surrogates she had interviewed years before. Savita, a cleaning lady at the clinic who then became a surrogate at the same clinic, told Pande that there had been no improvement in her living standard and that she continues to be a cleaning lady at the clinic:

> "I couldn't save anything. A lot of it went for my husband's treatment [medical expenses]. Then my granddaughter fell sick with tuberculosis and though I spent a lot in her treatment we couldn't save her. I did not ever want this, but now my daughter is also trying to become a surrogate."[129]

Pande found that Savita's story was not unusual: "Many former surrogates reported that they spent their entire earnings on family medical expenses and their husbands' businesses."[130] Puja, a second-time surrogate, tells Pande, "But what should I do? This inflation does not allow me to stop [becoming a surrogate]."[131] Another surrogate, Mansi, tells Pande, "the money [from surrogacy] is not as much, you know. It seems like it would be enough for 10 years but it actually is nothing. Life is very expensive nowadays."[132] These narratives indicate that persisting structural economic circumstances lead surrogacy to be a suboptimal solution to poverty. Indeed, Pande concludes that her longitudinal research found that "the lives of most surrogates did not change,"[133] and that "few were able to save up enough to get out of the cycle of poverty."[134]

I suggest in Chapter Five that the fact that in many observed cases, surrogacy has not had a long-term beneficial impact indicates that it may not be useful to consider

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[128] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 19.
[129] Pande, Amrita, p. 191.
[130] Pande, Amrita.
[131] Pande, Amrita, p. 193.
[132] Pande, Amrita, p. 194.
[133] Pande, Amrita.
[134] Pande, Amrita.

exploitation of this sort to be "mutually advantageous" after all. The suboptimal nature of the consequences does not mitigate the exploitation to the extent of making it permissible, therefore.

1.5 The Occidentalising Gaze

Before proceeding with this thesis, which defends an account of exploitation, and then brings this to bear on the Indian commercial surrogacy, it is worth addressing the potential charge of Occidentalising. My aim in this thesis is to suggest that Indian surrogates are wrongfully exploited, and that wrongful exploitation requires greater intervention than many theorists appear to admit. However, does my approach serve to unduly impose Western liberal values on a situation that evades this sort of analysis?

Vida Panitch characterises the ethnographic challenge as holding that "the exploitation lens Occidentalises surrogacy by conceptualizing the practice in universalizing terms, thereby eclipsing the particularities of the global surrogate's lived experience."[135] However, Panitch seeks to avoid this by arguing that her justice and consent conditions, which comprise exploitation, are in fact informed and supported by the ethnographic research, thus reflecting the surrogates' lived experience. Similarly, I draw upon extensive ethnographic data in order to produce a vulnerability-focused account that is sensitive to the empirical reality of surrogacy in India.

Pande identifies the problem as follows:

> In the case of a developing country like India, where surrogacy is fast emerging as a survival strategy, it makes little analytical sense to battle about the morality of surrogacy. By analyzing surrogacy as a new form of labor, we can develop some knowledge of the complex realities of women's experience. Further, by identifying commercial surrogacy as labor, susceptible to exploitation like other forms of labor, and by simultaneously recognizing the women as critical agents,

[135] Panitch, 'Global Surrogacy', p. 329.

> we can deconstruct the image of the victim that is inevitably evoked whenever bodies of third-world women are in focus.[136]

Pande seems to be suggesting that the most salient consideration is not whether surrogacy is a moral or immoral act, or whether this kind of labour should or should not be for sale. Rather, she suggests starting from the position that we find ourselves in whereby surrogacy *is* currently being used a form of labour. Following this, we should prioritise surrogates' narratives, as opposed to *solely* partaking in abstract moral theorising. I have aimed to produce a theoretical thesis that grounds normative arguments in the real-world context, in order to subvert this charge.

I believe another fundamental concern of theorists such as Pande is the danger of attributing passive victimhood to the women involved, rather than recognising them as "critical agents." I aim to avoid this worry by developing a conception of vulnerability that captures the way in which agents make constrained choices under a backdrop of injustice. Further, in Chapter Three, I conceptualise vulnerability in a way that seeks to avoid the negative connotations that it is often associated with, by emphasising its universality as an innate human condition that turns out to be exacerbated by social arrangements. I therefore embed vulnerability in a wider theory of institutional justice, and characterise it as a result of the failure of the state to discharge such duties of justice.

1.6 Conclusion

This chapter has set out various features of the situation that I will argue comprise the vulnerability, and contribute to the subsequent exploitation, of surrogates. These features include surrogates' socioeconomic status, the backdrop of forced sterilisation, the use of brokers, and familial pressure. As well as this, I have outlined various controversial

[136] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 972.

practices peculiar to the Indian commercial surrogacy industry, such as the implantation of more embryos than accepted medical guidelines recommend, the use of non-consensual foetal reduction, and routine C-section use. Further, there seems to be a lack of informed consent at various stages of the process, which is due to surrogates not understanding the language of the contract, and not having had medical procedures explained to them in appropriate terms. These factors combined, I will come to suggest, render Indian surrogacy typically harmful, on Wertheimer's analysis. I have also addressed concerns regarding the dangers of Occidentalising, arguing that as my analysis is situated in the empirical reality and centres Indian surrogates' experiences, I hope to avoid this charge. In the next chapter, I develop and defend an account of exploitation, which I then bring to bear on commercial surrogacy in Chapters Four and Five.

Chapter Two

Exploitation: A Theoretical Analysis

2.1 Introduction

A preliminary step to invoking exploitation in relation to the case of commercial surrogacy is to develop an analysis of exploitation, determining the conditions under which it can be said to occur. Following this, the task will be to establish whether commercial surrogacy arrangements satisfy these criteria. What criteria must be met, therefore, for it to be the case that A has exploited B? In outlining and defending these conditions, it is also necessary to consider whether exploitation is a moralised concept, and therefore something that is inherently wrongful, or whether there can be instances of morally innocuous and non-wrongful exploitation. Further, exploitation may be wrongful, but it has been influentially argued by Alan Wertheimer that whether this should make it impermissible is a separate question, related to the *moral force* of this wrongfulness.[137] I will question whether this is as it should be, and adopt an account of exploitation that holds that exploitation is necessarily wrongful in a way that provides reason for redress. *Contra* Wertheimer, I tether the moral permissibility of exploitation more closely to its presence. In doing so, I seek to reflect exploitation's use as a political term, that is, its use as an indictment of social arrangements. On this view, therefore, exploitation's wrongful nature inspires stronger demands, and provides reason for intervention. That is, exploitation's wrongfulness gives prima facie reason for its moral impermissibility. I argue in Chapter Five, therefore, that there are reasons to intervene in even mutually advantageous exploitation.

[137] Wertheimer, 'Two Questions about Surrogacy and Exploitation'.

While exploitation may plausibly be used to describe morally innocuous situations, such as exploiting an opponent's weakness in a game of chess, or exploiting a nearby stream as a water resource, this is not the type of exploitation that I will be concerned with. Such cases will be excluded from my definition, which will capture *wrongful* exploitation in its paradigmatic sense, that is, the non-neutral, morally salient kind, as opposed to the morally innocuous sense. I henceforth use the term 'exploitation' to refer to wrongful exploitation, unless otherwise indicated.

What exactly is this paradigmatic sense of wrongful exploitation? An initial attempt at a definition would recognise that it involves the *use* of someone, or something. Mere 'use,' however, does not capture what is morally objectionable about exploitation. An evaluative, or moral, component is required to indicate that exploitation is *mistreatment*. It would be more accurate to say that to exploit is to take *unfair* advantage. However, philosophers tend to disagree as to what constitutes 'unfair' advantage, and, more broadly, what exploitation consists in. I will attempt to find consensus on this issue, and will employ the 'unfair advantage' condition while doing so. Indeed, I will argue that some notion of taking unfair advantage of *vulnerability* constitutes the common core of otherwise divergent accounts of wrongful exploitation.

The palpable difficulty of defining exploitation is attributable to its membership in a class of "essentially contested"[138] concepts, about the proper use of which there are genuine, irresolvable disputes. Indeed, it seems plausible that there are multiple definitions of exploitation which apply in different contexts, and that the debate is becoming obscured by a desire to provide a universalisable account. Such a pursuit reflects an imperative of theoretical elegance, rather than showing sensitivity to the range of contexts in which the label of exploitation may plausibly apply. Thus, while the literature is rife with competing conceptions of exploitation, my aim is to seek

[138] W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1955): 167–98.

overlapping consensus amongst these. I acknowledge that the definition I will employ may be susceptible to counterexamples and may not be able to accommodate every case of exploitation. In seeking overlapping consensus, my account will be successful in classifying clear cases of exploitation as exploitation, and clear cases of non-exploitation as non-exploitation. However, the contested nature of the debate is such that my account may still end up being too under-or over-inclusive. It is intended to be generally acceptable, not universally so, therefore I acknowledge that difficult cases and questions will remain. Furthermore, I recognise that exploitation may turn out to be more of a family resemblance concept, wherein instances of exploitation may be connected by a series of overlapping similarities regarding unfairness, use, and benefit, rather than sharing one common feature, or set of conditions.[139] Nevertheless, the definition I employ is appropriate to the purposes of my analysis, and serves as a useful philosophical tool for exploring what is objectionable about Indian commercial surrogacy, and analogous cases.

In this chapter I begin by setting out my desiderata for a theory of exploitation, which will form a blueprint of the approach to exploitation that I wish to take. I then introduce the debate by setting out Alan Wertheimer's highly influential account. I use Wertheimer's account to introduce the procedural and substantive exploitation distinction. Wertheimer's account shaped the debate and led to the idea that analyses of exploitation must pay attention to the conditions of individual transactions, rather than focusing on background societal mechanisms that produce exploitation, as Karl Marx's seminal account had done. Under transactional accounts such as Wertheimer's there is little exploration of the sense in which economic structures and the broader social context, rather than discrete transactions, affect exploitation. This discussion of Wertheimer's influential approach will lead into a review of some influential accounts of

[139] Ludwig Wittgenstein, *Philosophical Investigations*, 4th Edition (Oxford: Blackwell Publishing Ltd., 2009), pp. 65-71.

exploitation in the literature, as I explore the terrain before defending my chosen account.

I interrogate the aforementioned debate between transactional and structural accounts, and suggest that their main disagreement over force, where structural approaches adopt a force-inclusive definition of exploitation, while transactional accounts maintain that consent is present, may be resolved by adopting two understandings of voluntariness, regarding participation in a transaction. I then suggest that a vulnerability-based account may be able to bridge this divide. Indeed, a vulnerability-focused account is able to reflect the defect in choice and reference to background injustice advocated by structural accounts, as such background injustice is a prime cause of vulnerability. A vulnerability-focused account also retains some attractive features of transactional accounts, such as ostensible consent, and the ability to be distinguished from 'force.' Following this, I develop and defend a mid-level vulnerability-based account that would be widely acceptable given various convergences in the literature on exploitation. The account offered is mid-level in the sense that while it does not try to offer fundamentally universalisable principles, it goes beyond offering ethical evaluation for specific occasions, providing more generalisable guidance. In appealing to such mid-level principles, it attempts to incorporate aspects of, and find common ground between, divergent theories.

2.2 Desiderata for a Theory of Exploitation

2.2.1 Coheres with political usage

It will be useful to begin by setting out the desiderata for what an account of exploitation should pay attention to. I would like the theory of exploitation that I come to defend to

reflect its use as political term, in the sense that it is used to condemn seemingly unjust forms of treatment, broadly speaking. It should therefore cohere with what are generally understood to be paradigmatic cases of exploitation in the public imagination. For instance, one does not need to be a philosopher to use the term exploitation in reference to "zero hour contracts" and be on to something, and I want my account to reflect such usage. Further, I seek to posit exploitation as inherently wrongful, in order for it to cohere with the moral force with which it is used in general parlance.

2.2.2 Captures two senses of voluntariness

Crucially, an account of exploitation also needs to capture the idea that the exploited party, B, is a willing participant to the transaction in one sense. If B were pickpocketed, unbeknownst to B, this would be more reasonably considered an act of theft, rather than a paradigmatic case of exploitation. Rather, an account needs to capture that B is a willing participant, while also reflecting the idea that B would in fact find an alternative set of arrangements more desirable. So, a case in which B offers her wallet to A in exchange for rescue coheres better with a prima facie understanding of exploitation. Despite being a willing participant to an exploitative transaction, B is still likely to find the transaction less than ideal. The exploited party is at a loss, despite ostensibly gaining. I will come to argue, therefore, that there appear to be *two senses of voluntariness* operating in exploitation. On the one hand is B's willingness to improve her lot through an exploitative transaction. Indeed, B's voluntariness to participate in an exploitative transaction is likely to be *greater* the more desperate she is. Here, desperation breeds voluntariness. And yet B's desperate situation might provide another way of viewing B's voluntariness. B's level of desperation might also indicate a way in which her choice to

transact has been constrained, or shaped by her circumstances, and her voluntariness compromised.

I will come to argue that this understanding of the two senses of voluntariness exhibited by the exploited party helps to make sense of a core disagreement between advocates of structural exploitation and transactional exploitation. This disagreement pertains to the issue of whether exploitation involves forceful transfer, as advocates of structural exploitation maintain, or exhibits voluntary consent, a feature that transactional accounts place importance on. I will suggest that distinguishing these two understandings of voluntariness helps us to see that there is a sense in which both transactional and structural accounts are right.

2.2.3 Unfair distribution of benefit

A further desideratum for an account of exploitation is a reference to the benefit gained by both parties, and to the notion that the exploiting party, A, is gaining in a way that is unfair. A is taking advantage in a way that makes the benefit gained morally suspect. This acknowledgement of A's expropriation of unfair benefit in exploitation needs to be done in a way that distinguishes exploitation from other wrongs like theft, coercion, and manipulation, although it might share some features with these.

2.2.4 Pre-conditions to the transaction

An account of exploitation should also pay reference to the potential circumstances that lead to the transaction, and spell out how the satisfaction of these pre-conditions is constitutive of exploitation. At present it might seem as if this is begging the question against transactional accounts, whose proponents might simply deny that pre-conditions are components of exploitation. I will argue this case later in the chapter, but for now it

is asserted. One recurring example in the literature is the 'pit' or 'rescue' example. Here, we are asked to imagine that B is hiking in a forest when she stumbles and falls into a pit, from which she cannot escape unaided. A happens to be passing by, and is carrying a rope. He offers to help B out of the pit with his rope in exchange for a proportion of B's future earnings.[140] B accepts, and this example is deemed a case of exploitation on most transactional accounts.

Yet the way in which this example is constructed neglects any mention of the background conditions that may plausibly have led to B falling in the pit. Indeed, any background conditions would arguably be irrelevant given the way in which this case it set up. In this case, given the level of abstraction, we are able to conclude that B is exploited without any reference to how B ended up in the pit, as the most salient elements of the situation are a) that B is in desperate need by being trapped in a pit and b) that A is proposing an unfair (exploitative) offer.

However, as an example, it seems to be removed from most cases of exploitation in ordinary usage and political discourse. While examples such as these may be useful in fine-tuning intuitions about fair terms, the consistent framing of exploitation in this way gives the impression that background conditions are not constitutively relevant, as clearly they do not seem to be in this case. It is possible to re-imagine the scenario, however, so that instead of being desperate to escape a pit, B is desperately poor and seeking to escape poverty, with limited available opportunities. A happens upon B and offers B work in her factory – where this time, instead of free rescue from pit, the exchange involves 'rescue' from starvation, in the form of an exploitative wage.

The abstraction involved in the earlier 'pit' example means there are no immediately relevant background considerations, and so discussion following this case is likely to focus only on the terms of A's offer. This is likely to lead to the development of

[140] This is a variant of a case given by Mikhail Valdman.
Mikhail Valdman, 'A Theory of Wrongful Exploitation', *Philosopher's Imprint* 9, no. 6 (2009): 1–14, p. 10.

an account of exploitation that plays close attention to this, neglecting background and pre-conditions. On its own, the pit example only shows that background conditions *can* be irrelevant to exploitation, and does not imply that they always are. However, there seems to be a general trend towards using such highly abstracted examples, and this plausibly leads to the development of accounts that deem background conditions irrelevant, and this is problematic. By contrast, the re-imagined rescue scenario might direct discussion towards the issue of how A is wealthy enough to own a factory, while B is poor enough to be starving. This, in turn, might lead to the development of an account of exploitation that is sensitive to these structural disparities. After all, the inequality preceding the exploitation in the factory case seems amenable to intervention and redress, whereas B's desperate situation in the pit case is harder to attribute to a particular cause, or set of social conditions. Indeed, it appears entirely unrelated to background justice. This, in turn, gives the impression that everything is as it should be in the background institutional context, directing the focus of exploitation to the conditions and terms of this particular offer and transaction.

While I do not want to dispute that there can be such cases of exploitation, my aim is simply to suggest that the framing of potential cases of exploitation through hypothetical scenarios is imbued with the author's own pre-conceived notion of what features should be relevant to exploitation, and which features are to be excluded in this imagined scenario. These features then inform the account of exploitation adopted, while others are neglected. The use of such highly abstracted examples of exploitation as a philosophical method, therefore, could plausibly be seen to have produced accounts that prioritise determining the terms of exchange as conditions of exploitation, to the detriment of background conditions such as injustice.

2.3 Exploitation Condition

It will become increasingly clear that I believe it is important to pay attention to the pre-conditions that lead to cases of exploitation, in my development of a theory that applies to discrete transactions, but remains inclusive of structures. I will therefore defend the following sufficient condition for exploitation:

A exploits B when A takes unfair advantage of B's vulnerability.

This condition might seem quite broad initially, but each aspect will be qualified. My definition of exploitation is limited to market exchanges, and so interpersonal exploitation in the absence of market structures, and pit-rescue style cases are not meant to be included.

There are two elements to my definition: the vulnerability of B, which is what I have in mind regarding the imperative of paying attention to pre-conditions, and the 'unfair advantage' element, which refers to the unjust benefit gained by A through such use of vulnerability. Vulnerability will be defined with reference to a minimal justice requirement,[141] the non-satisfaction of which will render B vulnerable in the sense relevant to this conception of exploitation. One must be vulnerable in accordance with a conception of justice relating to the basic structure of society. Putative counterexamples involving use of vulnerability in the sense related to interpersonal and romantic relationships, therefore, are not meant to apply. I suggest in the following chapter that one potential barometer of justice could be Amartya Sen and Martha Nussbaum's capabilities approach, where vulnerability would be defined as the position of falling

[141] This would exclude cases such as a 'vulnerable child,' where the parent uses this vulnerability to instil discipline in the child. The child is not vulnerable in the sense relevant to justice, and therefore to exploitation, on my account.

below a threshold of minimal flourishing, in terms of capabilities. However, as will be made clear, vulnerability will not be limited to this interpretation. Because vulnerability features regularly in various accounts of exploitation under different guises, in order to retain encompassing crossover appeal, my own account will remain neutral between, and hospitable to, these differing conceptions.

Use of vulnerability gives rise to the 'unfair advantage' element of the definition. The 'unfair advantage' element relates to the benefit that is gained, which is considered necessarily unjust due its deriving from an existing injustice, the vulnerability of B. To be clear, the advantage is 'unfair' due to its arising from vulnerability (and therefore prior injustice), rather than it being a result of how the benefits of the transaction are divided between the parties. Indeed, the problems with defining exploitation's unfairness according to exchange outcomes will be highlighted through a discussion of Wertheimer's account, which does attempt to couch exploitation's unfairness in the division of the transactional surplus.

The approach I advocate, situating exploitation's unfairness in the use of vulnerability and subsequent unjust benefit, gains motivation from discussions on unjust benefit and duties of restitution in the literature on international justice. Here, it is suggested that the duties of developed countries to developing countries can be grounded in the principle of unjust benefits.[142] [143] Arguments on the relationship between vulnerability and benefiting from injustice, and the implications this has in terms of exploitation's permissibility will be provided in Chapter Five. That chapter will also tackle objections focused on the way in which this definition of wrongful exploitation might be seen to lack exclusivity due to the way in which it perhaps captures a range of cases that might not immediately cohere with exploitation. For now, in defending the

[142] Norbert Andwander, 'World Poverty and Moral Free-Riding: The Obligations of Those Who Profit from Global Injustice', in *Absolute Poverty and Global Justice*, ed. Elke Mack (Farnham: Ashgate, 2009).
[143] Daniel Butt, *Rectifying International Injustice* (Oxford: Oxford University Press, 2008).

adoption of this condition, I critique dominant accounts of exploitation, in order to offer my vulnerability-based approach as an alternative.

2.4 Wertheimer's account

There is considerable disagreement in the literature as to what is to count as exploitation. Particular conceptions of exploitation differ in their verdict as to whether exploitation is occurring in particular cases, and what, if anything, ought to be done about this. The way in which a philosopher formulates the conditions for a definition of exploitation will determine (i) whether exploitation is present in a particular transaction (i.e. whether these conditions are being fulfilled), and (ii) whether anything needs to be done about this. I will explore the contentiousness that arises as a result of the way in which exploitation is defined through a critical analysis of Alan Wertheimer's highly influential account.

2.4.1 Harmful and mutually advantageous exploitation

In a paper focusing specifically on the question as to whether commercial surrogacy is exploitative, Wertheimer argues that exploitation can either be (net) harmful to the exploited party *or* mutually advantageous.[144]For Wertheimer, this distinction between mutually advantageous and harmful exploitation gives rise to a verdict regarding whether a particular case of exploitation is permissible or not, where only harmful exploitation is prima facie impermissible. He is therefore advocating for a distinction between the truth conditions of an exploitation claim and the moral force of exploitation: not all exploitation is morally problematic to the extent that requires intervention. So, even if it were the case that surrogacy was an instance of exploitation, the moral force of this, i.e.

[144] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 214.

the implications, including whether this calls for prohibition, is quite a distinct matter. Indeed, he argues that a practice being a case of mutually advantageous exploitation is not sufficient to establish that the practice should be prohibited. The prima facie case for intervention is only raised by harmful exploitation, where the exploitee suffers a *net harm*.

It may be pointed out here that legal permissibility is different from moral permissibility. Wertheimer does not appear to be entirely clear on which permissibility he is concerned with, seemingly using the two interchangeably. At times he discusses the prohibition of exploitative transactions, and whether a transaction should be "interfered" with, suggesting legal permissibility. Elsewhere, he states he is concerned with the "moral upshots" of exploitation, asking questions such as "can people have a right to exploit?" and "is it wrong to allow oneself to be exploited?"[145] I will interpret his claims as being about moral permissibility, while acknowledging that this may be closely tethered with legal permissibility and policy intervention.

2.4.2 Moral weight and moral force of exploitation

Wertheimer reaffirms this distinction years later in his seminal book, *Exploitation*, which considers the concept of exploitation more broadly, and applies it to other areas such as the exploitation of student athletes, and sexual exploitation in psychotherapy. Wertheimer defends the view that exploitation is a moralised concept. This is because "at least one criterion for a valid exploitation claim will turn out to be a moral criterion: the transaction is exploitative only if it is *unfair*."[146] On his view, an exploitative transaction is at least, in the way of unfairness, already wrongful. However, this admission of wrongfulness does not settle the matter of what should be done about exploitation, as other considerations, such as mutual benefit might be seen to outweigh this. Thus,

[145] Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1999), p. 6.
[146] Wertheimer, p. 6.

exploitation's wrongfulness is distinct from what Wertheimer identifies as (1) the moral weight of exploitation, that is, its degree of wrongness, and (2) the moral force of exploitation; "the various moral upshots that exploitation might involve for parties to the transaction or for society."[147] Answering questions such as "should we refuse to enforce exploitative agreements?" requires looking beyond exploitation's wrongfulness, or unfairness, to the *moral force* of this wrongfulness.[148]

2.4.3 Wertheimer on surrogacy

With regards to commercial surrogacy, Wertheimer argues that we do not know whether it is *typically* harmful, or typically mutually advantageous, and so should remain agnostic on this, and thus on its subsequent permissibility. If we were to try to determine surrogacy's status as either harmful or mutually advantageous exploitation, we must be interested in whether it is typically, or *ex ante*, a net harm. We are not interested in "whether surrogacy is harmful *ex post* in a particular case, but whether it is typically or *ex ante* harmful."[149] Crucially for Wertheimer, the question is "whether the expected value of surrogacy is negative, where the expected value is a function of the probability distribution of the various outcomes."[150] Wertheimer suggests that surrogacy presents a particularly difficult context for making an "all things considered" judgement "because some of the crucial benefits and harms are difficult to measure and vary substantially from person to person." [151] Such harms might be physical, psychological, or reimbursement-related. In Chapter Four, I build upon Chapter One's empirical overview of the nature of surrogacy in India, in order to suggest that surrogacy is typically *ex ante* harmful, which gives reason for intervention on Wertheimer's account. In Chapter Five,

147 Wertheimer.
148 Wertheimer.
149 Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 215.
150 Wertheimer, p. 213.
151 Wertheimer, *Exploitation*.

I consider what remains problematic about mutually advantageous exploitation, even if the harms identified in the Indian situation were to be removed, as well as querying whether this distinction is the right way to think about exploitation.

2.4.4 Mutually advantageous exploitation and the social surplus

For now, let us return to how Wertheimer characterises exploitation. Whether exploitation is harmful or mutually advantageous is characterised by the transaction's net effect on B: a net loss is harmful exploitation, while a net gain is mutually advantageous exploitation.[152] Mutually advantageous exploitation generates a social surplus that both A and B benefit from, as contrasted with the no-transaction baseline. Wertheimer argues that in any potential transaction, each party has a reservation price: the value that the person must receive if he or she is to agree to the transaction.[153] He asks to imagine a house sale:

> Suppose that A is a home buyer and that B is a home seller. Suppose that A is prepared to pay no more than $175,000 for B's house and that B is not prepared to sell to A for less than $150,000. In principle, A and B are willing to make an agreement at any price between $150,000 and $175,000. The space between the parties' reservation prices constitutes their *zone of agreement,* or *bargaining range* (see Figure 1.6) Any outcome within their zone of agreement generates a social surplus, which could be defined as the difference between the buyer's and seller's reservation prices…Each would prefer a price that is furthest from his or her reservation price. And any movement away from one's own reservation price is, in that sense, at the other party's expense, although it is not harmful to the party as contrasted with the no-transaction baseline. What I have called mutually advantageous exploitation occurs when B gains relative to the non-cooperation baseline but the distribution of the social surplus is unfair to B.[154]

Wertheimer illustrates this further with what he identifies as a "garden-variety case of alleged exploitation:" a hardware store owner increases the price of his shovels from $15

[152] Wertheimer, p. 20.
[153] Wertheimer.
[154] Wertheimer, p. 22.

to $30, as an unexpected blizzard hits the area. If B agrees to pay $30 for the shovel, as under the circumstances "the shovel is worth more than $30 to B," then "the transaction is clearly Pareto superior," as both parties gain. So this cannot be harmful exploitation. Yet "B feels exploited because B gains less (or pays more) than B thinks reasonable…B pays too high a price for what he or she gains."[155]

However, there are problems with Wertheimer's characterisation of mutually advantageous exploitation. An approach based on reservation prices might be too subjective to give a generalisable or accurate picture of when exploitation is occurring. After all, a poor buyer, due to their relative price constraints, is likely to have a particularly low reservation price that they do not feel is reasonable to diverge from in paying for something, given their circumstances. However, having an unrealistically low reservation price, which one will plausibly have to exceed, does not necessarily entail exploitation. Context-sensitivity of reservation price has the effect that some people can be exploited more easily, by having a low reservation price that they pay close to or exceed, rendering the distribution of social surplus "unfair" to them. Meanwhile those with a high reservation price may never have to pay close to it, allowing them to be consistently left with a favourable distribution of the social surplus, with the effect that they are never exploited.

Consider the following pair of cases, which illustrate how subjectivity of reservation price seems to unduly dictate exploitation on Wertheimer's account. Maya's friends are all attending a concert, and she needs to source a ticket. She isn't keen to attend, and is only going as her friends are going. She has a low reservation price. She's only willing to pay around £35, and the face value of the ticket was £20. If she can't find a ticket for £35 or under, she'll be resigned to not going. Uma, on the other hand, is desperate to attend. Her favourite band is playing, whom he hasn't seen in years because

[155] Wertheimer.

they rarely tour in her hometown. She therefore has a much higher reservation price of £70. Let's suppose that both Maya and Uma manage to source tickets for £35. On the reservation price account of fair exchange, only Maya has been exploited by the ticket seller, as Maya has come close to her reservation price. Uma, on the other hand, has made gains at the ticket seller's expense, by settling on a price far away from her reservation price, and, according to her reservation price, gaining a more favourable distribution of the social surplus. However, the ticket seller in both cases has gained at the expense of Maya and Uma, by charging above the face value for the cost of the ticket. Intuitively, therefore, these are both cases of exploitation of Maya and Uma. Wertheimer's approach can only account for the exploitation of Maya, however, which does not seem right. Intuitively, it seem that if both Maya and Uma are paying £35 for tickets that actually cost £20, then they are both paying an exploitative price.

Crucially, let us return to the "garden-variety" case of exploitation that Wertheimer posits, where B agrees to pay a hiked-up price for the shovel. If B pays this because "the shovel is worth more than $30 to B," then how has B also paid *too much* than what he thinks is reasonable? What is this being measured against? What would be the correct, or fair, price?

2.4.5 Fair market value

As established, Wertheimer argues that a transaction that B benefits from can still be unfair to B, and therefore a case of mutually advantageous exploitation.[156] By contrast, the *fair* price is generally that which occurs as a result of a perfectly competitive market. In such a market: "there are many buyers and sellers and perfect information, no agent can influence the price at which the transaction occurs…by contrast, when there are

[156] In the absence of harm, it is difficult to justify intervention, however.

relatively few agents, there may be a large bargaining range."[157] Wertheimer does not deny that exploitation can also occur within a perfectly competitive market; therefore this is not a sufficient condition for a fair transaction.[158] However, *generally speaking*, A would not be able to charge excessively in such a market, as B could simply buy from another seller. In paradigmatic market transactions, Wertheimer suggests that a fair price would be generated by the hypothetical "fair market value." This represents "the price that an informed and unpressured seller would receive from an informed and unpressured buyer if the house were sold on the market."[159]

For Wertheimer, the price that would be generated by a competitive market provides a plausible conception of a fair transaction at least for a certain range of Pareto superior cases. Pareto superior cases are those where at least one person gains utility, and no one loses. Exploitation occurs, therefore, when the price paid does not align with this hypothetical market price. The fair market price is a price at which "neither party takes *special* unfair advantage of particular defects in the other party's decision-making capacity or special vulnerabilities in the other party's situation."[160] Because there is no special or unfair advantage taking in such a situation, this is a nonexploitative price.

However, there are some concerns with this view, in particular the idea that the market generally determines fairness. Although Wertheimer limits this conception's application to a certain range of cases, i.e. paradigmatic market transactions, it might not even work in those that he has in mind. Let us consider the contemporary London housing market. This could be deemed a competitive market on the meagre features Wertheimer stipulates, in that no single letting agent has a monopoly, and there are multiple buyers and sellers, meaning no single agent can dictate how the market operates.

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[157] Wertheimer, *Exploitation*, p. 217.
[158] It is also worth noting that it is not a necessary condition either, as a monopolist could choose not to exercise her monopoly power.
[159] Wertheimer, *Exploitation*.
[160] Wertheimer, p. 232.

Yet many would be reticent to label the price of housing in London as 'fair.' Similarly, the current price of food is high when compared with earnings, and is on the rise. The food industry is a competitive market, on Wertheimer's definition, yet many are forced to use food banks. Again, it would seem perverse to call such a price 'fair.' Generally, there is no reason to assume that prices dictated by the market are intrinsically fair – this is an ideological position that those in favour of a non-market approach to resource allocation would argue against. What occurs even in competitive in markets is not necessarily fair, as the market is dictated by pressures outside of the realm of justice or fairness.

Further, we can imagine a situation in which a price seems fair without it being aligned with the hypothetical market value. Allocating someone in need social housing seems fair, even though the price of rent they pay is considerably misaligned with the hypothetical market value of rent (i.e. social housing rent is much lower). Perhaps Wertheimer's account of market fairness relies on other broader principles of justice already being satisfied, therefore. The hypothetical market price provides us with a criterion of fairness that operates, in "a certain range of cases," and these cases are those in which other principles of justice are already satisfied. This would suggest, therefore, that the macro-level principles of justice themselves are not enough to ensure the fairness of some transactions, and that the hypothetical market price is also insufficient as an account of fairness, on its own. On such a view, principles of fair transaction are separate from more general principles of institutional justice and fairness, but both appear to be doing work. This would suggest that although it attempts to be a standalone theory of exploitation and fair transactions, devoid of background baggage, Wertheimer's account is actually parasitic upon a theory of justice, which he neglects to explicate.

Admittedly, Wertheimer might say that he has not attempted to set out a *general* theory of the unfairness that lies at the heart of exploitation, and is drawing out what might be considered unfair, in the context of certain transactions. This leaves his

approach vulnerable to many counterexamples, but he can accept that he is just developing a context-sensitive analysis that may or may not have wider implications. This may be fair enough, but despite not offering a general theory, Wertheimer's approach to thinking about exploitation and unfairness has arguably been taken as such, and shaped the debate accordingly.

2.4.6 Wertheimer's transactional approach

One such way that Wertheimer's account has shaped debate is through positioning exploitation as the result of individual transactions. Wertheimer's approach has been influential as a model for further transactional accounts, which have followed suit and focused on the conditions of the particular transaction, identifying individual transactions as the locus of exploitation. Wertheimer states from the outset that "exploitation is often a micro-level wrong to discrete individuals in distinct relationships and transactions."[161] He contrasts this with the way in which political philosophy tends to be concerned with macro-level questions such as the just distribution of resources, and universality of rights. He posits that even under a backdrop of justice, exploitation can occur and that people would still be concerned about this. He briefly considers the objection that exploitation actually has its roots in macro-level injustice but manifests itself in micro-level transactions, claiming that "even in a reasonably just society, people will find themselves in situations in which they can strike an agreement that will produce mutual gain, and some of those cases will give rise to allegations of exploitation."[162]

However, this might be begging the question. Why should such cases be considered exploitation if 'exploitation' is defined as resulting from macro-level injustices, and if macro-level justice requirements are satisfied? In such a situation, there

[161] Wertheimer, p. 8.
[162] Wertheimer.

might still be transactions that are questionable or *unfair* in some way, but by definition, they cannot be exploitative. It may be interjected that Wertheimer is merely appealing to common pre-theoretic intuitions that dictate that some might wish to label such transactions exploitative. However, the question remains as to why such transactions *should* be named "exploitative" given that on structural accounts, exploitation (as determined by institutions and structures) would not exist under macro-level justice. It is true that morally problematic transactions could remain, but it might be erroneous to label them exploitation. On such an approach, exploitation is a feature of background macro-level injustice, and Wertheimer has arguably not shown otherwise in asserting that exploitation could persist.

Alternatively, Wertheimer could be read as having asserted that macro-level injustice is not sufficient for exploitation (despite him only having shown that it is not necessary). His point that even a just society would experience exploitation only does enough to show that injustice is not *necessary* for exploitation. But it remains that it might be sufficient. Indeed, this is what my own vulnerability-focused account expresses. In the absence of macro-level justice, therefore, this injustice can still be sufficient for exploitation, through the use of vulnerability, and this might be a kind of exploitation that would not be shown on transactional accounts.

It has been suggested, therefore, that Wertheimer's narrow focus on the transaction is to the detriment of macro-level justice. Interpreting exploitation as the result of features contained within a transaction between A and B abstracts from the wider social and economic context. Exploitation is therefore viewed as an individual problem, rather than a societal or economic one. Wertheimer acknowledges that prior to his contribution, exploitation had predominantly been the preserve of Marxist theorising, where it was considered a feature of the capitalist system, rather than a feature of individual transactions. A key feature of the debate on exploitation, therefore, is the

disagreement between transactional accounts, like Wertheimer's, and structural accounts, like Marx's. Transactional accounts focus on the conditions of the transaction itself as giving rise to exploitation, as opposed to interrogating the background conditions under which the transaction takes place. Whereas structural accounts pay reference to background or structural injustices in their analysis of exploitation. I will come to argue that a vulnerability-based account may serve as a bridging tool between this methodological divide.

2.5 Procedural and Substantive Fairness

Prior to exploring this disagreement between transactional and structural accounts, it is important to note another dichotomy: procedural and substantive fairness. In the sense that it has consistently been used here, exploitation necessarily involves unfairness. This unfairness is said to be either procedural or substantive.

Procedural unfairness is the result of some procedural defect in the transaction: "*A* unfairly utilises or creates a defect in the process of the transaction with *B* in way that benefits *A* at *B*'s expense."[163] So, when A takes unfair advantage of B's *vulnerability*, this is an instance of procedural unfairness. Without the procedural defect of taking advantage of vulnerability, the transaction might not have been unfair. It went wrong, in terms of fairness, because of the process by which it occurred, i.e. the unfair advantage taken of vulnerability. Similarly, when an elder brother "trades five pennies for his 5 year-old brother's single quarter,"[164] he unfairly takes advantage of his younger brother's ignorance of monetary units, generating a procedural defect.

[163] Matt Zwolinski and Alan Wertheimer, 'Exploitation', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2016 (Metaphysics Research Lab, Stanford University, 2016), https://plato.stanford.edu/archives/fall2016/entries/exploitation/.
[164] Zwolinski and Wertheimer.

With substantive fairness, "the unfairness is a feature of *what* is agreed to, rather than *how* the agreement is reached."[165] Broadly speaking, therefore, the substantive unfairness pertains to the issue of unfair price, or an unequal exchange. On such a view, a transaction might be unfair because A benefits disproportionately to B, taking a much higher proportion of the transaction's social surplus. Or, B might receive less for an item than its hypothetical market value, to use Wertheimer's criterion of unfairness. Alternatively, B might pay well above the hypothetical market value of an item, and be exploited as a buyer.

It might be questioned as to how useful this distinction is, as it seems that these two kinds of unfairness often coincide. If there turns out to be an unequal distribution of the transactional social surplus, this is likely to be the result of some procedural defect. If B has paid an inordinate amount for a shovel, this is plausibly down to the fact that B has been unable, for whatever reason, to determine the terms of the transaction, indicating some procedural failure, such as an imbalance of power between A and B. Indeed, why would such an unfair transaction be agreed to if there were not something amiss with the initial entry into terms? Indeed, Marx's account of exploitation serves as an exemplar of both notions. Marx viewed exploitation through the lens of his labour theory of value. In a class society, workers under capitalism are tied to the class of the capitalists who own the means of production. Workers, by contrast, own only their labour power. Without access to the means of production, workers are forced to sell their labour to those who do own it.[166] Further, capitalists then appropriate the surplus value of workers' labour as profit. This surplus value arises because a productive worker provides greater value in labouring than it costs to hire her.[167] Thus, on Marx's account, exploitation is both substantively unfair because the capitalist gains disproportionately from the exploited

[165] Zwolinski and Wertheimer.
[166] Karl Marx, *Capital* (New York: Cosimo, 2007), p. 218.
[167] Marx, p, 714.

party's labour by extracting the surplus value, and it is procedurally unfair because the social structures are arranged in such a way that force the proletariat to sell their labour in order to survive. This arrangement turns out to be substantively unfair because of prior procedural unfairness.

It seems, therefore, that procedural unfairness often goes together with, and indeed leads to, substantive unfairness. I have chosen to adopt a procedural conception of fairness, through the focus on vulnerability, as I believe this more accurately captures the wrongful nature of exploitation, and is better placed to provide justification for its remedy. B's vulnerability is the key wrong-making feature, the procedural defect that leads to an exploitative transaction. A focus on procedure also avoids the difficulty in attempting to determine a "just" price, which a substantive account would have to provide. The notion of a "just" price is particularly hard to determine, given the seemingly justified variance of prices across different contexts. Further, problems arise in allowing the just price to be determined by the market, as shown in the earlier discussion on Wertheimer. Moreover, the exploitation involved in commercial surrogacy in India does not seem to be contained to the issue of a "just price." As will be argued in Chapter Five, even if surrogates were to be paid a "just price" for their labour, this would not serve to mitigate the preceding unfairness of a situation in which desperation has led to the decision to become a surrogate. Indeed, an increased price could exacerbate the unfairness by serving as an inducement. As I characterise exploitation, the salient issue seems to be the prior injustice, pertaining to inequality and vulnerability, which allows for this situation to unfold, rather than fair reimbursement. Indeed the reimbursement to surrogates might already be considered "fair" in the sense that it is roughly allocated according to the market and is more than what they could earn by other means. Generally, lack of fair remuneration certainly can compound the exploitation, and makes certain instances of exploitation worse than others. However, the vulnerability-based

definition I defend identifies procedural unfairness (use of vulnerability) as the key wrong-making feature.

2.6 Transactional and Structural Accounts

As aforementioned, there exists a debate between advocates of transactional and structural accounts of exploitation. Transactional accounts focus on the terms of the transaction itself as giving rise to exploitation, as opposed to interrogating the background conditions under which the transaction takes place. Structural accounts give a crucial role to background or structural injustice in their analysis of exploitation. One core disagreement between structural and transactional accounts concerns the presence of force. Transactional accounts place importance on the consent given by the exploited party: "exploitative transactions can be fully voluntary, at least in the sense of being free from outright coercion, force, or deception."[168] In contrast, structural accounts typically hold the antithesis of this, that structures force or determine the transaction: "a society is exploitative when its social structure is organized so that unpaid labour is systematically *forced* out of one class and put at the disposal of another."[169]

I suggest that if we adopt the two understandings of voluntariness outlined earlier, we see that there is a sense in which both transactional and structural accounts are right. In support of this I also suggest that adaptive preferences typically play a role in the formation of B's decision to transact, and therefore that consent represents only one sense of voluntariness: adaptive voluntariness. I will also respond to various arguments provided by proponents of transactional accounts that aim to show that structures are

[168] Matt Zwolinski, 'Structural Exploitation', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 15 December 2011), https://papers.ssrn.com/abstract=1773864, p. 156.
[169] Jeffrey Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen', *Philosophy & Public Affairs* 16, no. 1 (1987): 3–41, p. 3 (emphasis added).

not relevant to exploitation. Following this, I argue that structural accounts experience some problems that transactional accounts can overcome, leading me to prefer a hybrid account that focuses on individual transactions but remains inclusive of background justice and structures.

*2.6.1 Consent **and** force*

Let us imagine the following scenario, based on the empirical evidence presented in the first chapter. Shilpa is a married woman with young children, living in poverty in rural India. Her husband has a job as a labourer, but his earnings are minimal. She hears about surrogacy through a friend and makes independent contact with the clinic. She is offered £3, 800 to become a surrogate. This is an amount of money that seems like a lot to her. It is far higher than anything she could earn through other means, but is less than what she would be paid for the labour in other countries. Even after being adjusted for purchasing power, it is not equivalent to the payment received by surrogates elsewhere. She is now confronted with the choice between becoming a surrogate and undergoing all the risks and trials associated with the role, and remaining in the precarious position of poverty that she is currently in.

On a transactional reading of this situation, Shilpa consents to this role, and her consent should be taken as transformative. It is transformative in the sense that if there were no consent, the situation would be clearly wrongful: if she had been forced into this against her will, then this would be the wrong-making feature of the situation. Since Shilpa has not been forced, a transactional account would now turn to the terms of the offer to consider whether exploitation is occurring. A transactional account might then consider whether the offer of £3,800 is *unfair* – whether this is too little, and therefore exploitative.

Indeed, let us consider Wertheimer's transactional account. In this scenario, his account is likely to hold that this is an unfair and therefore exploitative offer, but that as Shilpa gains as compared with a no-transaction baseline, this is a case of mutually advantageous exploitation, and therefore should not be interfered with. Now, it might even be the case that a commitment to Wertheimer's account would lead to this not being considered a case of exploitation at all, given the price is seemingly in accordance with the hypothetical fair market value. Indeed, the commercial surrogacy industry in India could be characterised as a competitive market. This would suggest that no party has taken special advantage of the other, as there being multiple buyers and sellers, which is said to entail that the parties "do not receive a receive greater value than they would receive if they did not encounter each other."[170] However, let us suppose that it is a case of mutually advantageous exploitation, as Wertheimer has himself hypothesised.[171] On such an approach, given the primacy of consent, and the fact that Shilpa *has* consented, there is no room to consider an alternative situation she might have preferred, or the background circumstances that led to her choice.[172] However, a structural account would consider the fact that social structures have shaped Shilpa's circumstances and subsequent choice, *forcing* her into this exploitative role. Shilpa's labour has been systematically forced from her class, and been put at the disposal of another. This might seem to be inconsistent with holding that Shilpa has validly consented to the transaction, as proponents of transactional accounts maintain.

[170] Wertheimer, *Exploitation*, p. 232.
[171] Wertheimer, 'Two Questions about Surrogacy and Exploitation'.
[172] Unless what she has consented to is harmful exploitation, in which case Wertheimer believes there is cause for interference with the transaction.

2.6.2 Two understandings of voluntariness

If we distinguish two understandings of voluntariness we can see that there is a sense in which both transactional and structural accounts are right about consent and force. Transactional accounts seek to maintain that consent is present, a feature that distinguishes exploitation from coercion, and reflects the phenomenon of individuals often being willing participants to exploitation. This correlates with the first, ostensible, sense of voluntariness I identified earlier, that B is, on the face of it, willing to transact.

Structural accounts, however, maintain that ultimately exploitative transactions are forced, which does not immediately cohere with the sense in which people appear to *choose* exploitation, amongst other options. However, adopting the second sense of voluntariness, we see that despite being voluntarily chosen, or consented to, the transaction may also be considered less voluntary than previously thought in the sense that it only arises out of a particular set of constrained circumstances, and might not have been agreed to otherwise. B's voluntariness is therefore compromised, when considered against a situation of greater justice. Whether or not this involuntariness can appropriately be considered force will be explored next. But for now, it is worth recognising that the transaction appears to be both voluntary, in one sense, cohering with the transactionalist conception of *consent*, while also appearing involuntary, in a way that coheres, on some basic level, with the structural conception of *force*.

2.6.3 Capitalist force

I am sympathetic to the way in which transactional accounts seek to emphasise consent in order to distinguish exploitation from the idea of physically forcing someone to do x, as force does not seem to be the phenomenon that the term exploitation captures. A choice seems to be exercised, however constrained, but I will suggest that this does not

preclude the presence of force. Indeed, the common association of force with *physical* force may be obscuring other ways in which force can manifest itself. I therefore turn to exploring the ways in which the idea of structural force could be defended.

Jeffrey Reiman defends a Marxist conception of exploitation that includes both force and unpaid labour. Because capitalists own the means of production, workers are forced to work, and end up working "more hours for their bosses than the number of hours of work it takes to produce the real equivalent of the wages their bosses give them in return,"[173] meaning that they are forced, in part, to work without pay. This work without pay is what makes capitalism a form of slavery. Reiman acknowledges that many would be reticent to label capitalism as a form of slavery, given the image of slavery in the public imagination as direct ownership of people as slaves, as seen in colonial America and antiquity. However, this would be a mistake, as slavery is simply "forced unpaid labour;"[174] this is the defining feature, and it can be realised in various forms. One such form is direct ownership of another, and another is the slavery represented in exploitation, wherein the force-inclusive unpaid labour definition of exploitation holds that any exploitative society, involving *work without pay*, is a form of slavery. Analogously, I suggest, people may be reticent to believe that force can exist without physicality, given the predominance of this sense of force in ordinary language. Force seems synonymous with physical control, but this might be obscuring the other ways in which force manifests itself.

2.6.4 Feinberg: compulsion and coercion

It is instructive to invoke Joel Feinberg's distinction between compulsion and coercion as two ways to understand force. Feinberg argues there are cases in which the agent

[173] Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism', p. 4.
[174] Reiman.

"expressly gives his consent, but the consent lacks moral or legal effect (is "invalid") because it was *forced* rather than free."[175] This would suggest that consent is able to sit alongside force, an act can both express consent *and* be forced. This would appear to dissolve the disagreement between transactional and structural accounts, as transactional accounts maintain consent is forthcoming, while structural accounts emphasise the forced nature of exploitation.

Feinberg continues that some techniques of forcing someone to act can be "placed on a spectrum of force running from **compulsion** proper, at one extreme, through compulsive pressure, **coercion** proper, and coercive pressure…" [176] In compulsion proper, therefore, "either another person or an impersonal force makes one's body move directly…and there is no role whatever for ones' will, whether resistant or acquiescent."[177] Here, some force makes it *literally impossible* for the agent to do otherwise. Feinberg's examples of compulsion include a person sent reeling by a hurricane or explosion, someone being pushed off a cliff, and a more powerful person causing someone to drop a knife by pulling their fingers apart and forcing open their grip on it. Compulsion is reserved for cases where "options are closed, in the sense that some alternative, or all alternatives, to a given act are made *impossible*."[178] This seems to refer to the *physical* sense of force.

Coercion, Feinberg asserts, denotes another sense in which options may be "closed." While compulsion closes options by making alternatives impossible, coercion, by contrast, "does not destroy the alternative, so much as *destroys its appeal* by increasing its cost."[179] Under coercion, therefore, options are closed in the weak sense: "options are

[175] Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1986), p. 189 (emphasis added).
[176] Feinberg (emphasis added).
[177] Feinberg, p. 190.
[178] Feinberg (emphasis added).
[179] Feinberg, p. 192 (emphasis added).

made not impossible but too expensive to be eligible for choice."[180] Coercion resembles compulsion in that both "are the deliberate forceful interference in the affairs of human beings by other human beings."[181] What distinguishes the clearest cases of coercion from physical compulsion is that they employ *threats*, which "apply pressure to a person's will,"[182] and "force him to *act* and not merely to be moved or restricted in his bodily motions."[183] In cases of coercion, therefore, "there is a sense in which the victim is left with a choice. He can comply, *or* he can suffer the probable consequences." To recall the slavery example, if the alternative to compliance in slavery, say, is death if one is caught running away, "then one alternative choice is made so unreasonably costly that it is quite ineligible," and is "no better than no choice at all."[184]

I advance the idea that the perception of 'force' that seems to be held by critics of structural accounts is of force as 'compulsion,' in Feinberg's sense. That is, it is physical, and literally unavoidable. This common understanding of force as compulsion may explain the reticence to think of capitalist exploitation as forced, and as a form of slavery, as slavery seemed *distinctly* forced, in the *compulsion* sense, while capitalism does not. However, the coercion that Feinberg identifies, is still a form of force. Further, I would like to suggest that many cases that we might have thought of as forced in the traditional sense, that is, in Feinberg's compulsion sense, are actually cases of coercion. Therefore even some cases of slavery i.e. slavery in the absence of physical restraint, might be better understood as coercion, yet we would still want to think of slavery as *forced*, giving motivation to the view that force can be understood as coercion as well as compulsion. We still want to think of slavery as forced, and for that conception of force to retain its moral import. It is therefore helpful to understand that force can occur

[180] Feinberg.
[181] Feinberg.
[182] Feinberg.
[183] Feinberg.
[184] Feinberg.

without physical unavoidability. Viewing paradigmatic cases of force as coercive, detached from physical force, will also help us to see that force operates in areas that we normally would have considered to be free from force, because they do not adhere to the physical, compulsion understanding of force.

When force is defined so as to include coercion, threat of physical violence is not the only form that force can take. On Feinberg's understanding, one can also be forced by threats such as starvation, or other factors that are not physical. Let us return to slavery, a paradigmatic case of labour that most would agree has been *forced*. Slaves are held to have been forced in a way that we, under capitalism, are not. Modern capitalist exploitation conceived as 'slavery' seems very different to the kind that occurred in colonial America. After all, there is a *choice* we have under capitalism, which slaves did not. However, how much of a choice can there be said to be had under capitalism when the choice is to work or to starve? If one maintains that this *is* still a choice (one can choose to go on benefits, or to choose to starve, rather than join the labour force), then one should equally maintain that slaves sometimes had a choice to stay or run away. Running away was plausibly still an *option* for slaves when they weren't physically restrained. Joining the resistance and participating in slave uprisings, or staying put, was still a *choice*. Yet people would be reticent to label it as such, as this seems to detract from the way in which slavery was so clearly forced. It would have been difficult for slaves to escape, but choices and paths to avoid exploitation are also hard for many. This can be understood using Feinberg's conception of coercion, where choices are rendered by the aggressor as being so unappealing, without actually being *literally* unavoidable, as in compulsion.

Therefore, it seems that slavery, a paradigmatic case of force, may, in many cases, plausibly fall under Feinberg's definition of coercion. We would want to maintain that despite not necessarily involving constant physical constraint in a "gun to your head"

scenario, slavery was still forced. If one only acknowledges a compulsion-style conception of force, necessarily involving physical force, then one would therefore have to say that many slaves were not being forced, which simply isn't plausible. Clearly a slave's "choice" to remain, rather than attempt escape, should not be considered "free." But it remains a choice, insofar as it exists as an option. Yet it has been rendered so unappealing, that it is no longer viable. Analogously, the alternatives to working under capitalism are so unappealing that an individual is forced, in Feinberg's coercion sense, to work. In both cases there is a degree of choice, yet the alternatives are not viable options. If running away was not viable as slave, then choosing to starve is equally not viable as a member of the proletariat, and both are cases of force *qua* coercion. I do not wish to deny that there is a difference in the level of coercive pressure in slavery and capitalism, in that slaves were subject to a higher degree of coercive control, as well as many other harms. However, the method of force, that is coercion, which renders alternatives unappealing, remains analogous.

2.6.5 Structural force

So, on a structural account of exploitation like Marx's exposition of capitalism, defended by Reiman, workers are exploited as a result of the "force built into the very structure of the system of ownership and the classes defined by that system."[185] This seems at odds with the way in which transactional accounts hold that exploitative transactions express consent. I have argued thus far that consent correlates with the first, ostensible, sense of voluntariness identified earlier. On the second sense of voluntariness, however, where B's decision appears less voluntary when compared against a situation of greater justice, we see similarities with the structural conception of force. I have also suggested that the reason we may not immediately think of exploitative transactions as forced, in the same

[185] Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism', p. 12.

manner that slavery was forced, is the prioritisation of a conception of force that emphasises physicality and the complete absence of choice. Adopting Feinberg's conception of coercion, however, we see that one can be forced by social structures without the alternative being made physically impossible. Returning to Reiman, therefore, under structural force, "people's options are limited by their social position to a *range* of things they can do, with options outside this range unacceptable or prohibitively costly."[186] The force works statistically, so although is still possible for people to break from structural constraints, it is statistically unlikely.

Structural force, therefore, is not supposed to preclude the presence of choice, or indeed consent. Rather, "force affects individuals by imposing an array of fates on some group, while leaving it open how particular individuals in that group get sorted, or sort themselves, into those fates."[187] Structural force works in a way analogous to how a physical structure might impact behaviour. Consider: a physical structure such as a bottleneck in the road imposes fates on groups by "forcing a majority of cars to slow down while leaving it to chance and other factors who makes up that majority and who gets into the minority that slips easily through."[188] It is not that someone's actions are directly dictated by structures, but rather, that structures place them in a certain position within society, serving to constrain individuals to some array of situations, "leaving it to them or to other factors to determine how they are distributed among those situations. Therefore, between the forcing structure and its effects there can be room for the operation of free and rational choice on the part of the individuals affected."[189]

[186] Reiman, p. 14.
[187] Reiman, p. 12.
[188] Reiman.
[189] Reiman.

2.6.6 Force and consent

It seems, therefore, that there does not have to be a disagreement between transactional and structural accounts regarding force and consent. The force that structural accounts are referring to – whereby structures cause certain groups to be constrained to a certain array of roles – is compatible with the idea of individuals within those groups exercising choice, and consenting to transactions, within the range allocated to them. Surrogacy may be one of few options for Shilpa, given the way in which structural force constrains and dictates her circumstances, but she may still rationally choose surrogacy amongst this narrow option set, thus appearing to consent in the way transactional accounts require.

Despite this, proponents of a transactional account may be reticent to acknowledge any such force as being present, because in the liberal tradition, force invalidates consent. Further, if a transaction is not validly consented to, this has radical implications in terms of its permissibility. The proponent of a transactional reading of exploitation, who doesn't think exploitation is necessarily impermissible, therefore, seeks to maintain a distinction between exploitative transactions and forced ones, as forced transactions exhibit invalidated consent, and therefore merit grounds for intervention in a way that 'merely' exploitative transactions do not. Consent is often seen as morally transformative, in that it has the power to make an action right, when it would otherwise have been wrong. It is able to turn "a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment."[190] Consent, therefore, has a moral function, and correspondingly, its absence generates important implications. A structural reading of exploitation, by contrast, does not seem to be affected by the presence of consent, as it is recognised that transactions can be both forced and chosen, in a manner that is not couched in terms of consent.

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[190] Heidi M. Hurd, 'The Moral Magic of Consent', *Legal Theory* 2, no. 02 (June 1996): 121, https://doi.org/10.1017/S1352325200000434, p. 123.

2.6.7 Transactional accounts and preference satisfaction

As it has been noted, transactional accounts prioritise the issue of consent. Consent is seen as morally transformative, legitimising transactions which exhibit it, and giving grounds for intervention where no consent is present. While consent is invalidated by coercion, valid consent is taken to be a key component of exploitation, on transactional accounts. However, I will now explore the ways in which consent within exploitation could typically be seen as reflecting adaptive preferences in a discussion that serves as a primer to Chapter Five, where I argue that the social construction of consent and choice gives reasons to intervene in exploitative transactions.

Matt Zwolinksi offers a transactional account of exploitation that holds consent to be morally transformative. In a discussion focused on sweatshop workers, Zwolinski argues that even in conditions of "less than full autonomy,"[191] such as against background injustice, choices signal autonomy as well as information about an agent's preferences.[192] In considering the paradigmatic case of the impoverished sweatshop worker in a less economically developed country, Zwolinksi maintains that the sweatshop worker's consent exhibits the worker's preferences and autonomy. This makes her choice to enter such labour morally transformative. The choice expresses her preferences, therefore "acting to remove that option is likely to cause them *great* harm,"[193] which would be wrong. His argument is intended to justify non-interference in consensual but exploitative transactions. A worker's choice to accept sweatshop labour "shows that she prefers that kind of labour to any other alternative." Crucially, he makes the mistake of acknowledging that "sweatshop labour might not be the kind of thing for which she has any *intrinsic* desire." Rather, "all things considered – her poverty, the wages paid by the

[191] Matt Zwolinski, 'Sweatshops, Choice, and Exploitation', *Business Ethics Quarterly* 17, no. 4 (October 2007): 689–727, https://doi.org/10.5840/beq20071745, p. 693.
[192] Zwolinski.
[193] Zwolinski, p. 694.

sweatshop and that paid by alternative sources of employment etc. – she prefers working there to anything else she might do."[194]

It is this "all things considered" qualification that paves the way for my response that such choices only seem to express adaptive, rather than genuine preferences. The idea of adaptive preferences, posited by Jon Elster, is that our seemingly freely chosen preferences are themselves a result of our perceived options and life circumstances, and are therefore shaped by the social, economic, and political circumstances in which we find ourselves. This is why it is not quite right that Zwolinski says a sweatshop worker's assent "shows that she **prefers** that kind of labour to **any other alternative**." Plausibly, she **prefers** a counterfactual alternative in which there are more opportunities available to her. Given the stresses and strains inherent to sweatshop labour, it is likely that in this counterfactual scenario of increased options, sweatshop labour would not be her preferred option. Many preferences are not the expression of an inherent desire or interest, but are adapted to a given feasibility set. Therefore, even if the individual in Zwolinski's example does prefer sweatshop labour to not transacting at all, this preference has been formed as a result of the unavailability of other options. It therefore seems disingenuous to suggest that exploitative transactions are justifiable in so far as they are consensual, and that this consent is legitimated due to the way in which it expresses an agent's preferences. Really, such preferences have come to change as a result of unavailability, which itself results from prior injustice.

Seemingly anticipating this point, but without explicitly recognising the idea of adaptive preferences, Zwolinski recognises that sweatshops workers make their choices – and, I add, form their preferences – "among a severely constrained set of options."[195] He therefore considers the issue of reduced voluntariness and questions whether workers truly make a "choice" at all. He couches this in terms of coercion, considering whether

[194] Zwolinski.
[195] Zwolinski, p. 695.

workers are coerced by economic necessity. In response, he states that even if it were the case that workers were coerced, this does not mean that their expressed preference should be disregarded: "while coercion may undermine *some* sorts of moral transformation effected by choice, it does not undermine *all* sorts. Specifically, the presence of coercion does not license third parties to disregard the stated preferences of the coerced party by interfering with their activity."[196] This is because "one of the main reasons that coercion is bad is because it reduces our options." [197] Zwolinski acknowledges that like the gunman scenario, "poverty can be regarded as coercive because it, too, reduces our options,"[198] which is bad. But it would be worse, and would further coerce, to reduce options further by removing this option: "so long as he is still free to choose from among the set of options available to him, we will do him no favours by reducing his options still further. Indeed, to do so would be a further form of coercion, not a cure for the coercion of poverty."[199]

To put it in the terms of my argument, Zwolinksi could be interpreted as saying that even if the choice to enter sweatshop labour reflected only an agent's adaptive preferences it remains wrong to take away this option from them. Their preference, choice, decision – no matter what the origin of these – ought to be respected, because the bad thing about coercion in the first place is that it reduces choice. To this, I have two rejoinders. Firstly, Zwolinski's argument depends heavily on the idea that coercion is problematic due to the way in which reduces options. However, if it could be said that coercion is problematic for other reasons, it would no longer be convincing to argue that preserving options is the best response to coercion. Rather, it could be levelled that coercion is bad, not for reducing our options, but due to the way in which an individual is forced to choose a particular outcome through the manipulation of their existing

196 Zwolinski, p. 701.
197 Zwolinski.
198 Zwolinski.
199 Zwolinski.

options. By manipulation, I refer to the sense in which a suboptimal, often unfair, option is portrayed as the best choice, despite being the type of option that would be ordinarily be considered bad. On this analysis of coercion, therefore, it would not be permissible to allow coercive options to continue to exist, as these still play upon an agent's will in a problematic manner. Rather than permitting options that contribute to the coercion, it would be necessary to address the underlying causes as to why the individual is susceptible to the manipulation of their will in this way.

Secondly, an upshot of Zwolinksi's argument, which prioritises leaving options open due to the inherent value of having more options, rather than less, is that no matter what the option is that is open to us, having this option open is deemed better than not having it at all. Yet we could plausibly imagine a situation in which having an increased option available to us actually makes our existing situation worse, or at least, does not add value. For example, consider a Sophie's choice scenario, where a mother is informed that both of her children will be killed, but she is given the option of saving one. Having the additional option of being able to choose one child to save is widely recognised as paradoxically making the situation worse, rather than better. Sophie now has to effectively sentence one child to death herself. Here, the case could be made that it might be better for Sophie's options to be reduced. It would be better for her if she did not have this option open to her, casting doubt on Zwolinski's maxim that having your options reduced is necessarily bad.

Analogously, a doctoral student might wonder what it might have been like to do a PhD before the advent of the Internet, which provides unparalleled access to articles and information. Now it is possible to find entire books online, whereas before computers were commonplace, every journal article would have had to have been individually sourced from a university's physical library. Accessing information has never been easier now that we have a wealth of searching options open to us. Yet perhaps the

argument could be made that in a world where there are more options, and more choices available to us, this engenders an anxiety that might not have been present in an age where our access to information was more limited. Perhaps there is now increased anxiety regarding whether we have truly exhausted the literature, sufficiently included the relevant authors, simply because there are more access options open to us, which create new pressures and expectations. It seems, therefore, that reduced options need not necessarily be bad.

Zwolinski also suggests that the mere addition or possibility of an option to work in a sweatshop cannot be a bad thing. Either the option is better than A's other alternatives, in which case A is made better off by accepting it, or it is not, in which case A is not made better off, and simply chooses whatever option they would have selected in the absence of this offer: "In neither case, then, does the offer of sweatshop labour make the potential workers *worse* off."[200] In other words, an offer does not negatively affect A's status quo situation. However, is this really so? In an illuminating discussion on whether more choice is better than less, Gerald Dworkin questions the idea that options, in the form of an offer, merely preserve the status quo:

> One of the main arguments for supposing that more choices are always desirable is that adding additional options cannot make one worse off for one need not exercise any of the new choices. This is to ignore the fact that the possibility of increased choices can affect (for the worse) the original situation.[201]

To illustrate this he compares situations in which divorce is possible, and where such dissolution of marriage is not. The presence or absence of the option of divorce affects "the expectations brought to the marriage, the ability to tolerate imperfections of

[200] Zwolinski, p. 702.
[201] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 71.

the marriage partner, the sense of commitment to the marriage."[202] Here, the mere presence of the choice could be taken to alter the initial situation. Further, reverting back to our paradigmatic surrogacy scenario, it could be the case that the presence of the option to enter into surrogacy and the subsequent expansion of choice is not itself benign, and can in fact negatively alter B's status quo situation. Contrary to Zwolinski's assertion, the mere presence of the option may actually serve to make Shilpa worse off. Shilpa's husband or wider family may be critical of her if she decides not to take up the offer, believing that they need the money. Once on the table, even an offer could harmfully affect Shilpa's situation by causing tension in her marriage and provoking disapproval from her family. In the opening chapter of this thesis I drew upon ethnographic evidence suggesting familial pressure does appear to operate in this way, which would lend support to this argument.

This discussion has intended to show that increased choice and options are not always beneficial, in the way that Zwolinksi's argument requires. I have aimed to provide general support for the idea that background justice and B's pre-proposal situation are of relevance to exploitation, and to cast doubt on the idea that consent should be as morally transformative as transactional accounts purport. I began by querying Zwolinski's claim that even if workers' options are limited, their consent still represents an act of autonomy and is an expression of their preferences.[203] I suggested that consent in this situation actually appears to reflect an agent's *adaptive* preferences. In Chapter Five, "Surrogacy as Wrongful Exploitation," I will provide arguments as to why consent's merely reflecting this gives reason for intervention. I will argue that when preferences are adapted to, and shaped by, unjust background conditions, there is reason to sometimes disregard them, or counterbalancing measures might be taken to stymie the effects of satisfying such preferences. For now, I have wanted to provide a response to the

[202] Dworkin.
[203] Zwolinski, 'Sweatshops, Choice, and Exploitation', p. 694.

view that choice, even in a constrained situation, reflects an agent's preferences. In doing so, I have argued against Zwolinski's pre-empted response, that more options, whatever the content, are better than none. Zwolinski requires an alternative argument to show why we should never interfere with a decision that appears to reflect a stated preference.

2.6.8 Transactional accounts and background justice

Another key theme amongst transactional accounts is that background justice has no special relationship with, or particular relevance to, exploitation. In a separate paper, Zwolinski considers the question as to what role, if any, considerations of background injustice should play in the correct understanding of exploitation. His response is that "it should play fairly little. Structural injustice matters, of course, but it does not typically matter for determining whether a sweatshop is acting exploitatively, and it does not matter in a way that grounds any kind of special moral responsibility of fault on the part of the sweatshops or the MNEs (multinational enterprises) with which they contract."[204] Similarly Mikhail Valdman, in a separate paper to the one that will be the focus of the next chapter on vulnerability, argues that that there is no important relationship between taking advantage of injustice and exploitation, and that taking advantage of injustice is neither necessary nor sufficient for, nor even a contributing factor to, exploitation's wrongness: "on any reasonable conception of justice, whether person A wrongly exploits person B is unaffected by whether A Takes Advantage of Injustice in her dealings with B. The view that there is something wrong with Taking Advantage of Injustice, I believe, misidentifies the attributes of a person that it is wrong to benefit from."[205] In this section I shall challenge both these views, arguing that although background injustice is not necessary for exploitation, there is an argument to be made for its sufficiency, in

[204] Zwolinski, 'Structural Exploitation', p. 155.
[205] Mikhail Valdman, 'Exploitation and Injustice', *Social Theory and Practice* 34, no. 4 (2008): 551–572, p. 553.

particular, through the way in which background injustice is a leading cause of vulnerability, taking unfair advantage of which will be shown to be a common route to exploitation in the next chapter.

Zwolinski argues against the idea that background injustice is either necessary or sufficient for exploitation. In doing so, he engages with arguments put forward by Ruth Sample. Following Wertheimer, Zwolinski agrees that structural injustice is not necessary for exploitation because even in a just society, we will find instances of cases that fit well under the banner of exploitation.[206] There do appear to be cases removed from background injustice, which correlate with common conceptions of exploitation. These include desert island situations, where there is no backdrop of society, institutions, and no apparent responsibility for B's bad situation. If A stumbles upon a shipwrecked B, and proposes an inequitable arrangement that B agrees to given her desperate situation, the exploitation involved here is not dependent on any structural injustice. As I considered earlier in this chapter, this could just be a labelling issue; we might want to think of this unfair transaction as exploitative, but we might be mistaken in doing so, if it could be argued that exploitation is necessarily related to structural injustice. Rather, this kind of transaction is correctly labelled extortion, or grossly unfair, rather than exploitative. However, as exploitation is commonly understood in a way that coheres with such cases, I grant that background structural injustice does not appear to be necessary for exploitation.

In arguing against the idea that background injustice should be *sufficient* for exploitation, however, Zwolinski critiques Sample's Kantian account of exploitation. For Sample, exploitation "involves interacting with another being for the sake of advantage in a way that degrades or fails to respect the inherent value of that being. It is this lack of

[206] Zwolinski, 'Structural Exploitation', p. 171.

respect that explains the badness of exploitation."[207] Sample identifies "three disparate forms of exploitation judgement."[208] These are three ways in which we can fail to respect an individual: "neglecting what is necessary for that person's well-being or flourishing…taking advantage of injustice done to him…commodifying, or treating as a fungible object of market exchange, an aspect of that person's being that ought not be commodified."[209] In regards to injustice, therefore, Sample argues, "if we gain advantage from an interaction with another, and that advantage is due in part to an injustice he has suffered, we have failed to give him appropriate respect."[210] Injustice plays a role in exploitation insofar as it provides an opportunity to exploit. Taking advantage of this opportunity constitutes a failure to respect, and is therefore exploitative: "…his bargaining position has been to some degree weakened by injustice. Those who make use of such weaker bargaining positions for the sake of advantage are failing to demonstrate the appropriate respect that is due to the victims of injustice."[211] Taking advantage of injustice, therefore, is seen as sufficient for exploitation, due to the way in which it signals a failure to respect.

Against this, Zwolinski argues that merely using a bargaining position created by injustice isn't enough for exploitation: "someone who performs a useful service at a fair price for victims of injustice does not wrongfully exploit them." He gives the example of a contractor who rebuilds someone's home after it was destroyed by arson, and charges the "normal market price."[212] In this case, the contractor is not exploiting the homeowner. Indeed, it would be morally virtuous of the contractor to offer a reduced price for victims of injustice, but "a failure to exhibit supererogatory kindness does not

[207] Ruth Sample, *Exploitation: What It Is and Why It's Wrong* (Lanham: Rowman & Littlefield Publishers, Inc., 2003), p. 57.
[208] Sample.
[209] Sample.
[210] Sample, p. 74.
[211] Sample.
[212] Zwolinski, 'Structural Exploitation', p. 172.

render one's actions exploitative," and on this reasoning perhaps the same discount should be offered to someone whose house was destroyed by a storm, rather than just to victims of agential injustice. The identification of structural or background injustice, therefore, is not taken to be sufficient for identifying particular transactions as exploitative.[213]

In response, while house building is not such a clear example of this, perhaps the case could be made that certain industries, which, by and large, necessarily profit from background injustice, *are* inherently exploitative. In this case, the use of injustice *would* be sufficient for exploitation. Consider the weapons industry in relation to the current conflict in Syria. One of the key factors in prolonging this conflict is the continued supply of weaponry to the multiple warring parties. The parties fighting in this war are only able to do so through the consistent and plentiful supply of weaponry, which has been procured through countries such as the US as well as various states in the Middle East.[214] Merely by selling weapons – regardless of whether they are being sold at the market price – the industry is profiting from injustice, in a way that is problematic, and it might be held that the nature of this concern is exploitation. No matter what the price, in some cases the injustice is so grave that any use of it appears to cohere with plausible understandings of exploitation. Indeed, this is a position I defend in detail in Chapter Five, where I suggest that exploitation's use of vulnerability, regardless of whether this transaction turns out to be "mutually advantageous" in one sense, provides reason for intervention, due to the injustice perpetuated.

Let us accept Zwolinski's point, however, that in order for exploitation to occur, there must be something *more* to the analysis than merely profiting from injustice. In Sample's account, the crucial element is the *failure to respect* generated by taking advantage

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213 Zwolinski, p. 171.

214 'Who Is Supplying Weapons to the Warring Sides in Syria?', *BBC News*, 14 June 2013, sec. Middle East, http://www.bbc.co.uk/news/world-middle-east-22906965.

of injustice. This failure to respect is what supposedly renders taking advantage of justice sufficient for exploitation. Failure of respect occurs when we exploit others because "we make use of their genuine need for the sake of advantage."[215] This behaviour *degrades* the other party, such that "when a person interacts with another for the sake of further advantage in a way that degrades the other person in virtue of her vulnerability, exploitation has occurred."[216] I agree that Sample's account, as Zwolinski presents it, fails to show the sufficiency of taking advantage of injustice for exploitation. However, a closer examination shows that Sample's account *does* appear to flesh out further her exploitation condition. This can be seen through Sample's discussion of the following case:

> A factory owner visits a village in a Pacific Rim country and offers to set up a running-shoe factory that would pay each worker $2 per day. The current average daily wage in the village is $1, which is enough to prevent a worker and his family from starving. The workers will have no benefits other than salary and must work eighty hours per week. The workers accept. The running shoes sell for $95 per pair in the United States and Western Europe, and half of that price is corporate profit.[217]

This is a case based loosely on the real-world example of Nike, which pays its workers as little as fifteen cents an hour to produce its running shoes in India. It is a case that I believe was chosen because it represents an intuitive case of exploitation, involving workers' desperate circumstances and objectionable remuneration. Sample's discussion of this case demonstrates she is able to qualify the taking advantage of injustice condition, such that it excludes cases such as the house contractor counterexample proposed by Zwolinksi, and could therefore be levelled as a plausible sufficient condition.

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[215] Sample, *Exploitation: What It Is and Why It's Wrong*, p. 75.
[216] Sample, p. 88.
[217] Sample, p. 8.

Sample argues that "if the workers are lifted out of poverty, even if only slightly, while the factory owner makes very little profit, we might not regard his treatment of them as exploitative."[218] However, "if he profits substantially and yet compensates them in an inadequate way, his indifference to their lack of adequate food, housing, education, and medical care may constitute degradation."[219] Therefore it seems as if Sample has something more in mind than merely "taking advantage of injustice" as constituting exploitation. She suggests that not all 'taking advantage of injustice' constitutes *a failure to respect*, or, *degradation*, and therefore exploitation. It is not merely that the factory owner uses the injustice of the workers' situation for exploitation to occur. Rather, there appears to be some notion of gaining excessive profit at their expense operating within this condition. Degradation, therefore, is more stringent a condition than Zwolinksi's argument leads us to believe. To return to his proposed counterexample with this in mind, it seems that Sample would not regard the house contractor as *degrading* the victims of injustice whom he is building homes for, if he is merely charging the normal market price. Charging this reasonable price does not signal a failure to respect, and is therefore not exploitative, despite the apparent way in which the transaction also takes advantage of injustice. Crucially, we can surmise that it does not constitute degradation for the contractor to request reasonable remuneration, if Sample also holds that the factory worker who pays a fair wage to victims of background injustice is not exploiting them.

This discussion was intended to cast doubt on the way in which Zwolinksi attempts to show that taking advantage of injustice is not relevant to exploitation. This is done with the intention of suggesting that there is a relationship between injustice and exploitation. Zwolinski's criticism of Sample's presentation of this relationship arguably falls short in showing there can be no such relationship. Indeed, Sample's degradation and taking advantage of injustice condition can be fully explicated in order to account for

[218] Sample, p. 89.
[219] Sample.

his criticism. While it seems that *merely* taking advantage of injustice cannot be sufficient for exploitation, this is not what her account suggests.

Indeed, the way in which I have defended Sample's account bears relation to how I defend my own. I will come to suggest that there is a significant relationship between background injustice and exploitation. This lies in the very real way in which background injustice contributes significantly to the creation of *vulnerability*, the unfair use of which forms part of my exploitation condition. To recall, I argue that A exploits B when A takes unfair advantage of B's vulnerability. The definition of exploitation employed is limited to market transactions, and to vulnerability that is a result of failings in institutional justice, rather than the vulnerability involved in interpersonal relationships, say. My account, however, might be considered more broad than Sample's, as Sample appears to be appealing to some notion of fair exchange, in asserting "if the workers are lifted out of poverty, even if only slightly, while the factory owner makes very little profit, we might not regard his treatment of them as exploitative."[220] Here, a more equitable distribution of the social surplus is seen as mitigating the exploitation.

However, as I will set out in Chapter Five, as long as the workers are contracting from a position of poverty, it remains that vulnerability is being used, and that this use of vulnerability results in an unfair advantage gained, that would be considered exploitative. The advantage gained is unfair as the use of vulnerability in this way invariably gives rise to an unjust benefit, as the transaction trades on an objectionable and rectifiable injustice. As long as the use of vulnerability persists, exploitation occurs, inflicting a status harm on exploited individuals, which is inimical to ideals of equal regard and relational equality. This definition might be seen to lack exclusivity, capturing a wide range of cases, so, crucially, my account admits of *degrees* of exploitation. The cases captured by my account differ in seriousness, severity, and attention demanded. Some exploitation is more

[220] Sample, p. 89.

pernicious, therefore. Factors such as the level of B's vulnerability, the nature of good sold, and the level of benefit gained by A will all contribute to an assessment of how badly someone has been exploited, and the level of intervention required. Therefore, my account is able to admit that the case of the factory owner who equitably divides the social surplus, proffered by Sample, is less exploitative than a case in which a factory owner profits in a way that further polarises the two parties to the transaction, or entrenches his position at the expense of his workers. Further, in Chapter Six, I provide an argument for viewing the exploitation of bodily labour as particularly pernicious and explain why it seems to receive particular attention. I admit, therefore, that there will be examples that fall under my account of wrongful exploitation that do not seem highly exploitative or like the type of exploitation that warrants state intervention.

Despite this, however, my investigation in this chapter and the next suggests that vulnerability seems to be a plausible common denominator of the kind of interaction we might want to characterise as exploitative, and therefore that a vulnerability-based account is worth preserving, perhaps more so than alternative models that attempt to set out the conditions of a non-exploitative fair exchange. I advocate using discretion in determining which exploitative transactions we are to tackle, rather than prioritising exclusivity in a definition of exploitation. I have also chosen not to set out a condition that characterises unfair advantage as when an individual pays above the market price, as earlier in this chapter I suggested some problems with Wertheimer's defence of such an approach, and the palpable difficulty in determining a "just price." Exploitation doesn't function as neatly as this; it is often claimed on an ad hoc basis, resisting a universalisable definition, though it seems to be centred on some core notion of vulnerability.

I will now further defend the relationship between background injustice and exploitation, in order to justify employing a vulnerability-focused definition. As briefly aforementioned, Valdman believes there is **no important relationship** between

exploitation and taking advantage of injustice: "whether person A wrongly exploits person B is unaffected by whether A Takes Advantage of Injustice in her dealings with B."[221] Rather, Valdman argues that the key element of exploitation, which he takes to be sufficient, is *taking advantage of desperation*, regardless of whether this desperate state has stemmed from injustice.[222] Advantage taking is fleshed out in terms of gaining excessive benefit. Such extracted benefits are "excessive insofar as they reflect B's desperation or the fact that A is pressing her advantage against B."[223] At best, Valdman argues, there is an evidentiary relationship between wrongful exploitation and Taking Advantage of Injustice, in that "many instances of Taking Advantage of Injustice are also instances of wrongful exploitation, and the presence of the former could alert us to the presence of the latter. But, in itself, Taking Advantage of Injustice is not necessary or sufficient for, or a contributing factor to, exploitation's wrongness."[224]

I suggest the relationship between background injustice and exploitation is as follows: when background injustice creates vulnerability, as it so often does, it can be seen as sufficient for exploitation. This occurs through the unfair use of the vulnerability condition I have specified. Indeed, worldwide, the leading cause of vulnerability is likely to be background injustice. Vulnerability, as I define it in the next chapter, in terms of capabilities, *is* an issue of justice, involving institutional failures and subsequent poverty. It is the manifestation of background injustice. Injustice, therefore, is important to exploitation, as it is a massive contributor to vulnerability, which is a key element to the account of exploitation I defend. There is a way, therefore, that taking advantage of background injustice is sufficient for exploitation, and it is when vulnerability that is a result of background injustice has been taken advantage of. To be clear, there are instances of vulnerability that lead to exploitation that are not caused by injustice, such as

[221] Valdman, 'Exploitation and Injustice', p. 566.
[222] Valdman, p. 567.
[223] Valdman, p. 568.
[224] Valdman, p. 566.

the vulnerability created and sustained by interpersonal relationships. However, my account does not seek to capture these. It is limited to exploitation within market exchanges, and vulnerability is limited to consistency with institutional conceptions of justice.

By contrast, in order to reject the idea that Taking Advantage of Injustice is of relevance to exploitation, Valdman constructs cases such as the aforementioned "pit rescue" example, where B has found himself in a pit, is in need of rescue, and A takes advantage of "the injustice that befell him to achieve her ends."[225] The misfortune of ending up in a pit is not the sort of injustice that my account seeks to capture, however. We are therefore referring to different types of injustice, and so exploitation. Valdman's pit example would not be relevant on my account, which is focused on exploitation within particular exchanges. I have chosen to focus my account on the types of cases that seem to recur in political discourse, such as sweatshop labour, kidney selling, and commercial surrogacy. I believe these to be more distinctly related to intuitive injustice concerns, and I couch this in terms of vulnerability.

It is my contention that all socioeconomic vulnerability is a matter of injustice, a position that I defend in the following chapter. While desert island scenarios of vulnerability that exist in the absence of any institutional structure are a theoretical *possibility*, they fall outside of the scope of my account which argues that in reality vulnerability is shaped, constrained, and exacerbated by institutional arrangements, and is hinged upon a conception of justice. *Contra* Valdman's conception of a 'Taking Advantage of Justice account,' it is not just *any* Taking Advantage of Injustice that constitutes exploitation. It is taking advantage of a state's failure in discharging duties of *institutional* justice, i.e. the resultant vulnerability. My intention in this discussion has been to show that injustice can be regarded as sufficient for exploitation, through the

[225] Valdman, p. 559.

construction of vulnerability. On my account, vulnerability is necessarily conceptualised as resulting from injustice, and forms a key element of my exploitation condition. I have chosen to define vulnerability in this way as it seems to reflect empirical reality, whereby vulnerability, and therefore exploitability, are largely results of structural and background injustice. The relationship between the two is therefore strong, and more robust than Valdman's discussion, which employs a rather broad notion of injustice, might suggest.

2.7 Conclusion

In this chapter I have analysed the elements of exploitation, beginning by suggesting desiderata for a convincing account. I have interrogated Wertheimer's seminal approach, wherein exploitation is determined in relation to a hypothetical market price: B is exploited when paying above the fair market value for an item or service. I identified various counter examples to this approach, suggesting that diverging from the fair market value is neither necessary nor sufficient for exploitation. This discussion of Wertheimer led into a general discussion on the nature of, and disagreements between, transactional accounts of exploitation like his, and structural accounts like Marx's. Transactional accounts focus on the terms of the transaction itself as giving rise to exploitation, as opposed to interrogating the background conditions under which the transaction takes place. One of the key disagreements between such accounts is that transactional accounts maintain exploitative transactions are consensual, while structural accounts reference the way in which structures and circumstances force actors into constrained positions. I suggested that if we adopt two senses of voluntariness, and two conceptions of force (coercion and compulsion), there is a sense in which both accounts are right. I then suggested that consensual exploitation reflects adaptive preferences, and

will provide arguments in Chapter Five as to why this justifies intervening in such transactions. Next, I defended Sample's account against Zwolinski, and *contra* Valdman argued for the presence of a strong relationship between background and structural injustice, and exploitation, through vulnerability. Finally, I discussed a potential shortcoming of structural accounts, and suggested a vulnerability-based account is preferable. In the next chapter, I will defend my chosen vulnerability-based account, arguing that vulnerability is at the core of even seemingly opposed theories of exploitation.

Chapter Three

Vulnerability and Exploitation

3.1 Introduction

In the previous chapter I outlined the theoretical landscape surrounding the conception of exploitation. In doing so, I explored ideas relating to voluntariness, arguing that there are plausibly two senses at play in common theoretical use. Distinguishing these helps to disentangle and dissolve the debate between transactional and structural accounts of exploitation, in showing that their concerns about consent and force can both be accommodated. As well as this, I argued for a strong evidentiary link between background and injustice and exploitation, through the construction of vulnerability. I now wish to expand upon this, by providing support to the claim that taking unfair advantage of vulnerability is a plausible sufficient condition for exploitation. Indeed, in order to provide a generally acceptable account, I now seek to suggest that disparate theories of exploitation can be reconciled under the common banner of vulnerability, a concept that I argue is fundamental to exploitation, as it is at the core of putatively distinct accounts.

I will suggest that even purportedly contrasting analyses depend, in part, on the concept of vulnerability. For this reason, it is worth taking seriously in a working definition of exploitation, which doesn't require resolution of all underlying philosophical disagreements.[226] I begin this chapter by disentangling a debate between Robert Goodin and Mikhail Valdman in order to advocate for a vulnerability-based conception of

[226] It is worth emphasising again that I do not wish to claim vulnerability is a necessary antecedent of exploitation, but rather that it is a common antecedent and a recurring feature of a variety of exploitative transactions, and so can be employed as a sufficient condition.

exploitation. I focus the discussion on these two accounts as they lie at opposing ends of a spectrum, and exemplify archetypes of competing accounts of exploitation. Further, Valdman critiques Goodin's account in order to show that vulnerability is of no relevance to exploitation, but I aim to show that Valdman's own account turns out to be reducible, in part, to vulnerability, thus providing support for the centrality of vulnerability to exploitation. Following this, I engage in a conceptual analysis of vulnerability, beginning with its ordinary language use. Finally, I endorse the capabilities approach as a working account of vulnerability, arguing that viewing vulnerability in this way coheres with the wrongfulness of various aspects of exploitation. It is by no means the only way to conceive of vulnerability, but is fruitful to the purposes of my investigation.

3.2 Exploitation and Vulnerability

As explicated in the previous chapter, the analysis of exploitation that I bring to bear on my examination of the commercial surrogacy industry is founded on the idea that vulnerability is being taken unfair advantage of, and that this is what comprises the exploitation. This seems to suggest that vulnerability is the state of being susceptible to another's power, and exploitation is one categorical instance of the exercise of that power. I would venture that our pre-theoretical intuitions about exploitation lead us to believe that it is underpinned by an idea of vulnerability. The Oxford English Dictionary defines exploitation as "the action of turning to account for selfish purposes, using for one's own profit."[227] This definition does not initially appear to invoke any notion of vulnerability, as it is silent about what exactly is turned to account and what is used for

[227] 'Exploitation | Definition of Exploitation in English by Oxford Dictionaries', Oxford Dictionaries | English, accessed 27 October 2017, https://en.oxforddictionaries.com/definition/exploitation.

another's profit, but the following examples provided by the dictionary, of sentences which use exploitation, do appear to reflect and depend upon common-sense conceptions of what it means to be vulnerable:

1. Slavery, the use of man by man (*exploitation*), was the reigning principle of society in its first ages.
2. The exploitation of the credulous public.
3. Their whole existence [was] an exploitation of the helpless people they reigned over.[228]

In sentence (1) it is quite clear to see how slaves would have been vulnerable to their masters in some relevant sense, and that this would have served as a causal and temporal antecedent to their exploitation. During the time of American slavery, individuals were made vulnerable through being forcibly removed from their homeland and held captive, leading them to be exploitatively bought and sold as slaves. Prior to that, we might say that Europe and America's imperialist dominance made other nations vulnerable to their powers. Sentence (2) posits the public as a vulnerable subject, with the use of the word '*credulous,'* which indicates a power disparity and an asymmetry of information, or disposition to be overly trusting, conditions which could feasibly comprise vulnerability in a generalisable definition. Sentence (3) explicitly invokes the term '*helpless'* to describe a people. The way it is used in the sentence could conceivably implicate it as a pre-condition, or at least, feature of their exploitation. 'Helpless,' ordinarily defined, appears to indicate the presence of a power imbalance, echoing the conceptions of vulnerability implicit in the previous two sentences.

[228] 'Exploitation | Definition of Exploitation in English by Oxford Dictionaries'.

From this cursory analysis of the way exploitation is used in common parlance, we can see how the notion of vulnerability might be closely tied with, and implicitly feature as, an aspect of the exploitation. I will now turn to exploring a debate between two theorists, in order to show that both accounts of exploitation are reducible, in part, to vulnerability.

3.2.1 Introducing the debate between Goodin and Valdman

In this section I attempt to disentangle a debate between Robert Goodin and Mikhail Valdman in order to advocate for a vulnerability-based conception of exploitation. I have chosen to focus the discussion on these two accounts as they lie at opposing ends of a spectrum, and exemplify archetypes of competing accounts of exploitation. Therefore, resolving a debate between these two accounts, in order to advocate for the superiority of a vulnerability-centred approach to exploitation, generates conclusions that are likely to be generally applicable to the wider debate on exploitation, serving as a parsimonious methodological tool. Further, the two accounts are already in dialogue with each other, with Valdman explicitly criticising Goodin's vulnerability-focused account. On my interpretation, however, Valdman's criticisms are unfounded, as he too inadvertently theorises exploitation in a way that could be interpreted in terms of vulnerability. As a result, his criticisms do not turn out to undermine vulnerability-based accounts, as the account he offers as a putative alternative to the vulnerability model could also be considered in terms of vulnerability.

Goodin posits a procedural account of exploitation that views exploitation as a defect in a process of a transaction (i.e. through the use of vulnerability), while Valdman views use of vulnerability as an insufficient explanation for the wrongfulness of exploitation, and posits an outcome-based account that prioritises the "excessive

benefits" gained by the exploiter, as key to this wrongfulness, jettisoning the concept of vulnerability in the process. Valdman himself sees Goodin's account as a competitor to his own:

> There are two kinds of wrongful exploitation: the kind that wrongs the exploited and the kind that is merely wrong or indecent. I argue that my view's main competitor — the view that exploitation's wrongness lies in the opportunistic use of people's vulnerabilities (defended by Allen Wood and Robert Goodin) — cannot account for the former.[229]

I set aside Allen Wood's account, and do not attempt to defend it, as it relies on the notion of "degradation," which is not clearly defined. For Wood, exploitation is wrongful because "it is degrading to have your weaknesses taken advantage of, and dishonorable to use the weaknesses of others for your ends."[230] Degradation and dishonor seem like nebulous concepts in this context, and I believe the wrong of exploitation can better explained by the use of (justice-related) vulnerability, as will be argued in Chapter Five. For now, therefore, I rescue only Goodin's account of vulnerability from Valdman's critique, as its focus on vulnerability is more aligned with my own approach.

I begin by introducing Goodin's vulnerability-based account of exploitation. This is a moralised account that holds that exploitation is, by definition, always wrongful.[231] Next I introduce the objection posed by Valdman, who attempts to distinguish between indecent and wrongful exploitation, arguing that because Goodin cannot make this distinction, he is forced to concede that some seemingly innocuous transactions are wrongfully exploitative, and that this is a problem for Goodin's

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[229] Mikhail Valdman, "A Theory of Wrongful Exploitation," *Philosopher's Imprint,* July 2009, 9(6): pp. 1-14.
[230] Allen W. Wood, 'Exploitation', *Social Philosophy and Policy* 12, no. 02 (June 1995): 136–58, https://doi.org/10.1017/S0265052500004702, p. 151.
[231] Robert E. Goodin, 'Exploiting a Situation and Exploiting a Person', in *Modern Theories of Exploitation* (London: SAGE Publications Ltd, 1987), 166–200.

account.[232] I argue, however, that this is a mischaracterisation of Goodin's argument, and that Goodin is in fact able to adequately distinguish between types of exploitation in the cases Valdman provides, and thus evade this critique. Further to this, I attempt to show that Valdman's own positive account of wrongful exploitation is much closer to Goodin's than he presents it. It seems that wrongful exploitation can be explained without having to resort to the "excessive benefit" condition that Valdman posits, and while retaining the vulnerability condition involved in Goodin's account. Further, even if we allow the possibility that Valdman's "excessive benefit" condition is necessary for exploitation, putatively above and beyond vulnerability, excessive benefit itself is defined in terms of "unacceptable non-transaction costs," which, in turn, are defined in terms of "urgent needs," a notion which has clear parallels with vulnerability. Valdman and Goodin's approaches, therefore, appear to share more than initially thought. Indeed, I will suggest that Valdman's account could plausibly accommodate a central vulnerability component with minimal change to the conditions he stipulates. This is of note because Valdman seeks to discredit the vulnerability view of exploitation, in presenting his alternative account. However, I argue that Valdman's account is in fact consistent with a vulnerability view, and so his dismissal of the vulnerability approach is misguided.

3.2.2 Goodin's account of exploitation

The foundations for Goodin's account of exploitation are laid down in his book, *Protecting the Vulnerable*. Here, Goodin contends that underlying our moral objections to vulnerability and dependency relationships are the attendant risks of power being abused. What is really wrong with vulnerability and dependency "is that they necessarily create

[232] Valdman, 'A Theory of Wrongful Exploitation'.

opportunities for the strong to exploit the weaknesses of those who are vulnerable and dependent."[233] People in a vulnerable position are exploitable, therefore.

In a subsequent chapter in an edited collection, Goodin extends his account of exploitation. Here, he continues his line of reasoning that certain duties arise from the existence of vulnerability:

> The morally charged form of exploitation consists essentially in delicts of a very particular moral duty. Occasions for exploitation arise when one party is in an especially strong position vis-à-vis another. Those same circumstances impose upon the stronger party a heavy moral responsibility to protect the weaker. It is a flagrant violation of this duty – *playing for advantage when morally you are bound not to do so* – which we call exploitation. Just as the analysis of the notion of 'adultery' is parasitic upon an analysis of the duty of marital fidelity, so too is the analysis of exploitation parasitic upon an analysis of this duty to protect the vulnerable.[234]

Fundamentally, for Goodin, exploitation is a matter of taking advantage when you are not supposed to, thus constituting taking *unfair* advantage. He analyses this unfairness in terms of a game. In the game analogy, 'fair play' is play according to the formal rules and informal ethos of the game, while 'unfair play' is play at variance with those standards. Thus, "'taking unfair advantage,' seen in this light, would consist in "availing oneself of strategic opportunities which are denied to one under the rules and ethos of the game at hand."[235] Crucially for Goodin, there is an element of subjectivism built into his account, in terms of what the different norms of play are in different contexts: "what is fair or unfair, exploitative or non-exploitative, will thus depend heavily on the nature of the game…what is to count as exploitative should indeed depend on context."[236]

Goodin continues that the general unfairness of exploitation consists in playing for advantage in situations where it is inappropriate to do so, inappropriately seizing strategic advantage, constituting an abuse of process. He identifies four conditions under

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[233] Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (London: The University of Chicago Press, 1985), p. 193.
[234] Goodin, 'Exploiting a Situation and Exploiting a Person', p. 167 (emphasis added).
[235] Goodin, p. 183.
[236] Goodin.

which it is inappropriate to play for advantage, recognising that in all the corresponding cases he provides, "the parties are particularly vulnerable, in some way or another, to the actions and choices of those described as their 'exploiters.'"[237] Let us now turn to these four conditions and cases.

It is inappropriate to play for advantage:

1) When players have renounced playing for advantage themselves i.e. striving for "narrow, egotistical advantage over friends and lovers, who have renounced any such advantage over you."[238]
2) When other players are "unfit or otherwise unable to play in games of advantage at all," i.e. are in no position to bargain, perhaps due to a disability, addiction, or fundamental lack of choice.[239]
3) When other players are "no match for you in games of advantage." Here Goodin has in mind economic exploitation and cases of vastly disproportionate bargaining power, such as that seen in a monopolist's relations with a buyer who needs their product desperately, capitalists and wage labourers, as well as fruit corporations and "the banana republics of Latin America."[240]
4) "When your relative advantage derives from others' grave misfortunes," such as when profit is made from disaster victims whose suffering is televised for the purpose of its effect on the audience.[241]

Goodin argues that these four conditions, although not exhaustive, are manifestations of one particular kind of wrong – the violation of the norm of protecting the vulnerable.

[237] Goodin, p. 187.
[238] Goodin, p. 184.
[239] Goodin.
[240] Goodin.
[241] Goodin, p. 185.

For Goodin, exploitation occurs when the following two duties to protect the vulnerable are violated:

1) the "duty to suspend ordinary rules of behaviour in dealing with those who are particularly vulnerable to you, and specifically, to refrain from pressing your advantage against them in the way that would have been perfectly permissible in ordinary, everyday relationships,"[242] and
2) the "duty to take positive measures to assist those who are particularly vulnerable to you."[243]

When only the second duty is violated, exploitation of the vulnerable has not occurred. A 'flagrant violation' of the duty to protect the vulnerable, however, occurs when someone violates both duties, and thus exploits the vulnerable. For Goodin, therefore, a '"flagrant violation' of that duty to protect the vulnerable thus constitutes the essence of interpersonal exploitation."[244] Exploitation is parasitic upon the notion of a duty to protect the vulnerable, and its wrongness can be traced to the violation of this duty.[245]

3.2.3 Valdman's critique

For Mikhail Valdman, exploitation's special kind of wrongness results from violating *"our moral obligation not to extract excessive benefits from people who cannot, or cannot reasonably, refuse our offers."*[246] In advocating this view, he purports to be primarily arguing against vulnerability-based accounts of wrongful exploitation as conceptualised by Robert

[242] Goodin, p. 187.
[243] Goodin.
[244] Goodin, p. 188.
[245] It is worth noting that Goodin is not entirely clear regarding whether all wrongful exploitation *necessarily* takes this form, or whether he is just stating one form of exploitation.
[246] Valdman, 'A Theory of Wrongful Exploitation', p.1 (emphasis added).

Goodin. On Valdman's interpretation, Goodin's view holds that exploitation's wrongness lies in the inappropriate and opportunistic use of people's vulnerabilities. I seek to show that Goodin's vulnerability view, correctly interpreted, is not as far removed from Valdman's as he would believe.

Motivating Valdman's view is the belief that Goodin's vulnerability view cannot fully account for exploitation's wrongfulness. In order to show this he discusses what he takes to be a paradigmatic case of wrongful exploitation:

The Antidote Case

B is bitten by a rare poisonous snake while hiking in a forest. His death is imminent. A, who is carrying an antidote with him, happens to be passing by. The antidote normally retails for £10, but A charges B £20,000. B would rather lose this money than his life and so accepts this offer.[247]

A's action in this case seems intuitively exploitative and wrongful. Although the vulnerability view of wrongful exploitation appears to be a plausible explanation of the wrongness in the above antidote case, in that B was extremely vulnerable and A does appear to make inappropriate and opportunistic use of this vulnerability, Valdman holds that the wrongness of A's conduct cannot be fully explained in this way. He modifies the case to reveal the purported insufficiency of a vulnerability view:

The Rescue for Pleasure Case

A offers to help B for free by giving him the antidote at no cost, simply because A gets tremendous pleasure from helping people in distress. A is motivated by a desire to promote his own happiness, and is making inappropriate and opportunistic use of B's vulnerability for his own ends.[248]

[247] Valdman, p. 3.
[248] Valdman, p. 6.

While the conditions of the vulnerability view appear to be fulfilled, as A is still making inappropriate and opportunistic use of B's vulnerability, it does not seem that this case reflects what it means to be wrongfully exploited. It seems that Valdman is correct in his assertion that A's behaviour here is "not morally on a par with A's behaviour in the Antidote case."[249] More specifically, he claims that in the Antidote case A *wrongs* B, whereas in the Rescue for Pleasure (RFP) case, A may have acted wrongly but *does not wrong anyone*. Valdman continues that "there must be more to the wrongness of A's conduct in the Antidote case than his opportunistic use of B's vulnerabilities."[250] It seems, therefore, that the vulnerability view is insufficient to capture the wrongfulness of exploitation. Not all opportunistic uses of vulnerability result in wrongful exploitation. For Valdman, "since, on the vulnerability view, all there is to exploitation's wrongness is the opportunistic use of people's vulnerabilities, this view cannot fully explain the wrongness therein."[251] At most, the RFP case is one of indecent exploitation, which does not wrong B. I will argue that Valdman's disagreement with the vulnerability view actually only turns out to be a disagreement with the 'opportunistic use' condition, and that this condition is in fact not to be found in Goodin's own vulnerability account of exploitation. Thus, the disagreement is rooted in a misinterpretation of Goodin's view.

As touched upon in the previous chapter in the discussion on Taking Advantage of Injustice, my own account would avoid Valdman's attack by maintaining that it is not meant to apply to the type of cases he presents, and that not every instance of exploitation can be accounted for by a universal definition. Rather, my account is contained to analysing exploitation within market exchanges, where B is vulnerable according to a conception of institutional justice.

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[249] Valdman.
[250] Valdman.
[251] Valdman.

In his own positive account, Valdman abandons both the 'inappropriate and opportunistic use' condition, and the vulnerability condition, arguing instead, that wrongful exploitation occurs "when one extracts excessive benefits from someone who cannot, or cannot reasonably, refuse one's offer."[252] Given that his objections appear to be directed towards the inappropriate and opportunistic use condition, it is not clear why Valdman ostensibly drops the vulnerability condition. Perhaps he seeks to distance himself from the accounts that he thinks fail, and so invokes new terminology to flesh out his own. As I will come to show, however, 'not being able to reasonably refuse an offer' is a state that is consistent with, and shares important parallels with, vulnerability. As well as this, for Valdman, the RFP case, unlike the Antidote case, is not a case in which A has extracted excessive benefits from B, and so is not wrongful exploitation on this analysis. He therefore believes his approach succeeds in narrowing down what it is about exploitation that is wrongful. In order to argue this, Valdman distinguishes between *benefiting at B's expense* and merely *benefiting from the use of B*.[253] The former is what constitutes wrongful exploitation, while the latter comprises unfair use, or indecent exploitation at most. Only in the Antidote case did A *extract* benefits from B, gaining benefits at B's *expense*. This is the substantial difference between this and the RFP case, and one that Valdman takes to be the distinguishing factor for wrongful exploitation.

3.2.4 Rescuing Goodin

I believe, however, that there are a number of concerns with Valdman's dismissal of Goodin's vulnerability approach. Valdman takes the RFP case to be a situation in which A has treated B's vulnerabilities 'as an opportunity to advance his own interests,' and so has putatively satisfied Goodin's condition for exploitation, yet it would seem incorrect

[252] Valdman.
[253] Valdman.

to conclude that B has been wrongfully exploited here. However, Goodin is able to respond to Valdman's attack.

Goodin could maintain that the RFP case is not rightly understood as exploitation on his analysis, and he therefore does not need to provide a further response to Valdman as to why the exploitation in the RFP case is not as bad as the exploitation in the antidote case, as it turns out to not be exploitation at all. All that is required in order to rescue Goodin's vulnerability view from Valdman's critique, therefore, is to explicate fully what 'inappropriate and opportunistic use' should consist in, in order to appropriately narrow down exploitation. Goodin's conception of taking "unfair advantage" is the way in which he does this. Further specifying this will narrow down the scope of what comes under the vulnerability view, and what is to count as exploitation.

To recall, Valdman's RFP case is that A offers to help B, a hitchhiker in need of a life-saving antidote, by providing it for free, simply because A gets tremendous pleasure from helping people in distress. This apparently fulfils Goodin's vulnerability condition, yet it doesn't seem to wrongfully exploit B. Valdman notes that "A is motivated primarily, or even entirely, by his desire to promote his own happiness, and that he uses B's predicament mainly, or even entirely, for this purpose. Here A uses B's vulnerabilities for his own ends. He treats B's vulnerabilities as an opportunity to advance his own interests."[254] On the face of it, it seems that hitchhiker B is extremely vulnerable to A, and that A, in making opportunistic of B's vulnerability for his own ends, is necessarily exploiting B.

However, closer examination shows that this example fails as a purported case of exploitation on Goodin's analysis. It seems that "using vulnerabilities to one's own ends" is a mischaracterisation of his view. Goodin actually seems to be saying that the key moral norm in question in exploitation is the duty to protect the vulnerable and that this

[254] Valdman, p. 6.

involves a general duty "to suspend ordinary rules of behaviour in dealing with those who are particularly vulnerable to you."[255] This is where the four types of playing for unfair advantage come from – it is no longer appropriate to play for strategic advantage in the ways outlined above, when someone is vulnerable. And this is because we have a fundamental moral duty to protect the vulnerable and their interests. Goodin may respond, therefore, that in the RFP case, the moral duty to protect the vulnerable is still being fulfilled, as *A is still providing the antidote to B free of charge.* None of the four types of playing for advantage are present when a commodity is given over freely. The duty to protect the vulnerable requires that A does not play for advantage when B is vulnerable. The general duty to protect the vulnerable entails a requirement to deviate from ordinary rules of market behaviour in dealing with them. Indeed, A has in fact suspended the normal rules of market behaviour by not charging B. Ordinary rules of market behaviour would normally dictate that A could sell for a reasonable price, such as the price set by the market. In providing the antidote for free, therefore, A has not satisfied Goodin's inappropriate use condition, and the vulnerable remain protected. It is not clear what duties to protect the vulnerable entail, in terms of helping us determine the exact price B should be charged in such a situation, but this is not an issue that I need to resolve here. All that is of concern is that the duty to protect the vulnerable has not been violated in a case where rescue is provided for free.

From this discussion we can see that Goodin's view is not simply that 'exploitation occurs when vulnerability is opportunistically used to A's own ends.' This would indeed capture far more cases than we would normally want to conceive of as exploitative. Religious Samaritans, for example, may view 'the needy' primarily as an opportunity to do God's work in order to secure a place in heaven. Yet we would not want to conclude that they are exploiting them when they offer them soup or shelter. In

[255] Goodin, 'Exploiting a Situation and Exploiting a Person', p. 187.

such cases, there is something key in the idea that the duty to protect the vulnerable is not being violated. Vulnerability is still being used, in a sense, but not in the sense that comprises exploitation, as the core moral duty to protect the vulnerable remains fulfilled. Similarly, as B is still given the antidote for free, B's interests have not been unmet, and they have not been exploited.

For Valdman, these cases are intended to show that wrongful exploitation must involve the extraction of benefits at B's *expense*, rather than just securing benefits from B. This is the supposed difference between the two cases that he argues Goodin's vulnerability-based approach can't account for. However, setting aside my response that Goodin need not concede this as a case of exploitation, thus disrupting Valdman's critique, let us consider Valdman's contention on its own merits. He derives the following conclusion from his presentation of the two cases:

> If *A* wronged *B* only in the Antidote case, this must be due to the fact that only in that case did *A extract* benefits from *B*. And so we can conclude that there is the kind of exploitation where *A* merely receives benefits from his use of *B*—where *A secures* benefits from *B*—and the kind where these benefits come at *B*'s expense — where *A extracts* benefits from *B*. [256]

Wrongful exploitation only occurs when A's extraction of benefits comes at B's expense. However, I believe this unduly narrows the concept of exploitation. Rather, exploitation can include cases where B suffers no material loss. And this supports Goodin's procedural account, which holds that it does not matter whether or not B was favoured or harmed by an action for it to be considered wrongfully exploitative. This idea also underpins the suggestion made in the previous chapter that adopting a procedural account can avoid some difficulties experienced by an outcome-based account.

[256] Valdman, 'A Theory of Wrongful Exploitation', p. 7.

In support of the idea that wrongful exploitation need not come at B's expense, let us consider the real-life case of the sale of NHS patient data for commercial purposes. Here, companies are able to profit from their access to, and manipulation of, NHS patient data, despite no material loss to the patients, and to which patients provide tacit consent. It is a parasitic form of exploitation, which appears to cohere more with Valdman's conception of 'indecent' exploitation, where benefits are secured, rather than extracted at patients' expense, as in 'wrongful' exploitation. Yet, this seems like a case of exploitation that we would intuitively consider as wrongful. Further, we would want to maintain that this is a case of exploitation due to the appealing nature of wrongful exploitation's political and illocutionary force, where the act of labelling inspires redress. The exploitation of patients in this way seems more than indecent, suggesting that wrongful exploitation need not require B to suffer a loss in the way Valdman claims. To be sure, the patients cannot be said to be suffering a loss, or benefit at their expense in terms of an invasion of privacy, as all data is anonymised and untraceable. It seems truly like a case of exploitation without material loss, and therefore seems better explained by one of Goodin's four inappropriate playing for advantage conditions, rather than by Valdman's excessive benefit condition. Goodin might say, for example, that this is a case of it being inappropriate to play for advantage when other players are "unfit or otherwise unable to play in games of advantage at all,"[257] due to the way in which patients only tacitly consent, are not fully informed about what their data might be used for, and are unlikely to receive a fair share of the benefits of this commercially-profitable data mining. Indeed, patients may also feel pressure to bow to the authority of the medical profession and let their data be used in this way. Further, Goodin could maintain that insufficient positive measures have been taken to inform and protect patients from data mining due to the deference to big technology companies in their role in healthcare, and thus the

[257] Goodin, 'Exploiting a Situation and Exploiting a Person', p. 184.

situation exhibits a failure to protect the vulnerable. Let us now turn to further analyse Valdman's own positive account.

3.2.5 Valdman's approach

For Valdman, exploitation is merely indecent when A's beneficial use of B is morally inappropriate but does not wrong B, and is wrongful only when B is wronged by A's beneficial use of B. To argue this, Valdman begins with the claim that A did not wrong B in the Rescue for Pleasure (RFP) case because he "acted just as a moral saint would have acted, just not for the same reasons,"[258] which seems plausible. On my interpretation of Goodin, I also come to the conclusion that this is not exploitation, and so A has not wronged B. Importantly for Valdman, what makes the Antidote case one of wrongful exploitation, and RFP only one of indecent exploitation, is that B paid an *excessive* price in the former, whereby A *extracted* benefits from B, gaining at B's *expense*, whereas, in the RFP case, the benefits that A received did not come out of B's pocket, but rather from his use of B. According to Valdman, wrongful exploitation therefore requires the *extraction* of benefits and this "is not required for wrongful exploitation on the vulnerability view. That view requires only that benefits are secured – that one profits from the opportunistic use of people's vulnerabilities."[259] And so, according to Valdman, "the vulnerability view cannot deliver a theory of wrongful exploitation."[260]

However, we have seen that this is not exactly what Goodin's vulnerability approach is. Correctly interpreted, Goodin's view begins to look quite similar to Valdman's. In fact, wrongful exploitation on Goodin's analysis can accommodate this same sense of benefits being *extracted*. Such extraction occurs when A violates the rules

[258] Valdman, 'A Theory of Wrongful Exploitation', p. 7.
[259] Valdman.
[260] Valdman.

of fair play in dealing with the vulnerable, leading to A taking unfair advantage and making inappropriate use of the vulnerable and their position.

What motivates Valdman, therefore, to eschew the vulnerability condition, and argue that exploitation's wrongfulness consists in gaining at the expense of another? It seems that he is attempting to analyse exploitation as outcome-based rather than making it about an abuse of process, as Goodin does. However, I suggest that he too relies on a conception of vulnerability, or market vulnerability, at least, in his analysis, which also makes his account process-orientated.

Valdman's view can be summarised in the following way: one wrongly exploits another iff one violates the obligation not to extract excessive benefits from someone who cannot, or cannot reasonably, refuse one's offer.[261] Being 'unable to refuse an offer' occurs when one is "faced with unacceptable non-transaction costs," which are "the costs incurred by refusing to accept an offer."[262] For B, in the Antidote case, the non-transaction costs were *certain death*, and so were unacceptably high. This, to me, seems strikingly similar to common sense conceptions of vulnerability. Indeed, to determine the unacceptability of non-transaction costs, Valdman draws upon Stuart White's conception of market vulnerability where C's *urgent need* for some good and D's monopoly over that good permits C to wrongly exploit D.[263] Unacceptable non-transaction costs (and so unreasonable alternatives) on this view would be analysed in terms of urgent needs and monopoly. Valdman takes these to be individually necessary and jointly sufficient for having unacceptable non-transaction costs. Valdman construes monopoly and urgency broadly, conceptualising urgent needs as those "which one needs to live a decent life and not just that which one needs to avoid misery or death."[264] We could similarly define

[261] Valdman, p. 9.
[262] Valdman.
[263] Stuart White, *The Civic Minimum* (New York: Oxford University Press, 2003), p. 45.
[264] Valdman, 'A Theory of Wrongful Exploitation', p. 10.

vulnerability as the position of having urgent needs unmet, and so having unacceptable non-transaction costs is to be vulnerable.

Valdman conceives monopoly broadly as well, such that a monopolist does not need to have actually cornered the market for them to have monopoly power over someone, or groups of people. The monopolist might just have gained this power over customers as a result of a "lack of adequate transportation" which makes the cost of shopping elsewhere for some customers unreasonably high.[265] Therefore, monopoly may be understood as a relation between particular individuals, "vis-à-vis the party in question,"[266] rather than to the whole market. This leaves it open to be considered in a manner similar to vulnerability. On Goodin's view, to be vulnerable is to be susceptible to harm to one's interests, and one is relationally vulnerable *to particular agents* for such threats to harm.[267] Although everyone is potentially vulnerable to these kinds of threats, what makes some persons or groups particularly so is a diminished capacity to protect themselves. In this sense, vulnerability for Goodin is tied up with reduced capacity or power to protect interests, relative to other agents. Using Valdman's example, vulnerability, in terms of lack of disposable wealth and access to transportation can make some people particularly susceptible to monopoly power, which might be considered a threat to harm. Vulnerability could therefore go some way towards accommodating Valdman's monopoly condition. It seems, therefore, that Valdman's analysis is plausibly reducible, in part, to vulnerability. He need not dispose of the vulnerability view, and his approach can be accommodated under Goodin's existing vulnerability framework.

For Valdman, exploitation occurs "when one extracts benefits from someone who cannot, or cannot reasonably, refuse one's offer."[268] We have seen that the latter part of that condition – not being able to reasonably refuse an offer – may be interpreted

[265] Valdman, p. 9.
[266] Valdman.
[267] Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities.*
[268] Valdman, 'A Theory of Wrongful Exploitation'.

as relying upon a conception of vulnerability. A thoroughly charitable interpretation of Valdman, however, would hold that although a vulnerability condition may comprise *part* of his definition, this is still may be insufficient for wrongful exploitation. As has been discussed, for Valdman, the wrongfulness of exploitation consists in the *extraction of excessive benefit* **plus** *vulnerability* (from someone unable to refuse an offer). An act without this, where only the 'inability to refuse an offer condition' (vulnerability) is met, would only be indecent exploitation, as in the Rescue for Pleasure case. So can this 'extraction of benefit' condition also be subsumed under the vulnerability view? Or is Valdman correct in asserting that this distinct condition is necessary alongside his 'inability to refuse an offer' vulnerability condition? I have already suggested that Goodin's account, fully explicated, could plausibly account for what Valdman means by the extraction of benefits. This, on Goodin's account, would be a result of inappropriate use of vulnerability. However, a sufficiently charitable interpretation of Valdman would further examine and interrogate his 'extraction of excessive benefits condition,' in order to determine its merit and establish whether or not it presents something novel and necessary, above vulnerability, for wrongful exploitation. I will turn to do this now.

3.2.6 Excessive Benefits

Valdman explicates his extraction of benefit condition the following way: "A wrongly exploits B only if A extracts *excessive* benefits from B."[269] He acknowledges that defending this condition requires answering the following questions: "when are extracted benefits excessive, and why is this necessary for wrongful exploitation?"[270] In answering the second question he posits the following example:

[269] Valdman, p. 11.
[270] Valdman.

> Suppose that in the Antidote case, A offers to sell B the antidote for $10 – its retail price – and that B accepts the offer.[271]

Although benefit was extracted here, as B has lost $10 rather than been given the antidote for free, and B could not refuse A's offer due to unacceptable non-transaction costs, it does not seem that this is enough to say that A has *wrongfully* exploited B. Valdman's explanation for this is that A didn't extract *excessive* benefits from B, and so he isolates this is as necessary for *wrongful* exploitation. However, is the *excessive benefit* condition truly necessary for wrongful exploitation?

Another plausible explanation as to why this is not wrongful exploitation, following Goodin's account, is that this is not *inappropriate use*. As we have seen, inappropriate, or unfair use consists in violating the duty to protect the vulnerable, by breaking the rules of fair play in dealing with them. On this view, the rules of fair play seem to have been respected as it does not seem that A has attempted to seize strategic advantage in the four ways Goodin outlines. Although A has not suspended ordinary market rules by giving the antidote for free, as in the RFP case, they have still not charged an *extortionate* price, and so have not made *inappropriate*, unfair, or non-standard use of the situation. Such non-standard use, or strategic advantage, is more likely to involve charging well above the retail price. The rules of fair play have not been infringed in a situation where A does not charge B an extortionate price for the antidote, thus the vulnerable remain protected, and exploitation has not occurred. It may be interjected at this point that that this interpretation of Goodin is still relying upon the notion of excessive benefit – that exploitation must still contain some reference to an excessive price, or an unjust benefit of sorts to determine inappropriate use or unfair advantage. This may well be true, but is beside the point, as the argument I am making is that Goodin's account of taking unfair advantage is wide enough to encompass such a notion,

[271] Valdman.

if necessary. All that this discussion is intended to suggest is that the explicit "excessive benefit extraction" condition is a superfluous addition to a Goodin-inspired account, and so not necessary as Valdman states, as it can be incorporated into Goodin's analysis. Rather, the "excessive benefits" condition seems like a restatement of Goodin's unfair advantage condition. I have aimed to show that this inclusion of an extra condition to the use of vulnerability condition, that supposedly differentiates Valdman's account, is not necessary, thus seeking to further undermine his argument that the vulnerability account is lacking.

Let us again be charitable and assume for the sake of argument that such a condition is indeed necessary, and that Valdman is justified in adding it. However, in answering the first of the above two questions, and providing an account of what is to count as "excessive" benefit, Valdman's explanation again appears to be reducible to vulnerability, suggesting that the vulnerability approach can indeed account for wrongful exploitation. In explaining what "excessive" benefit consists in, Valdman argues that in the above antidote case, "it seems that any benefits that A receives from B over and above the costs of providing B with the antidote would be excessive."[272] He opines that this is because:

> any amount that A requests over the costs of providing B with the antidote would be an amount that A can expect B to pay only because of B's dire circumstances. This suggests that, in the context of a theory of wrongful exploitation, extracted benefits are excessive insofar as they deviate from the benefits we would expect A to receive were he transacting with someone who was *rational, informed, and could reasonably refuse his offer.*[273]

Here, it seems Valdman inadvertently reinforces the similarity between his and Goodin's accounts. This explanation of excessive benefit parallels Goodin's account of inappropriate or unfair use. Valdman seems to be claiming that extracted benefits are

[272] Valdman, p. 12.
[273] Valdman (emphasis added).

excessive when they are more than what someone who is rational, informed, and able to refuse the offer would pay – in other words, when they are more than what someone who was not vulnerable, in a bad situation, or in desperate need, would pay.

Valdman invokes Wertheimer's analysis of a hypothetical market price as a view similar to his own. To recall, this is a price that an informed and unpressured seller would receive from an informed and unpressured buyer at which neither party takes special advantage of each other, relative to their particular circumstances, "such as their particular non-transaction costs."[274] Valdman explains that this notion of excessive benefit aligns well with the antidote case, as "we wouldn't expect two informed and unpressured people to settle on $20,000 for the antidote when it retails for $10."[275] Valdman's view is that excessive benefits are determined by "comparing the actual situation with one in which the bargainers did not have unacceptable non-transaction costs or where they could reasonably reject the other's offer."[276] On this approach, a non-exploitative price is one in the range:

> bounded by the lowest amount that a seller would accept and the highest amount that a buyer would pay if both were informed and if neither had unacceptable transaction costs. Or, more broadly, a non-exploitative price is one that an informed buyer would get from an informed seller in a competitive market *if either could reasonably refuse the other's offer*. This, I believe, captures precisely what is so objectionable about wrongful exploitation, which is the obtaining of excessive benefits *from* someone's unacceptable non-transaction costs, using these as leverage to extract excessive benefits from him.[277]

Thus, it seems that Valdman's account of excessive benefits is again reducible to a conception of vulnerability. By defining excessive benefits in terms of "unacceptable non-transaction costs" (which are previously defined by him in terms of "urgent needs," a notion which has clear parallels with vulnerability), the analysis appears to resemble a

[274] Valdman.
[275] Valdman.
[276] Valdman, p. 12.
[277] Valdman.

use of a vulnerability condition. Essentially for Valdman, exploitation occurs when (1) excessive benefits are extracted from someone who (2) *cannot reasonably refuse* an offer. Excessive benefits are extracted when B has unacceptable non-transaction costs (formulated in terms of urgent needs). Being 'unable to refuse an offer' similarly is analysed by Valdman in terms of "non-transaction costs."

Importantly, the concepts of "urgent needs" and "monopoly" necessary for unacceptable non-transaction costs, are to be understood broadly, and "include that which one needs to live a decent life and not just that which one needs to avoid misery or death,"[278] and only require that one agent has *monopoly power*, rather than actual market monopoly. Valdman provides the following example to illustrate the broadness of his urgent needs conception:

> To see why, suppose that *B,* while hiking in a remote forest, has fallen into a concealed pit from which he cannot escape. To his surprise, the pit happens to be well provisioned so that he could remain there for many years. Person *A* happens by and offers to lower *B* a rope for a substantial percentage of *B*'s future earnings, and *B* accepts. Because the pit is well provisioned, *B* does not have truly *urgent* needs, but he is still in no position to refuse *A*'s offer.[279]

By conceiving of urgent needs as more than just needs that are immediate and life threatening, Valdman aligns his conception *even closer* to the idea of vulnerability. Indeed, vulnerability encompasses states that are not just deadly or grave; it serves as a metric of general disadvantage, as I will suggest later in this chapter. It allows for the possibility of someone being vulnerable with some needs being fulfilled, while others are not, as you can be vulnerable according to different measures.

Thus far, I have sought to show that Valdman's account of wrongful exploitation is much closer to Goodin's than he presents it. They share similarities to the extent that it

[278] Valdman, p. 10.
[279] Valdman.

is possible to account for the examples Valdman provides to justify his own account, through further interpretation of Goodin's theory. It seems that wrongful exploitation can be explained without having to resort to the excessive benefit condition that Valdman posits, and without throwing out the "vulnerability" condition with the bathwater. Vulnerability, it seems, could plausibly be incorporated into Valdman's account, with minimal alteration.

Valdman's notions of urgent needs and monopoly, therefore, are co-extensive with the concept of vulnerability. He leaves the concept of urgent needs vague, asserting that such needs are those necessary to live a decent life. What exactly is a decent life? This has not been fleshed out on Valdman's account, so his theory perhaps raises more questions that it answers. The problem re-emerges in discussions surrounding what is required for a 'decent life,' and how this is to determine whether the non-transaction costs someone would experience in not engaging in an practice in order to attain this decent life, are 'unreasonable,' and so lead to exploitation. For Valdman you cannot be exploited by a ticket scalper because it is unlikely that you are gripped by an uncontrollable urge to buy a ticket at an inflated price. Rather, you are just letting yourself be used. It is only wrongful exploitation "when you have your back to the wall, so to speak, or when you have little control over your actions and choices."[280] This seems too narrow, however, and appears to contradict what he asserts earlier about urgent needs being those necessary to live a decent life, not just to avoid death. Living a decent life, therefore, is more than just not "having your back against the wall"; it is conceivably about flourishing, being respected, and standing in relations of equality to others. It seems we need the notion of vulnerability, therefore, to provide a more encompassing picture of what it means to be susceptible to exploitation, compared with what it means to be somewhat immune, and living a good life.

[280] Valdman.

Goodin's conceptualisation of vulnerability is also unsatisfactory, however. He begins by drawing upon the dictionary definition of vulnerability as "susceptible of injury," continuing "it is essentially a matter of being under threat of harm."[281] For Goodin, "the argument for protecting the vulnerable is first and foremost an argument for aiding those in dire need."[282] This, again, seems too exclusionary. We want an account of vulnerability to capture more than this, to reflect exploitation's widespread presence as a mode of relation.

Ruth Sample offers a more promising suggestion. Although she criticises Goodin's account of exploitation for reasons I will come to, she agrees that he is correct in identifying vulnerability as connected to exploitation in an important way.[283] Indeed, she argues "Goodin is right to emphasise that exploitation involves making use of another's vulnerability, and we are vulnerable (in part) because of our need."[284] Importantly, however, she construes need more broadly, arguing that:

> Needs include not only those objects necessary for physical survival, but also conditions of purposeful employment, the pre-requisites of psychological well-being, and constraints on interaction that are necessary for self-respect. Vulnerability is thus dependent on an account of what humans require for a good life.[285]

Essentially, therefore, exploitation depends on a notion of using vulnerability, which in turn, depends on a theory of justice and the good life. In the rest of this chapter, therefore, I shall conceptualise vulnerability, before finally settling on the capabilities approach to justice as a useful way of defining it for the purposes of my analysis.

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[281] Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, p. 110.
[282] Goodin, p. 111.
[283] Sample, *Exploitation: What It Is and Why It's Wrong*, p. 73.
[284] Sample.
[285] Sample, p. 74.

3.3 Sample's Criticism

Crucially, I do not want to show too much deference to Goodin's theory of exploitation. Indeed, I believe it exhibits some weaknesses that I hope the vulnerability-based approach I offer can overcome. Although Ruth Sample agrees with Goodin's focus on vulnerability as significantly related to exploitation, she suggests that his approach fails in an important way, in light of its welfare consequentialist nature. Indeed, she raises what I identify and discuss in depth in Chapter Five, as the puzzle of exploitation.

To recall, Goodin's account holds that exploitation does not necessarily involve harm. It can occur when both parties benefit, but when some norm is violated, in a way that constitutes inappropriate or unfair use. Sample argues, however, that "if, as he also says, his view is fundamentally consequentialist, this raises the question of what is morally wrong with a transaction that *improves* the situation of all those involved, no matter how unusual the transaction."[286] The consequences, after all, are improved. Goodin therefore needs to show that exploitation in general fails to bring about good consequences, that it is on the whole harmful, or, provide a further argument for its wrongfulness, in spite of good consequences.

However, this might be a mischaracterisation of Goodin's view, as he does claim that "the wrongfulness (unfairness, exploitativeness) lies in the act, not in the outcome,"[287] which seems distinctly non-consequentialist. The opportunistic use of vulnerability is what characterises the unfairness, despite the consequences. What Sample might be referring to, however, is Goodin's original work on vulnerability, *Protecting the Vulnerable*, which precedes and serves as a normative antecedent to his work on exploitation. In this seminal book, Goodin does consider the duty to protect the vulnerable as a principle with a "fundamentally consequentialist" structure, whereby "the

[286] Sample, p. 51.
[287] Goodin, 'Exploiting a Situation and Exploiting a Person', p. 182.

point of protecting the vulnerable is precisely that in doing so we produce good consequences"[288] In light of this, Sample's criticism seems more founded, as this consequentialist principle might be in tension with his argument for exploitation's wrongfulness. Indeed, flouting the duty to protect the vulnerable by exploiting them might produce better consequences: "it is hard to see how mutually beneficial exploitation is a case of failing to bring about good consequences, since it is by definition mutually beneficial."[289] Therefore, sometimes the duty to protect the vulnerable, in order to produce the best consequences, might require beneficially exploiting them.

Perhaps, therefore, Goodin cannot adequately account for why mutually beneficial consequence-optimising exploitation is wrongful. This is the task I take up in Chapter Five, to differentiate my account from his, and fully explicate how use of vulnerability plays a part in exploitation's wrongfulness. First, I will provide a consequentialist argument which points to the generally suboptimal nature of exploitative transactions, suggesting that the consequences they bring about do not turn out to be so good after all. Secondly, I outline the wrong that occurs in profiting from vulnerability, rather than taking action to address it. Thus my account can respond to Sample's criticism regarding what remains wrong with exploitation in the face of good consequences.

3.4 Theorising Vulnerability

Now that I have suggested that both Goodin and Valdman's accounts employ a vulnerability condition, it is necessary to gain further clarity about what the term denotes. I will now engage in a conceptual analysis of vulnerability, exploring the various ways in

[288] Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, p. 14.
[289] Sample, *Exploitation: What It Is and Why It's Wrong*, p. 51.

which it could be understood, before settling on the capabilities approach as a working definition.

It is instructive to begin with our pre-theoretical, common usage of the term. Vulnerability is defined by the Oxford English Dictionary as "the quality or state of being exposed to the possibility of being attacked or harmed, either physically or emotionally."[290] From this, we can glean that vulnerability is a state of precariousness, a teetering position, leading someone to be susceptible to harm. This can be cashed out in further ways, regarding the type of harm one is susceptible to, its source, as well as its remedy.

Vulnerability has been somewhat neglected by mainstream moral and political philosophy, which has tended to focus on individuals as 'independent' and 'autonomous' rational actors. The autonomous subject of philosophical discussions is theorised at a high level of abstraction, characterised as a perfectly able, disembodied, rational agent. Whereas, vulnerability tends to relate to the real, context-dependent, material conditions affecting individuals, a feature that might compromise the presumed objectivity of much philosophical discussion. For this reason, much of the literature on vulnerability, since Goodin's seminal work in 1985, comes from feminist philosophy, which has tended to critique dominant philosophy for failing to pay due attention to structural harms experienced by oppressed groups, and for inadvertently reproducing these harms under the guise of 'objectivity.' Rather, feminist philosophy views the subject of philosophical discussion as socially constituted, and the concept of vulnerability aligns well with such a presupposition. Indeed, feminist theory has long criticised the necessarily de-gendered subject of political theory, arguing that such a formulation of a political actor "exemplifies an absence of pregnancy and other female bodily characteristics that

[290] 'Vulnerability | Definition of Vulnerability in English by Oxford Dictionaries', Oxford Dictionaries | English, accessed 28 October 2017, https://en.oxforddictionaries.com/definition/vulnerability.

arguably play a major role for females in self-and social-identity formation, and in the formation of political interests."[291]

Much of feminist thought on the issue has begun with the claim that vulnerability is an immutable and universal facet of the human condition. We are all at some point in our lives vulnerable to someone, or something. In her development of an ethics of care, Eva Feder Kittay seeks to destigmatise 'assistance,' by asserting that instead of viewing it as a limitation, we should "consider it to be a resource at the basis of a vision of society that is able to account for inevitable dependency relationships between "unequals" ensuring a fulfilling life both for the carer and the cared for."[292] Importantly, Kittay notes that those without disabilities are only "temporarily abled," and all human beings will at some point be dependent.[293] This has also been a feature of egalitarian thinking, and John O'Neill suggests "the existence and recognition of common vulnerability to evil and calamity robs the fact of dependency of its potentially humiliating condition."[294] Rather than assuming radical self-sufficiency, "a good social order needs to start not from the denial of common vulnerabilities but from an acknowledgement of their existence."[295]

What exactly are these common vulnerabilities, therefore? By virtue of our embodiment, human beings have bodily and material needs, are exposed to physical illness, injury, disability, and death, and depend on the care of others for extended periods during our lives. Further to this, as social beings we are emotionally and psychologically vulnerable, and as socio-political beings we are vulnerable to various forms of oppression.[296] Vulnerability is also recognised in the literature as being

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[291] Vicky Randall, ed., 'A Political Theory of Gender: Perspectives on the Universal Subject', in *Gender, Politics and the State* (London: Routledge, 1998), p. 24.
[292] Eva Feder Kittay, 'The Ethics of Care, Dependence, and Disability', *Ratio Juris* 24, no. 1 (2011): 49–58, p. 1.
[293] Kittay.
[294] John O'Neill, 'Need, Humiliation and Independence', *Royal Institute of Philosophy Supplements* 57 (December 2005): 73–98, https://doi.org/10.1017/S1358246105057048, p. 93.
[295] O'Neill, p. 97.
[296] Catriona Mackenzie, Wendy Rogers, and Susan Dodds, eds., *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press, 2014), p. 1.

fundamentally relational. On Goodin's view, to be vulnerable is to be susceptible to harm to one's interests, and one is relationally vulnerable *to particular agents* for such threats to harm.[297] Although everyone is potentially vulnerable to these kinds of threats, what makes some persons or groups particularly so is a diminished capacity to protect themselves. Vulnerability also features in a number of debates within bioethics where it is associated with reduced capacity to give informed consent to a procedure.

It might be interjected that vulnerability being viewed as fundamentally relational, and as hinged upon a conception of justice, as I add, rules out the possibility of vulnerability to natural misfortune, and that this seems too limiting. Well, what is meant by natural misfortune? If we consider various natural disasters such as the Haiti earthquake in 2010, or the recent West African Ebola virus epidemic, we can see that although these started off as natural disasters, the trajectory of their destruction was shaped by social, relational, and institutional conditions. What began as a natural vulnerability to a virus, for example, was exacerbated by limited access to healthcare and cultural burial practices.[298] We might want to say, therefore, that there is a sense in which vulnerability to so-called natural disasters is socially constituted, and so the susceptibility to harm by natural misfortunate is relational.

Is vulnerability *necessarily* relational, however? Contra Goodin, it does seem that we can imagine a case where there is no relational or societal element at play whatsoever, such as if B were shipwrecked alone on a desert island, by sheer natural misfortune. Conceptually, I do not wish to deny there can be such instances of vulnerability, however, it is worth noting how removed such a situation would be from real life instances of vulnerability. As discussed in the previous chapter, while desert island scenarios of vulnerability that exist in the absence of any institutional structure are a

[297] Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*.
[298] Angellar Manguvo and Benford Mafuvadze, 'The Impact of Traditional and Religious Practices on the Spread of Ebola in West Africa: Time for a Strategic Shift', *The Pan African Medical Journal* 22, no. Suppl 1 (10 October 2015), https://doi.org/10.11694/pamj.supp.2015.22.1.6190.

theoretical *possibility*, my account excludes these, focusing on cases in which vulnerability is shaped, constrained, and exacerbated by institutional arrangements, and is hinged upon a conception of justice. Vulnerability, therefore, in comprising a key element of my exploitation condition, is conceptualised as necessarily resulting from injustice. I define vulnerability in this manner as this seems to reflect the empirical reality, whereby vulnerability is not merely an unavoidable accident, but rather is a rectifiable result of structural and background injustice.

While it is clear that we may all be vulnerable in some sense, it seems necessary not to dilute the concept, as vulnerability is not a feature that is distributed equally across human lives. Crucially, while vulnerability may be universal, it is not possessed by all to the same degree, due to the different effects of social structures on different individuals. Goodin argues that "any dependency or vulnerability is arguably created, shaped, or sustained, at least in part, by existing social arrangements."[299] Vulnerability to ill health, therefore, a condition that in principle affects all of us, will be either exacerbated or constrained by factors such as access to healthcare, or the type of labour one is engaged with, both of which are features of social arrangements rather than an innate state. Similarly, Elizabeth Anderson argues that we should not think of disability as intrinsically harmful or disadvantaging; the unjust disadvantage of disability is located in how society and other people treat the disabled.[300] The vulnerability associated with disability, therefore, is exacerbated by societal arrangements, and can therefore be mitigated by providing better access to public facilities and spaces, for example.

Similarly, our universal corporeal vulnerability is made worse or ameliorated by various social conditions. These may determine how equipped a person is to deal with such universal corporeal vulnerability. For instance, hunger and thirst are universal

[299] Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, p. 191.
[300] Elizabeth S. Anderson, 'What Is the Point of Equality?', *Ethics* 109, no. 2 (1999): 287–337, https://doi.org/10.1086/233897, p. 334.

aspects of the human condition, but their hold on an individual is determined by material and social conditions and the capacity of an individual to meet their own interests. Bodily vulnerability, therefore, may be compounded by poverty, and disproportionally affects certain individuals.

Vulnerability being situated in the body also adds another dimension to the analysis. It would seem that all sources of vulnerability have their effects on the body; even economic and social vulnerability will manifest as physiological or psychological vulnerability eventually, through stress and poor health. Vulnerability is very much a feature of embodied beings.[301] Vulnerability's being so concerned with the body makes it a particularly pertinent concept to bioethics, and in particular, to the case of commercial surrogacy. The embodied nature of commercial surrogacy, and how this intersects with vulnerability is something I focus on in Chapter Six, "Embodied Labour," in order to suggest that there is something particularly pernicious about labour that makes use of the body in this way.

It is also necessary to disassociate vulnerability from its negative connotations. As aforementioned, it is necessary to conceive vulnerability as a universal state, affecting everyone, to different degrees. It is in this sense, therefore, that vulnerability is a *metric of susceptibility to disadvantage*. On this view, vulnerability is a scalar notion, representing various degrees of disadvantage, across different categories. Such categories might include social capital, income, health, linguistic ability, disability, gender, and race. On this approach, vulnerability is a metric for assessing well-being, and susceptibility to further harm. Indian surrogates, as represented by the ethnographic research in the first chapter of this thesis, would be considered vulnerable across various intersecting categories according to this metric. Given their score on the metric, they are susceptible

[301] While I do not want to rule out the conceptual possibility that a hypothetical disembodied mind could also be vulnerable, it seems clear that vulnerability as it currently exists is inextricably linked with our embodiment.

to a greater level of harm, through exploitation, for example. It is important to recognise vulnerability as a currency of justice that is unevenly distributed.

Martha Fineman has persuasively argued that the 'vulnerable subject' must replace the autonomous and independent subject asserted in the liberal tradition.[302] Fineman seeks to reclaim the term vulnerable for its "potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."[303] However, I differ from Fineman in that I do not think it best to speak of a singular, unified "vulnerable" subject, as this risks erasing important differences in the unequal distribution of vulnerability, and obfuscating the extant harm, injury, and misfortune experienced by marginalised groups. Although Fineman recognises that because "we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level,"[304] her general focus on a "vulnerable subject" may serve to reproduce the universalism of dominant ideal theory. Although the motivation for this unifying conception of the vulnerable subject is to direct state action and remove stigma, I believe there is room for both a theory of vulnerability that points to the universal potentiality of harm *and* a conceptualisation that recognises that there are vulnerable groups who are experiencing extant heightened harm. This is what I attempt to provide in the following discussion of capability theory as a way of understanding vulnerability.

We can accommodate both the universality of vulnerability and differences in degree by invoking the scalar sense of vulnerability, in particular through the notion of capabilities. We can note that everyone is vulnerable, in the sense that everyone exists at some point on the scale. They differ in the degree to which they are vulnerable, however, and therefore on their position on the scale. We do not want to equate the lived

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302 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', *Yale JL & Feminism* 20 (2008): 1, p. 2.
303 Albertson Fineman, p. 8.
304 Albertson Fineman, p. 10.

vulnerability of a surrogate in the Global South, to universal vulnerability, after all. The capabilities metric provides a straightforward method of highlighting such disparities.

3.5 The Vulnerability Metric

I have suggested that vulnerability is a multifaceted state. The all-encompassing notion of vulnerability represents various degrees of disadvantage, across different categories. Such categories include educational status, income, health, disability, gender, and race. These categories can intersect to create variable experiences of disadvantage. One can be vulnerable in various ways, to various degrees. Ultimately, however, it does seem to be possible to classify some individuals as more vulnerable, compared with others. We want to retain vulnerability's status as a *scalar* notion, despite its universality, in order to reasonably conclude that by and large, and according to numerous measures, surrogates in India are particularly vulnerable.

As touched upon earlier, I do not believe the concept of vulnerability should invoke stigma. There is some reticence by theorists to use the term vulnerability due to its perceived negative connotations.[305] However, classifying individuals or groups as vulnerable should not signify any failure on their part. Rather, variations in vulnerability, and the label of categorical vulnerability, indicate failures of the state in discharging duties of social justice. Further, the concept of vulnerability is often associated with 'victimhood' and 'helplessness.' The falsehood of this association should be clear given the universality of vulnerability, and the fact that we will all, at some point in our lives, be vulnerable, in some sense, and dependent on others. Further, vulnerability can come apart from dependence and helplessness, providing further reason to distance it from these connotations. Consider migrant workers who live "below the radar" in a foreign

[305] I observed this phenomenon at a conference on exploitation.

country, without having the right to residency. They often exhibit radical self-sufficiency, in terms of obtaining cash-in-hand work, and surviving without any state assistance such as healthcare or social welfare. Such individuals are still vulnerable according to various measures, yet are by no means "helpless." I aim to disassociate vulnerability from its negative connotations, therefore, focusing on the way in which vulnerability largely represents failures, on the part of states and the wider global economic order, in meeting minimum justice requirements. Such failures amplify the difference in natural vulnerabilities between persons, and lead to the proliferation of avoidable vulnerability. One such way of cashing out this failure in institutional justice is the capabilities approach.

3.5.1 The capabilities approach

The capabilities approach is a particularly effective way of cashing out the vulnerability metric, for the purposes of my analysis. This is because it is able to reflect the plurality of disadvantage, that is, the different intersecting dimensions that could comprise vulnerability. I offer a thin definition of vulnerability as falling below a threshold of capabilities, which also indicates susceptibility to further disadvantage. The capabilities approach was borne out of dissatisfaction with a resourcist approach to justice. Rather than narrowly focusing on income and wealth, Amartya Sen centered the discussion on what people are able to *achieve* with their resources. Fundamental to this idea was the awareness that the same allocation of resources could have vastly differing results amongst different individuals with varied needs. For example, while a certain quantity of resources would benefit an able-bodied person, that same quantity might be insufficient in catering to the needs of a disabled person, who might require more resources to achieve the same level of well-being. Wealth, and access to resources, after all, are not the

only dimensions of vulnerability, or, justice. The capabilities approach is appealing, therefore, because it maintains an attractive balance between an objective list theory of well-being, and a resourcist approach, by accommodating differences in individual needs.

Furthermore, the various categories of intersecting disadvantage I have alluded to throughout this chapter are captured effectively by the idea of capabilities. Vulnerability, through the susceptibility to disadvantage it refers to, could be understood in terms of reduced capabilities, drawing upon Sen's contribution to the debate on inequality. On Sen's approach, capability is "an aspect of freedom, concentrating in particular on substantive opportunities."[306] It is its relation with freedom that makes capability a kind of *power*. Capability is understood in the context of the pursuit of well-being. According to Sen, living consists in various 'functionings,' such as being adequately nourished, being educated and avoiding escapable morbidity.[307] Such functionings are constitutive of a person's being, and the *well*-being of a person is dependent on the functionings achieved. Capability, therefore, reflects a person's freedom to lead one type of life or another, through their ability to achieve functionings. It denotes their substantive, real opportunities to achieve well-being, if they so choose to exercise this capability. This well-being freedom, according to Sen, helps us to judge "how good a 'deal' a person has in the society."[308]

In terms of my analysis of exploitation, a person is vulnerable when they are lacking capabilities, and do not have sufficient capabilities to achieve a reasonable degree of well-being. They lack opportunities to pursue well-being, and so are in a state of unfreedom. They are vulnerable in the sense of being disadvantaged with respect to not having a good 'deal' in society. This may make them willing to accept terms of an offer that others, with certain capabilities to achieve well-being, who are not vulnerable, would

[306] Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), p. 287.
[307] Amartya Sen, *Inequality Reexamined* (Oxford: Clarendon Press, 1992), p. 31.
[308] Sen, p. 41.

not accept, and this is where the 'unfair advantage' of exploitation lies, in their acceptance of an offer that under circumstances of fairness would not have been agreed to. In this sense, an exploitative transaction necessarily trades on injustice. This constitutes an unjust benefit, gained by A, which has implications in terms of giving reason to interfere in such transactions, as will be argued in Chapter Five. Circumstances of fairness in this sense are conditions of greater equality, or institutional justice, whereby a sufficiency, or threshold of capabilities, is guaranteed. A person in a vulnerable position, below this threshold and without well-being freedom, is likely to agree to terms that they would not otherwise have consented to, in order to achieve putative well-being, and it is this that comprises the use of vulnerability aspect of exploitation.

3.5.2 Justifying the use of the capabilities approach

A crucial point of contention at this point would be that it seems that we can exploit people even when their threshold capabilities are met. The relatively wealthy festivalgoer who pays an exploitative price for a ticket from a third party seller is likely to have a high-level of wellbeing. Her functionings, such as being adequately nourished, being educated and avoiding escapable morbidity, are likely to be met. Does my account say that she is never exploited? No. According to another account of exploitation, she may well be exploited. It is important to emphasise the point made in the previous chapter that my account of exploitation is restricted to analysing market transactions that arise as a result of vulnerability, which is itself defined according to a conception of justice. Crucially, I am not putting forward a necessary condition for exploitation, with my claim that "A exploits B when A takes unfair advantage of B's vulnerability." Indeed, I believe it is near impossible to produce a generally universalisable account that rings true for every instance of exploitation.

Rather, there are recurring elements that appear in competing definitions, and I believe the general root of this can be summed up as advantage gained through a power disparity. Vulnerability is one such way of cashing out this power disparity, although is not the only way. And the capabilities approach is one such way of cashing out vulnerability, although not the only way. Therefore, an alternative account might better capture the exploitation of a festivalgoer outlined above. I have chosen to focus on vulnerability and capabilities, however, because this approach particularly coheres with the facts of the case of commercial surrogacy in India, and analogous cases of exploitation such as kidney selling and other sales of labour.

By and large, Indian surrogates score particularly lowly on the capabilities scale, below the threshold minimum level of capability that is the requirement of justice. Further, the difference in the vulnerability of Indian surrogates and western surrogates, such as those in America, for example, is stark. Only an approach that takes into account a wide range of dimensions of justice, i.e. a range of capabilities, is able to capture the difference between these two groups. While we might want to conclude that there is a sense in which both groups of surrogates are exploited, certainly it seems that the nature, intensity and features of the exploitation in both cases differ, and the difference in capabilities might serve to explain this.

I must also address the widely debated flaws of the capabilities approach if I am to advocate it as adequately capturing vulnerability, and in particular, the vulnerability of Indian surrogates. One of the key points of debate in the capability literature is whether we need to enjoy *all* functionings, such as being adequately nourished, and being educated, in order to avoid deprivation and achieve well-being. Or is it possible to just enjoy most functionings, or even some of them, to not be considered vulnerable? If not all capabilities need to be met, however, how do we aggregate the ones that do into a single measure denoting functioning? Sen has himself suggested that some of the

capabilities are more 'basic' or fundamental than others, and that these basic capabilities can be relevant for deciding a cut off point for assessing poverty. However, he also consistently and explicitly refuses to defend "one pre-determined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning."[309]

For the purposes of this investigation, however, I endorse something like Martha Nussbaum's account. Her approach is specifically policy-focused, as she provides a list of ten "central human capabilities" that should be enshrined in every country's constitution: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.[310] Her approach is empirically informed and is therefore aligned with the real world theorising that this thesis has been concerned with. Nussbaum and Sen formulated their capabilities approaches with respect to disadvantage in the developing world. This approach, therefore, particularly lends itself to examining the vulnerability of Indian surrogates.

Nussbaum justifies her list of capabilities by arguing that each one is necessary in order for a human life to be "not so impoverished that it is not worthy of the dignity of a human being."[311] While the list is formulated on an abstract level, Nussbaum intends that it be translated into policies that take into account local differences. Crucially, she emphasises that the list remains open-ended and open for revision. While her approach is considered by some to be too prescriptive, and by others, to not go far enough, I believe adopting it is sufficient for now, to fend off concerns about specifying which capabilities are necessary, and how to aggregate these. For Nussbaum, all these

[309] Amartya Sen, 'Human Rights and Capabilities', *Journal of Human Development* 6, no. 2 (1 July 2005): 151–66, https://doi.org/10.1080/14649880500120491, p. 158.
[310] Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', *Feminist Economics* 9, no. 2–3 (1 January 2003): 33–59, https://doi.org/10.1080/1354570022000077926.
[311] Nussbaum, p. 40.

capabilities must be fulfilled. B might be considered vulnerable, therefore, if the state fails in meeting any one of these central human capabilities.

Nussbaum's approach is also attractive due to it being used as a starting point by Jonathan Wolff and Avner De-Shalit in their empirically informed project on understanding and remedying disadvantage. They tested her categories by conducting interviews with people in the UK and Israel who were "on both sides of welfare services," including social workers who take care of unemployed people and unemployed people themselves, doctors and patients, teachers and students, asylum centre workers and refugees.[312] Their aim was to evaluate how well Nussbaum's capabilities cohered with the interviewees' own perspectives, and explore whether those experiencing disadvantage endorsed philosophers' conceptions of disadvantage. First, the interviewees were asked what they considered to be the basic categories in terms of essential functionings, without receiving any prompts. Next, they were asked to comment on Nussbaum's categories, as well as further categories listed by Wolff and De-Shalit. Finally, they were asked whether they thought Nussbaum's approach missed out any important categories of functioning. Wolff and De-Shalit reported that on the whole, they received support for Nussbaum's categories, but also were led to add a further category (the functioning of being able to communicate, including being able to speak the local language) as a result of the interviews.[313]

The general endorsement of Nussbaum's categories by Wolff and De-Shalit's interviewees is heartening, and gives prima facie reason to accept her list as a working notion of vulnerability and disadvantage. This is because her approach seems to cohere with lived experiences of disadvantage, and what it means to be living a vulnerable existence. Achieving this coherence is beneficial from the perspective of reflective equilibrium, as the theory seems to be in alignment with facts about the world and

[312] Jonathan Wolff and Avner De-Shalit, *Disadvantage* (Oxford: Oxford University Press, 2013), p. 187.
[313] Wolff and De-Shalit, p. 44.

particular cases. Testing our theoretical judgements against realistic portrayals of poverty, therefore, serves to provide justification for a chosen approach. My purpose in this thesis has not been to outline and justify an entire theory of justice, but rather to seek overlapping consensus on the matter of exploitation. Having identified vulnerability as central to exploitation, I believe Sen and Nussbaum's approach to be sufficient in demonstrating one plausible way of cashing out when vulnerability exists, that is particularly relevant to the disadvantaged themselves, and to Indian surrogates.

Vulnerability, therefore, involves a capability failure: an inability to achieve functionings for well-being, as a result of poverty, violence, lack of education, or a combination of the above. For Sen, capabilities are an aspect of freedom, denoting power. Accordingly, the lack of capabilities is a state of unfreedom. The limited freedom state of reduced capabilities, also conceived as vulnerability, speaks to the reduced voluntariness that appears to be inherent to exploitation, as I argued in the previous chapter. There, I discussed the tension between proponents of structural accounts who hold that exploitative transactions are necessarily forced, and proponents of transactional accounts, who argue that they reflect consent and express a choice to act. There does seem to be something unfree about exploitation, as after all, it reflects the decision to enter into a transaction that is suboptimal, and is probably not something that would have been agreed to under different circumstances. Vulnerability, understood in terms of capabilities and a lack of positive freedom given various features of a background situation, appears to serve as a bridging point between structural and transactional exploitation. This is because vulnerability as capability allows us to use the language of reduced power, capability and unfreedom, rather than 'force,' to capture what structuralists assert about the arrangements which produce forced transactions. Rather than submitting that the proletariat are forced to transact with the capitalists, the proponent of the vulnerability view of exploitation may suggest that the proletariat are

made vulnerable in terms of reduced capabilities and reduced options to pursue wellbeing, transacting in a situation of unfreedom, which leads to their exploitation. This approach, therefore, allows for coherence with both competing conceptions of exploitation.

A further virtue of the capabilities approach to vulnerability, and the vulnerability approach to exploitation, is that it is able to capture the intuition that there *is* something problematic about B's pre-exploitation proposal situation. Often in exploitation discourse, the emphasis is placed on the conditions of the transaction or the outcome, whereby exploitation is seen as wrongful due to the inequitable division of a transactional surplus. However, this approach is lacking in that an often-levelled solution to exploitation, therefore, is that the exploited party should simply be paid more, or be paid so much that the transaction becomes appealing to even those who are well-off. In this way, it is suggested that we can remove the element of unfair price and unfair remuneration from the equation (and therefore mitigate exploitation). However, the fact of B's dire background situation remains. Such a solution has the unattractive consequence of making it impossible to then exploit those who are desperately poor, so long as they are paid a "fair price." In Chapter Five, I develop an argument according to which use of vulnerability constitutes exploitation's wrongfulness in two ways. Firstly, it invariably gives rise to an unjust benefit, and secondly it inflicts a status harm on the vulnerable, and is inimical to relational equality, and therefore gives reason for intervention.

Simply paying B more, therefore, does nothing to address and account for the intuition that it does not seem fair that people feel compelled to transact in dire circumstances, at all. By contrast, a vulnerability account, conceived in terms of the capabilities approach to justice, is able to locate this intuition in a theoretical framework that explains why it seems problematic for A to transact with B when B's pre-proposal

situation is as dire as it is. Indeed, meeting basic capabilities is a minimum requirement of justice, so when this is unmet, the vulnerability and capability approach helps to explain the unfairness that arises as a result of the initial pre-proposal situation, and carries on into the exploitation. As I will argue in Chapter Five, this framework for institutional justice is able to account for why mutually advantageous exploitation can still be wrongful, despite being a narrow Pareto improvement, and why, therefore, there are good reasons to limit such transactions.

3.6 Conclusion

In this chapter I began by reconciling two seemingly opposed theories of exploitation. Valdman has criticised vulnerability accounts of exploitation for being too broad and capturing innocuous cases, through a critique levelled at Goodin. I argue, however, that Goodin's account can accommodate the criticisms offered by Valdman, and that Valdman's own account can be interpreted to include a vulnerability condition. Vulnerability is therefore worth preserving in a theory of exploitation, and appears to be central to even competing accounts. I then explored what is commonly meant by vulnerability, developing an approach that takes into account vulnerability's sense as a scalar notion, in terms of denoting potential susceptibility to harm and disadvantage. Finally, I endorse the capabilities approach as a working definition of vulnerability, and highlight the merits of viewing vulnerability in this way for explaining the wrongfulness of exploitation. In the following chapter I set aside my definition of exploitation for a moment, retuning to it in Chapter Five, to provide an empirically grounded assessment of surrogacy in India. Drawing upon the facts of the case I argue that we are able to show Indian surrogacy arrangements to be typically *ex ante* harmful, and therefore as

satisfying Wertheimer's exploitation condition, thus giving reason for intervention, by his own lights.

Chapter Four

Surrogacy as Harmful Exploitation

4.1 Introduction

In Chapter Two I critically analysed various accounts of exploitation in the literature. In particular, I focused on Alan Wertheimer's seminal account of exploitation. To recall, Wertheimer argues that exploitation can either be (net) harmful to the exploited party *or* mutually advantageous. [314] For Wertheimer, this distinction between mutually advantageous and harmful exploitation gives rise to a verdict regarding whether a particular case of exploitation is permissible or not. A practice being a case of mutually advantageous exploitation is unlikely to establish that it should be prohibited.[315] Rather, the case for intervention is only raised by harmful exploitation, where the exploitee suffers a *net harm*.

In a 1992 paper focusing on commercial surrogacy and exploitation, Wertheimer argues that we do not presently know whether surrogacy is *typically* harmful, or typically mutually advantageous, and should therefore remain agnostic as to whether it is permissible, and thus whether legal intervention follows. Wertheimer suggests that surrogacy presents a particularly difficult context for making an "all things considered" judgement about expected value "because some of the crucial benefits and harms are

[314] Wertheimer, 'Two Questions about Surrogacy and Exploitation'.

[315] It may be pointed out here that legal permissibility differs from moral permissibility. Wertheimer does not appear to be entirely clear on which permissibility he is concerned with, perhaps using the two interchangeably. At times he discusses the prohibition of exploitative transactions, and whether a transaction should be "interfered" with, suggesting legal permissibility. Elsewhere, he states he is concerned with the "moral upshots" of exploitation, asking questions such as "can people have a right to exploit?" and "is it wrong to allow oneself to be exploited?" I interpret his claims as being about moral permissibility, while acknowledging that this may be closely tethered with, and have implications for, legal permissibility.

difficult to measure and vary substantially from person to person."[316] For Wertheimer, "the question is not whether surrogacy is harmful *ex post* in a particular case, but whether it is typically or *ex ante* harmful."[317]

In this chapter, I suggest that surrogacy in India is more likely to be typically *ex ante* net harmful to surrogates. This gives us strong reasons for paternalistic intervention, by Wertheimer's own lights. The chapter is structured as follows. To begin, I further outline Wertheimer's position on surrogacy and harmful exploitation. Next, I draw upon empirical evidence about the nature of surrogacy in India. Wertheimer suggests that lack of consent, although not necessary for intervention, when it occurs alongside exploitation, gives reasons to intervene. This is because "it may make the exploitation worse, in part because it makes it more likely that it will be a case of harmful rather than mutually advantageous exploitation."[318] I present evidence that suggests that Indian surrogates display a lack of informed consent at various stages of the process, and therefore that surrogacy in India merits intervention on Wertheimer's approach. Further, I argue that factors contributing to surrogacy's status as harmful exploitation include the nature of various medical practices used, which go against accepted protocol, as well as the use of surrogacy hostels. I suggest that these factors outweigh the benefit gained by surrogates, rendering current surrogacy arrangements in India typically harmful. This harm derives from widespread practices, and therefore appears to be a result of the very structure of the Indian surrogacy industry. In light of these practices, and in the absence of a restructuring of current surrogacy arrangements, surrogacy in India can be conceived as typically *ex ante* harmful, and Wertheimer would be forced to concede that it constitutes harmful exploitation.

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316 Wertheimer, *Exploitation*.
317 Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 215.
318 Wertheimer, p. 230.

4.2 Harmful and Mutually Advantageous Exploitation

Although there is enduring disagreement as to what exploitation consists in, Alan Wertheimer's account has received much attention in the literature, achieving something close to canonical status. Crucially, Wertheimer has also applied his account of exploitation to the case of commercial surrogacy. I will therefore be interrogating the arguments made there, and evaluating them in light of new empirical evidence provided by the Indian context.

In his paper, 'Two Questions About Surrogacy and Exploitation," Wertheimer lays the foundations for his 1997 book, *Exploitation*, asserting that exploitation can either be (net) harmful to the exploited party *or* mutually advantageous. He uses this distinction to deliver a verdict on the permissibility of an exploitative transaction. On this approach, mutually advantageous exploitative transactions require stronger reasons for interference than harmfully exploitative transactions, where the harm provides a prima facie case for interference. If surrogacy were a case of harmful exploitation, deciding whether "paternalistic restrictions would be justified" would be "relatively easy, particularly if we have reason to doubt the voluntariness of the surrogate's decision."[319] Wertheimer acknowledges that this has less to do with the exploitation itself, and is a response to the harm. Whereas, surrogacy being voluntary and mutually advantageous means that "there is a strong presumption that surrogacy contracts should be permitted and even enforceable, although that presumption may be overridden on other grounds."[320] Indeed Wertheimer conditionally concludes that surrogacy should not be intervened with.

Wertheimer defines exploitation the following way: "we typically say that A wrongfully exploits B when A takes unfair advantage of B."[321] For Wertheimer, "unfair

[319] Wertheimer.
[320] Wertheimer, p. 212.
[321] Wertheimer.

advantage" reflects two dimensions of an exploitative transaction: "the dimension of value and the dimension of choice."[322] With respect to the dimension of choice, Wertheimer states "we typically say that A exploits B only when B's choice is somehow compromised, even if, as I believe, exploitation does not require that B's choice be strictly involuntary. It appears that exploitation requires at least some defect in choice, because A does not exploit B when B makes an entirely voluntary and altruistic transfer of disproportionate value to A."[323]

With respect to the dimension of value, A must also benefit from the transaction for it to be exploitation. In addition, A exploits B only when the transaction is *harmful* or *unfair* to B. In cases of exploitation that are unfair, and not harmful (i.e. those that are mutually advantageous), the unfairness consists in the payment to B deviating from the hypothetical market price. To recall, this is the price that would be agreed to in a hypothetical competitive market – a price that an "informed and unpressured seller would receive from an informed and unpressured buyer."[324] Mutually advantageous exploitation, therefore, involves special advantage taking, and a subsequent deviation from the hypothetical market price.

In order to determine whether a transaction is a case of mutually advantageous or harmful exploitation, Wertheimer argues that we must look at its net effect on *B,* adopting an "all things considered" conception of harm. While there are harms, or drawbacks of *all* beneficial transactions, "we do not say that a worker is harmed by employment, although the worker may prefer leisure to work. We assume that the benefits received by employment are greater than the costs. So the question is not whether surrogacy has harmful elements, but whether it is a net harm, whether the costs

[322] Wertheimer, p. 213.
[323] Wertheimer.
[324] Wertheimer, *Exploitation*.

to the surrogate outweigh the benefits."[325] If, all things considered, the benefits of the transaction are greater than the costs, then the transaction is net beneficial to *B*.

However, establishing this is not easy. Wertheimer himself acknowledges this, stating, "surrogacy presents a particularly difficult context for making an "all things considered" judgment because some of the crucial benefits and harms are explicitly psychological and subjective."[326] He lists some potential harms: "physical harm or death resulting from the pregnancy or the delivery, restraints on the surrogate's choices during pregnancy, and the inconvenience and discomfort associated with a normal pregnancy. Perhaps most important, the surrender of the baby to the intended parents may be psychologically harmful to the surrogate."[327] These all seem like fairly serious harms. Indeed, some are plausibly quite common, almost unavoidable, in part due to the way in which they are inherent to the labour, such as restrictions on surrogates' choices, and the inconvenience and discomfort associated with pregnancy. However, Wertheimer offers no principled guidance on which harms could be overlooked, and subsumed under potential benefits. Without further guidance on how to compare and quantify the various harms that can be associated with such transactions, and how to value them against the potential benefits, it is difficult to ascertain whether surrogacy is net harmful or beneficial.

Acknowledging the apparent difficulty in applying his distinction in the case of surrogacy, Wertheimer writes: "given our limited factual knowledge and unresolved theoretical controversies over what counts as "objective" harm, I am inclined to think that we should now remain agnostic. For, depending on the answers to these questions, surrogacy could turn out to be a case of harmful exploitation, mutually advantageous

[325] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 215.
[326] Wertheimer.
[327] Wertheimer, p. 216.

exploitation, or neither."[328] Indeed, the difficulty in determining what counts as "objective" harm provides a more penetrating problem for the application of his harmful/mutually advantageous distinction generally, not just in the case of surrogacy.

Despite acknowledging how difficult it would be to determine, Wertheimer brings this distinction to bear on the case of surrogacy, for the sake of argument. He begins by dismissing a few ways in which surrogacy might be considered harmful as opposed to mutually advantageous (i.e. the payment is low, and it presents a moral harm through commodification). Next, he assumes surrogacy is mutually advantageous in order to consider what would follow from this. The thrust of the paper, therefore, treats surrogacy as mutually advantageous, concluding, "it does not follow that such exploitation is a reason for prohibiting surrogacy or refusing to enforce surrogacy agreements."[329] While the conclusion Wertheimer offers (that paternalistic interventions are not justified) is conditional upon surrogacy actually turning out to be mutually advantageous, taken together with his subsequent book, which also takes a generally permissive line towards exploitation, the overall impression created is that there is little reason to intervene in (mutually advantageous) exploitative transactions. Wertheimer hastens to admit, however, that "whether surrogacy is a case of harmful exploitation, and thus presumptively prohibitable, depends upon facts and arguments that have not been resolved."[330]

Wertheimer's acknowledgement that it is difficult to determine whether surrogacy is net harmful or beneficial raises certain questions about the usefulness of the distinction in the context of surrogacy. If it is too difficult to determine what type of exploitation is occurring, what function is the distinction serving? It might be levelled that the distinction still tells us what determines moral permissibility, regardless of

[328] Wertheimer.
[329] Wertheimer, p. 222.
[330] Wertheimer, p. 239.

whether we can turn out to know this. It seems, however, that its utility can be questioned if it is not practically operationalisable. It does not seem that surrogacy is atypical in this regard either; many paradigmatic cases of exploitation, such as sweatshop labour, organ selling, and hazardous mining, seemingly involve both physical and psychological harms and benefits that are similarly difficult to quantify, value, and hierarchise. I dissect the usefulness of this distinction further in Chapter Five, arguing that even in mutually advantageous exploitation, the benefits gained are suboptimal, as there is normally an alternative non-exploitative arrangement that would produce better overall consequences. Rather, exploitation's wrongfulness and permissibility is better determined by factors relating to social justice, independent of whether it is harmful or beneficial to the immediate parties involved. However, in this chapter I take up the task of arguing that facts provided by the empirical context in India help to flesh out the application of Wertheimer's distinction, in a way that presents surrogacy as a case of harmful exploitation, and "thus presumptively prohibitable," by his own lights. I will now turn to reappraise his conditional verdict on commercial surrogacy, in light of new facts presented by the Indian case.

4.3 Harmful Exploitation in the Indian Context

In the first chapter I provided an empirical overview of the Indian surrogacy industry. I will now draw upon what was shown there, in order to argue that commercial surrogacy in India presents a case of harmful exploitation. While other philosophical analyses have paid attention to some of the facts of the Indian case, none have gone into this level of detail. I argue that Wertheimer's conditions for paternalistic intervention can be satisfied

by the lack of informed consent given by surrogates, the harm caused through the particular medical practices used, and the use of surrogacy hostels.

4.3.1 Informed consent

Although a lack of consent is not necessary for harmful or mutually advantageous exploitation on Wertheimer's account, he suggests it may still be relevant because "it may make the exploitation worse, in part because it makes it more likely that it will be a case of harmful rather than mutually advantageous exploitation."[331] He fleshes this out further in his later work on exploitation, arguing, "to the extent that B's choice is not consensual, B's responsibility to fulfill the terms of the transaction is mitigated…to the extent that B's choice is not voluntary, we have less reason to assume that the transaction is advantageous to B."[332]

Lack of consent, therefore, is relevant to the assessment of exploitation's moral force in two ways. Firstly, it provides support for considering a transaction to be net harmful, rather than mutually advantageous. Secondly, it allows for the possibility of intervention, as B no longer has responsibility to fulfill the transaction. I will therefore turn to examining the ways in which surrogacy in India demonstrates a lack of informed consent, at various stages of the process. This gives support to the claim that surrogacy is net harmful, as well as giving reason for intervention on Wertheimer's analysis, due to B no longer being responsible for fulfilling the terms of the transaction.

How, then, is informed consent lacking? As noted in the first chapter, Amrita Pande found that in Hope Maternity Clinic, Anand, the surrogacy contract is in English, a language almost none of the surrogates can understand.[333] Some essential points of the contract are translated for them, and one surrogate states that, "the only thing they told

[331] Wertheimer, p. 230.
[332] Wertheimer, *Exploitation*, p. 253.
[333] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 976.

me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection," whilst another adds, "we were told that if anything happens to the child, it's not our responsibility but if anything happens to me, we can't hold anyone responsible."[334] Another surrogate, interviewed in Anand, Gujurat, says: "We are not really told much about the medicines and injections... We [her husband and she] are not as educated as you are, you know. I won't really understand much else! And I trust Doctor Madam, so I don't ask."[335] Similarly, a study that observed 18 Indian fertility clinics, interviewing doctors, surrogacy brokers, and 14 surrogates, found that not a single surrogate mother "was able to explain how many embryos had been transferred, or the possible complications in multiple pregnancies and fetal reduction."[336] Further excerpts from interviews, detailing the manner in which surrogacy has been described can be found in Chapter One.

Evidence suggests that the surrogacy procedure has been oversimplified, to surrogates who are uneducated and do not seem to understand what the medical procedures entail. There is no mention of the various risks associated with pregnancy and surrogacy, and one surrogate's comments indicate that the contract involves the surrogate waiving the clinic's responsibility for her well-being, if something were to go wrong. It is hard to see how this could be validly consented to, if the risks associated with the procedures are not appropriately understood. The lack of adequate information, therefore, raises the question as to whether surrogates are able to give informed consent when they have such limited knowledge of what they are contracting into.

Informed consent is central to discussions on ethically acceptable medical practice. It is seen as necessary ethical justification for medical treatment, research on

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334 Pande, p. 977.
335 Amrita Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India', *Indian Journal of Gender Studies* 16, no. 2 (1 June 2009): 141–73, https://doi.org/10.1177/097152150901600201, p. 148.
336 Malene Tanderup et al., 'Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy: A Mixed Methods Study in New Delhi, India', *Acta Obstetricia et Gynecologica Scandinavica* 94, no. 5 (May 2015): 465–72, https://doi.org/10.1111/aogs.12576, p. 468.

human subjects, and uses of human tissues.[337] While some associate it with respecting a patient's autonomy, Onora O'Neill points out that its importance is more elementary: it provides reasonable assurance that a patient has not been deceived or coerced.[338] O'Neill acknowledges that "genuine consent is not a matter of overwhelming patients with information, arrays of boxes to tick or propositions for signature."[339] Rather, it is apparent where "patients can *control* the amount of information they receive, and what they allow to be done."[340]

So while surrogates have not been presented with sufficient information, this need not be indicative of a lack of consent, as full information is not always necessary for consent. Instead, could the above narrative describe a situation in which surrogates have been able to control the amount of information they receive, and what they allow to be done? It appears not. There is a general level of deference to the medical profession that is particularly heightened in the context of Indian surrogacy, where the women in question lack education and basic reproductive knowledge.

To recall, this is also the population that has historically been subject to forced sterilisation. As I outlined in Chapter One, Sharmila Rudrappa notes that India's history of fertility control and fertility assistance are connected. Most of the surrogates Rudrappa interviewed had themselves been sterilised. Similarly, Pande observed that of the surrogates she interviewed, 13 of the 20 that practiced some form of contraception were in fact sterilised.[341] Sterilisation is the preferred approach of the government, as the requirements of the pill regimen were seen to be "beyond the powers of mind and discipline of illiterate Indian housewives."[342] There is a clear delineation between the

[337] O. O'Neill, 'Some Limits of Informed Consent', *Journal of Medical Ethics* 29, no. 1 (1 February 2003): 4–7, https://doi.org/10.1136/jme.29.1.4.
[338] O'Neill.
[339] O'Neill.
[340] O'Neill.
[341] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 112.
[342] Narayana and Kantner, *Doing the Needful: The Dilemma of India's Population Policy*, p. 111.

authoritative medical profession, and the surrogates, therefore. The reason surrogates have been given access to less information is not that they have wilfully chosen to do so, but rather that it is deemed that they would not have understood the more technical aspects. Indeed, when questioned whether surrogates are informed about how many embryos will be transferred, one doctor replies, "no, we never ask them and they are not even informed how many are going to be transferred. They are illiterate, uneducated girls...We do tell them that they are going to get embryos transferred into their womb and they are very happy when they are having twins because they are going to get more money."[343]

These interviews suggest that surrogates were not asked how much information they would like to receive, but rather, the decision was taken for them by the doctor in question. The lack of informed consent, therefore, is a troubling aspect of surrogacy in India, and follows a long history of the state imposing population control policies on uneducated rural Indian women, without adequately informing them of the risks involved. Following O'Neill's account, wherein consent mitigates against deceit or coercion, and their associated harms, it appears that the lack thereof allows for the incidence of those harms. On Wertheimer's analysis, although lack of consent does not *necessitate* that the transaction constitutes harmful exploitation, it provides support for thinking that it does, and secondly, it mitigates B's responsibility to live up to the bargain, thus giving reason for intervention.

4.3.2 Medical practices

To recall, Wertheimer notes that there are certain physical harms associated with surrogacy: "the risk of physical harm or death resulting from the pregnancy or the

[343] Tanderup et al., 'Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy', p. 469.

delivery, restraints on the surrogate's choices during pregnancy, and the inconvenience and discomfort associated with a normal pregnancy."[344] Restraints on choices and discomfort both appear to be inherent to the pregnancy, and are plausibly experienced by most surrogates. These are the kind of harms that must be counterbalanced with the expected gains, in order to determine the nature of the exploitation. The Indian context features additional risks and harms, however. As the focus is on delivering the best service to customers, surrogates themselves appear to be deprioritised. This can be seen in the use of controversial medical practices such as implanting multiple embryos at once, and routinely using cesarean sections for delivery, as I introduced in the first chapter. I suggest, therefore, that the widespread use of contentious medical practices presents serious tangible harms.

The nature of in vitro fertilization (IVF) is such that physicians often transfer multiple embryos in order to maximize birth rates, which in turn increases the multiple-birth risk.[345] The increase in incidence of multiple births around the world is directly due to the increased use of assisted reproductive techniques.[346] In the UK, NICE guidelines were specifically designed to reduce the risk of IVF-induced multiple births, reflecting the fact that multiple pregnancies carry higher health risks than single pregnancies. The NICE guidelines therefore recommend single embryo transfer, and state that doctors should only consider using two embryos if no top-quality embryos are available.[347] Similarly, American Society for Reproductive Medicine guidelines state that doctors should implant just one, and certainly no more than two, embryos at a time.[348] In India, the Assisted Reproductive Technologies Rules (2010) acknowledge that specific efforts

[344] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 216.
[345] Laura A. Schieve et al., 'Live-Birth Rates and Multiple-Birth Risk Using In Vitro Fertilization', *JAMA* 282, no. 19 (17 November 1999): 1832–38, https://doi.org/10.1001/jama.282.19.1832.
[346] 'Multiple Pregnancy: Antenatal Care for Twin and Triplet Pregnancies | Guidance and Guidelines | NICE', accessed 28 October 2017, https://www.nice.org.uk/guidance/cg129/chapter/introduction.
[347] 'Multiple Pregnancy'.
[348] 'Criteria for Number of Embryos to Transfer: A Committee Opinion', *Fertility and Sterility* 99, no. 1 (January 2013): 44–46, https://doi.org/10.1016/j.fertnstert.2012.09.038.

must be made to reduce the incidence of multiple pregnancies but permit the transfer of 3 embryos at a time.[349] The investigative journalist, Scott Carney, found that the Akanksha Infertility Clinic in Anand, Gujarat, routinely implants as many as five embryos at a time in a surrogate's uterus,[350] vastly exceeding both the Indian guidelines and the general consensus in other countries on what is safe.

This constitutes an objective harm, in several ways. Firstly, as aforementioned, the guidelines are in place because implanting multiple embryos increases the risk of multiple pregnancy, and Carney found this to be the case with several of those he interviewed, indicating that multiple pregnancy is occurring as a result of this practice.[351] Multiple pregnancies carry a host of particular health risks. The greatest risk is that the babies will be delivered prematurely, which in turn generates further risks to both mother and the offspring. Risks to the mother from multiple pregnancies include pregnancy-induced hypertension, toxaemia, gestational diabetes, vaginal-uterine haemorrhage, miscarriage, anaemia, operative delivery and postnatal illness. In general, maternal mortality is also 2.5 times higher than that associated with singleton births.[352] There have been cases of surrogates dying as a result of their pregnancy. These include a woman in Ahmedabad, Gujurat, who died after developing complications at a routine check-up in 2012,[353] and a surrogate who died after giving birth to twins, one of which also died.[354] While there is insufficient data on the prevalence of these risks in Indian surrogate pregnancies, outlining such risks, as well as the clear link between the risks generated and

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[349] Tariq Ahmad, 'India: Draft Legislation Regulating Assisted Reproductive Technology Published | Global Legal Monitor', web page, 2 November 2015, //www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/.
[350] Carney, *The Red Market*, p. 148.
[351] Carney.
[352] 'Complications of Multiple Pregnancy - Health Encyclopedia - University of Rochester Medical Center', accessed 28 October 2017, https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=85&ContentID=P08021.
[353] 'His Surrogate Mother Dead, Baby Boy "All Right" - Indian Express', accessed 28 October 2017, http://archive.indianexpress.com/news/his-surrogate-mother-dead-baby-boy-all-right/950923/.
[354] 'Surrogate Mother Died after Birth', accessed 28 October 2017, http://www.newsinenglish.no/2013/04/02/surrogate-mother-died-after-birth/.

the practices used, serves to represent the considerable dangers peculiar to this kind of labour, which should be factored in to an analysis of harm.

As a way of mitigating the risk of multiple pregnancies in cases where multiple embryos take, some are selectively aborted in the first trimester of gestation, by a practice called multifetal reduction. This involves the insertion of a needle, guided by ultrasound, abdominally or vaginally, to inject potassium chloride into the foetus, stopping its heart.[355] Reduction of twins to a single pregnancy is generally not performed, however, so surrogates pregnant with twins would still face the aforementioned risks associated with multiple pregnancies. Carney found that in cases where three or more embryos take, the Akanksha clinic selectively aborts specific embryos to bring down the total to more manageable levels, often without explaining to surrogates what is happening.[356] This reinforces the earlier point about the lack of informed consent along various stages of the process.

Following O'Neill, consent is not transitive: "I may consent to A, and A may entail B, but if I am blind to the entailment I need not consent to B."[357] So while surrogates may have ostensibly consented to surrogacy (though this too has been called into question if they have not understood what they are consenting to), this does not entail that they have consented to subsequent practices that appear to be entailed by surrogacy in the Indian context. While successful surrogacy does not require doctors to implant such a high number of embryos, evidence suggests that this occurs on a routine basis in India. This is plausibly due to the particularly competitive and cost-driven commercial nature of the industry, with one doctor explaining, "when you have

[355] 'Multifetal Pregnancy Reduction-Topic Overview', WebMD, accessed 28 October 2017, https://www.webmd.com/infertility-and-reproduction/tc/multifetal-pregnancy-reduction-topic-overview.
[356] Carney, *The Red Market*, p. 148.
[357] O'Neill, 'Some Limits of Informed Consent'.

international commissioning parents you have to give them the best service; otherwise they will go another place and have it."[358]

The prevalence of this practice was also highlighted by a documentary following an Irish couple and their use of an Indian surrogate. The surrogate was implanted with three embryos and forced to undergo foetal reduction to terminate one after they all took, as the clinic does not allow surrogates to carry triplets.[359] Foetal reduction also carries with it particular risks and harms to the pregnant woman. There is approximately an 8% risk of miscarrying the entire pregnancy following this procedure, which would plausibly, in turn, have psychological repercussions.[360] Further, a study found that one year after multifetal reduction, one third of the women who underwent the procedure still had depressive symptoms related to the process.[361] The study focused on couples that managed to conceive using IVF after a long duration of infertility, and their subsequent guilt in using reduction was said to be related to this prior struggle to conceive. That said, the results could still plausibly be extrapolated to the psychological distress that surrogates may feel, albeit for reasons unique to surrogacy. Ultimately, it is an invasive medical procedure involving the termination of an embryo, to which a surrogate may have formed an attachment. Regardless of the psychological harms, the non-consensual imposition of the practice itself constitutes a harm, as I will show.

A further harmful practice that is reportedly routinely used in the Indian surrogacy context is a caesarean section. Caesarian sections are customarily used for ease of delivery and for exerting control over its timing, despite carrying unique medical risks. Carney found that in a surrogacy hostel he visited in Anand, no surrogate he interviewed

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358 Tanderup et al., 'Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy', p. 470.

359 'Couple Who Had Twins Tell of Regret after Embryo Aborted in Surrogacy', Independent.ie, accessed 28 October 2017, https://www.independent.ie/irish-news/couple-who-had-twins-tell-of-regret-after-embryo-aborted-in-surrogacy-29910046.html.

360 Mary V. Rorty and JoAnn V. Pinkerton, 'Elective Fetal Reduction: The Ultimate Elective Surgery', *J. Contemp. Health L. & Pol'y* 13 (1996): 53.

361 M. Garel et al., 'Psychological Reactions after Multifetal Pregnancy Reduction: A 2-Year Follow-up Study.', *Human Reproduction (Oxford, England)* 12, no. 3 (1997): 617–622.

expected a vaginal birth.[362] Further, an investigative report by the San Francisco Chronicle, which also followed the Akanksha Infertility Clinic in Anand, found that three quarters of the 649 babies born there were delivered by caesarean.[363]

Pande found that although most women had their previous deliveries at home naturally, with minimal medical intervention, as surrogates they inevitably underwent a caesarean section: only two surrogates out of the 42 in her study had vaginal deliveries.[364] Similarly, the ethnographer Sharmila Rudrappa found that almost all surrogates in her study "had delivered, or were scheduled to deliver babies, through caesarean surgeries between the thirty-sixth and thirty-eighth weeks of their pregnancies,"[365] despite almost all of them having delivered vaginally for their own births. She observes that this was for doctors to have "complete control over the birthing process and to time the arrival of the babies in accordance to intended parents' schedules."[366] Rudrappa found that the scheduling of C-sections allowed for the surrogacy agency to "calculate how many beds it had available in its dormitory, how many more new clients it could take on, and how many new mothers could be housed for new babies to be borne all over again."[367] Pande notes another potential reason for the routine use of C-sections, hinted to her by nurses was that the surrogate is less likely to become attached to the baby if the delivery is surgical.[368]

There are clear harms presented by using C-sections when not medically necessary, and even when they are. Pande's research uncovered various instances of such harms. Sharda, a surrogate Pande encountered who had just delivered a baby for a domestic couple, had been bleeding excessively since the C-section:

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[362] Carney, *The Red Market*, p. 140.
[363] 'India Surrogacy : Chapter Three - San Francisco Chronicle', accessed 28 October 2017, http://www.sfchronicle.com/local/bayarea/item/India-surrogacy-3-24058.php.
[364] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 117.
[365] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, p. 115.
[366] Rudrappa, p. 168.
[367] Rudrappa.
[368] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 117.

> "They made me have a scissor. I told them my first two children were normal, why do I need an operation now? I have lost so much blood. Ask my husband, he will tell you. I have become half my size."[369]

The extent of Sharda's post-Caesarean weight and appetite loss meant that she could not produce enough breast milk for the baby. Rudrappa encountered one surrogate, Payal, "who said that the spot on her spinal cord where she received her epidural in order to prepare her for caesarean surgery still hurt." She had not seen a doctor to address this pain, however, as like most surrogates interviewed by Rudrappa, "she did not receive postnatal care, or postsurgical attention."[370] For the surrogates who do not deliver via C-section, vaginal delivery also carries particular risks and harms, including vaginal tearing and major pelvic floor injuries that could cause incontinence, as well as postpartum hemorrhaging, which is heightened in multiple pregnancies.[371]

There are, therefore, clear objective harms exhibited in the Indian surrogacy industry, which are down to the nature of the medical practices used, and lack of post-pregnancy care, as well as the risks of pregnancy and vaginal delivery generally. There is currently no long term evidence on the extensive use of C-sections in Indian surrogacy, but it seems plausible to opine that there are lasting effects, with Rudrappa questioning: "are medical personnel so skilled at cutting up humans that there are no errors, and somehow each and every body miraculously heals itself by magically closing up the lacerations and wounds?"[372] The risk of improper recovery is compounded by the lack of postnatal and postsurgical care in the Indian context. Even in the absence of actual harm occurring, surrogates are put at undue risk of harm, due to the routine, rather than medically required, use of such procedures. It should also be noted that anti-biotic

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[369] Pande, Amrita, p. 119.
[370] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*., p. 116.
[371] Ylenia Fonti et al., 'Post Partum Pelvic Floor Changes', *Journal of Prenatal Medicine* 3, no. 4 (2009): 57–59.
[372] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*, p. 169.

resistance is a major public health threat in India, due to factors such as "a high burden of infectious diseases, unregulated sale of antibiotics, financial incentives for healthcare providers to prescribe antibiotics, patient expectations, rising incomes, and limited public health response."[373] Thus it seems plausible to opine that long-term health and post-pregnancy recovery may be affected, and this health care context presents a further risk of harm.

Dr Patel, the main physician at the centre that was the focus of Pande's research, insists that she does each C-section with the infant's safety the foremost concern, and never for the sake of convenience. Her clinic's high rate, she says, is due to factors such as complications caused by IVF, including higher numbers of twins and triplets, and the fact that many of her surrogates have multiple pregnancies, and usually can't have a regular delivery if their first was by C-section.[374] These reasons are still a result of the various malpractices found in the Indian surrogacy context, however, such as multiple embryo implantation, and do not do the work to show that the use of C-sections is not ultimately rooted in the benefit gained by the clinic and contracting parents. While C-sections are not always more harmful than the alternative, it appears that there are more babies being delivered by this method than could be justified on the basis of maternal (or child) best interests.

In what sense do elective caesareans constitute a harm? The World Health Organisation recently ruled that, in general cases of pregnancy, they should only be used when medically necessary due to the significant complications they can cause.[375] Guidelines from the American College of Obstetricians and Gynecologists (ACOG) also emphasise this concern, advising that vaginal deliveries should be the norm and early

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[373] Manish Kakkar et al., 'Antibiotic Resistance and Its Containment in India', *BMJ* 358 (5 September 2017): j2687, https://doi.org/10.1136/bmj.j2687.
[374] Rudrappa, *Discounted Life: The Price of Global Surrogacy in India.*
[375] 'WHO | Caesarean Sections Should Only Be Performed When Medically Necessary', WHO, accessed 28 October 2017, http://www.who.int/mediacentre/news/releases/2015/caesarean-sections/en/.

cesarean deliveries should be avoided.[376] Complications stemming from caesareans include infection of the wound, infection of the womb lining, known as endometritis, which can cause fever, womb pain, and abnormal vaginal discharge or heavy bleeding, blood clot (thrombosis) in legs, excess bleeding, and damage to the bladder or ureter.[377] Research also suggests that cesarean delivery is associated with an increased risk of postpartum maternal death.[378] It is also suggested that women in developing countries are more likely than those in developed nations to have compromised immune systems due to under-nutrition, and that this compounds the risk of the procedure.[379] Further, the lack of long-term follow up health care for Indian women, particularly the rural impoverished women who typically comprise the surrogate population, exposes them to a heightened risk. It was reported by the San Francisco Chronicle that several women who had babies delivered by C-section at Akanksha clinic said it had caused lingering pain that kept them from resuming other work they'd done, such as housekeeping. The report also suggests that other risks could arise if a surrogate becomes pregnant with her own child later, and the type of medical care that she had received at the clinic was not available.[380]

It may be objected that I have outlined only *potential* risks, to particular surrogates, and therefore only the *potential* for harm. In cases where the risks I have outlined do not transpire, there has been no harm. And certainly not every case of surrogacy will fall prey to these risks. The evidence as it stands, therefore, is insufficient to show that surrogacy is *ex ante* harmful. After all, not all multiple pregnancies will result

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376 'Cesarean Delivery on Maternal Request - ACOG', accessed 28 October 2017, https://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Obstetric_Practice/Cesarean_Delivery_on_Maternal_Request.

377 N. H. S. Choices, 'Caesarean Section - Risks - NHS Choices', 19 July 2016, http://www.nhs.uk/Conditions/Caesarean-section/Pages/Risks.aspx.

378 Catherine Deneux-Tharaux et al., 'Postpartum Maternal Mortality and Cesarean Delivery', *Obstetrics & Gynecology* 108, no. 3 (September 2006): 541, https://doi.org/10.1097/01.AOG.0000233154.62729.24.

379 Adamson S. Muula, 'Ethical and Practical Consideration of Women Choosing Cesarean Section Deliveries without "Medical Indication" in Developing Countries', *Croatian Medical Journal* 48, no. 1 (February 2007): 94–102.

380 'India Surrogacy : Chapter Three - San Francisco Chronicle'.

in health difficulties, multifetal reduction can be successful without causing harm, and cesareans can be performed without complication. Further, there is insufficient data here showing the *prevalence* of these risks. It is no good listing the possible risks of C-sections and multiple pregnancies: if these risks rarely transpire, how can they count as instances of harm?

In response, I acknowledge that although the ethnographic literature does show the common use of these medical practices, there is presently insufficient evidence on the overall *ex post* harm caused by them, in terms of the *prevalence* of these adverse effects. It is a difficult and sensitive area of research, and it is unlikely that more robust evidence will become widely available soon. After all, clinics have an interest in preserving their privacy, and so it is difficult for researchers to gain access to the relevant data. Rather, I suggest that there *is* sufficient evidence to infer that these risky medical practices are fairly commonly undertaken, due to the nature and demands of IVF and surrogacy in India, which lead to the commercial transaction being prioritised, to the detriment of the interests of the surrogate. The use of such medical practices, I argue, constitutes an *expected harm*, even when the associated risks don't transpire into harm, and this is what is relevant to determining the presence of harmful exploitation. This expected harm occurs through the way in which multiple embryo implantation and non-medically necessary caesareans are clear instances of *malpractice.* In order to claim, as I have, that surrogacy in India is *ex ante* harmful on a harm-based analysis, all that needs to be shown is that the *expected* harm outweighs the *expected* benefit. And this is the case where certain malpractices are used; their use is enough to demonstrate this expected harm, as these practices are not normally permitted for the very reason that the expected harm outweighs the expected benefit.

So, even if a caesarean were performed without any complications, and a multiple pregnancy did not cause physical harm in every instance, a medical practitioner

consciously putting an individual at deliberate risk of harm, by using such practices, constitutes a sufficiently troubling harm. It harms that individual in relation to the appropriate regard and consideration that they are entitled to, and constitutes a dereliction in a duty of care.

A further point to note is that these practices would not be used in the contracting parents' home countries. It is reported that Britons are the largest consumers of the Indian commercial surrogacy industry,[381] and it would simply not be the case that these practices would occur here. There would be uproar if it were discovered that UK surrogates were being implanted with five embryos at a time. In regards to the medical evidence relating to risk, there appears to be no plausible reason as to why such a discrepancy between the practices used in India, and those that can be expected in the parents' home country, should exist, and could be justified. The disparity between countries' practices demonstrates a lack of equal regard for patient safety, and displays an inequality in the treatment of Indian surrogates.

4.3.3 Surrogacy hostels

In the first chapter giving an empirical overview of the situation in India, I presented evidence on the use surrogacy hostels run by clinics, where the surrogates stay during the nine months of pregnancy. In the Anand clinic that was the focus of her research, Pande found that surrogates live in groups of eight to a room and "the rooms are lined with single iron beds with barely enough space to walk in between."[382] In some clinics, surrogates were not allowed to climb stairs to ensure the safety of the foetus, and had to wait for nurses to operate the elevator, so they had "nothing to do the whole day except

[381] 'Revealed: How More and More Britons Are Paying Indian Women to Become Surrogate Mothers - Telegraph', accessed 28 October 2017, http://www.telegraph.co.uk/news/health/news/9292343/Revealed-how-more-and-more-Britons-are-paying-Indian-women-to-become-surrogate-mothers.html.

[382] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 981.

pace back and forth on the same floor."[383] The surrogates follow a strict diet, alongside vitamins and various medicines. One surrogate remarks, "everything works like clockwork. We wake up at 8 a.m., have tea, take our medicines and injections, and go back to sleep until noon."[384]

While Indian surrogacy guidelines neglect to say anything on this issue, it is possible that holding surrogates like that constitutes wrongful confinement under Section 342 of the Indian Penal Code.[385] Crucially, proof of actual physical obstruction is not necessary, and it is sufficient for the victim to hold the belief that they are not free to depart, and would be restrained if they attempted to do so. Further, to recall, Wertheimer identified "restraints on the surrogate's choices during pregnancy,"[386] as a potential harm of surrogacy. It is unlikely that he had in mind the kind of regulation enforced by surrogacy hostels, but rather was referring to controls that women generally self-impose during pregnancy, such as not smoking or drinking, avoiding caffeine and certain foods, and eating healthily. The encouragement of surrogates to stay in hostels, which enforce strictly regimented meals and ban the climbing of stairs, however, demonstrates a greater degree of restraint on the surrogate's choices, and so more clearly points to *ex ante* harm.

However, it may be argued that many surrogates freely agree to live in such hostels, thus mitigating any harm. Indeed, many surrogates are particularly willing to stay in hostels in order to hide their pregnancy from the outside world, as surrogacy, due to its association with sex work, is particularly stigmatised in India. However, it remains that the women only feel the need to hide their pregnancy because they are acting as surrogates. Even if they were better off in the hostels than in the outside world, these constraints are still a cost arising from surrogacy. Further, it should be questioned as to whether the costs of being restricted in a hostel and the benefits of hiding a pregnancy should be traded off

383 Pande.
384 Pande, p. 983.
385 Krishna Deo Gaur, *Textbook on the Indian Penal Code* (Universal Law Publishing, 2009), p. 596.
386 Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 216.

against each other if the result involves such a drastic restriction of liberty. Indeed, agreeing to be consensually restrained in a hostel might serve to undermine some other value, such as autonomy, which was supposed to underpin such a decision.

4.4 Assessing the Net Harm

At this point it might be objected that I have not said enough about the countervailing benefits to these harms. The main such benefit is payment. While not equal to the pay of US surrogates, the payment surrogates receive is significantly higher than what they might earn working elsewhere. Pande found that for most of the surrogates that she interviewed, the money earned through surrogacy was "equivalent to almost five years of total family income."[387] Ultimately, therefore, to deem this a case of harmful exploitation, I need to show that the expected harms outweigh the expected benefit payment brings.

To this, I have two responses. Firstly, Wertheimer appears to suggest himself that payment does not mitigate the harms where they exist: "suppose that most surrogates are worse off for the experience, all things considered. Could surrogacy be advantageous to the surrogate if the monetary compensation were high enough?"[388] He continues that it is possible that "an increase in compensation would convert a net harm into a net benefit for some women."[389] However, generally speaking, if there are considerable physical and psychological harms involved, payment does not serve to counteract this: "it is rarely argued that surrogacy would be less exploitative if the surrogate were paid more. In fact, unpaid surrogacy is typically regarded as less exploitative than paid surrogacy. Among the critiques of surrogacy, higher pay is the dog that doesn't bark."[390] Wertheimer seems to

[387] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 974.
[388] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 217.
[389] Wertheimer.
[390] Wertheimer.

suggest that pay does not mitigate these harms where they exist, partly because "the very receipt of monetary compensation may actually cause some of the psychological harm experienced by some surrogate mothers, who may feel they are doing something "sleazy."[391] The point seems to be that it is problematic enough for considerable harms to exist, like the ones I have outlined, for the exploitation to be considered net harmful, and increased payment does not detract from their existence.

Secondly, if a cost-benefit analysis were conducted, the case could be made that the financial benefit appears to be offset by health and future financial costs, through ill health as a result of surrogacy. The point might also be made that much of the harm is the result of practitioners going against accepted medical protocol, and that this is a type of harm that should not be traded off for financial gain. It is not merely that a surrogate is making the trade off between unavoidable costs of pregnancy, and potential benefit. Rather, surrogacy in India involves the deliberate imposition of avoidable and particular harms, and the risks these pose to health are so significant they cannot be overridden by payment, and further, neither should they be financially incentivised. Financial rewards, therefore, do not override the sense in which the exploitation remains harmful. Here, an analogy can be made with the existence of labour laws on maximum working hours and workplace safety in developed countries. It is not accepted for workers to choose to undertake excessive working hours that would significantly impact upon their health, and which laws exist to regulate against, even if workers deemed this net beneficial. Similarly, it does not seem justifiable for employers to flout health and safety regulations in exchange for paying their employees more to be put at this risk of harm.

[391] Wertheimer.

4.5 Conclusion

In this chapter I have argued that the lack of informed consent and harmful nature of surrogacy in India provide reason for intervention, on Wertheimer's analysis. Lack of consent plays an evidentiary role in suggesting the transaction is likely to be net harmful, and mitigates B's responsibility to follow through with the transaction. Further, the routine imposition of risky medical practices, and the widespread use of surrogacy hostels, render surrogacy a case of *ex ante* harmful exploitation in the sense that it imposes net expected harm. On Wertheimer's analysis, this would give us prima facie reason for intervention. The case for intervention, on this account, would be related to the harm, rather than to the exploitation itself. Therefore, the prima facie reason for prohibition would be removed if exploitation could be rendered non-harmful. What, then, if the controversial medical practices were removed? Greater regulation could do just that. If surrogates were implanted with just one embryo at a time, or two in special circumstances, and were given a choice regarding how they wanted to deliver the baby, what would follow? This may be an unrealistic scenario, given the demands and nature of IVF, and perhaps not worth considering for the reason that these procedures may be inherent to surrogacy if it is to be carried out viably on a commercial basis. Yet, for the sake of argument and philosophical interest, it is worth considering what would follow if surrogacy were considered "mutually advantageous," as opposed to harmful. In the following chapter I suggest that what would follow is still a case for intervention, due to the wrongful nature of mutually advantageous exploitation.

Chapter Five

Surrogacy as Wrongful Exploitation

5.1 Introduction

In the previous chapter I argued that surrogacy in India is likely to impose a net expected harm on surrogates, and thus to qualify as harmful exploitation, on the distinction put forward by Alan Wertheimer. Surrogacy in India being a case of harmful exploitation gives strong reasons for paternalistic intervention, by Wertheimer's own lights. I cited various features of the Indian situation that contribute to surrogacy's status as net harmful, including the lack of informed consent at various stages of the process, the nature of various medical practices used, which go against accepted protocol, and the use of surrogacy hostels. In this chapter I imagine what might remain problematic about the situation if the harms were removed by better regulation, say, and surrogacy were rendered a case of mutually advantageous exploitation.

To recall, Wertheimer argues that although mutually advantageous exploitation might remain unfair to B in some way, in the absence of harm it is harder to justify intervening in such transactions. In this chapter, I put forward a case for intervening in mutually advantageous exploitation. While my argument is formulated specifically with reference to surrogacy, its foundational elements can be generalised to justify intervening in other cases of mutually advantageous exploitation. To be clear, intervention is not intended to necessarily entail prohibition, although prohibition is often what Wertheimer appears to refer to when discussing intervention. I recognise, however, that an argument for prohibition requires conducting an extensive cost-benefit analysis of the predicted

effects of prohibiting a practice, as compared with allowing it, and this is not a task that can be taken up in a theoretical thesis. Rather, I am using intervention to refer to a range of actions, which would serve to mitigate or reduce the exploitation. These may go beyond mere regulation, and include prohibition, although this is not explicitly what I am justifying here. Crucially, I seek to argue against the generally permissive approach taken towards exploitation in parts of the literature.

I provide three arguments for the wrongfulness of mutually advantageous exploitation, which are then taken to motivate justification for intervention. The first argument, consequentialist in nature, focuses on dissecting Wertheimer's distinction between mutually advantageous and harmful exploitation. I suggest that even in mutually advantageous exploitation, the benefits gained are suboptimal, as there is plausibly an alternative non-exploitative arrangement that would produce better overall consequences. Mutually advantageous exploitation is not as beneficial to B, and to society at large, as permitting it would require. Contrary to the claim that it remains better to transact exploitatively than to not transact at all, a commitment to welfare consequentialism actually entails interference, in order to generate better overall consequences.

Following this, I make the non-consequentialist argument that as mutually advantageous exploitation still involves the unfair use of vulnerability, it is wrongful, and this justifies intervention. The unfair use of vulnerability involved in exploitation is wrongful in two ways: firstly, it necessitates that the benefit gained is unjust, due to it trading on prior rectifiable injustice; secondly, it inflicts a status harm on the vulnerable, which renders it inimical to ideals of relational equality.

Finally, I make an argument for intervention from social construction. In response to claims that interfering in exploitative transactions is too idealistic to be politically feasible, and under current constraints B's 'best option' or 'free choice'

shouldn't be interfered with, I invoke Clare Chamber's argument on the social construction of choice. Here, I suggest that the social influence that led to a surrogate's choice to enter into surrogacy is a matter of (in)justice, and so should be limited where possible. In addition, I draw an analogy between female genital mutilation (FGM) and wrongfully exploitative surrogacy, arguing that in the same manner that most liberals would agree that there are reasons for the state to interfere in FGM, there are similar reasons for interfering with exploitative transactions like surrogacy. Together, these three arguments offer a route towards justifying intervention in mutually advantageous exploitation.

5.2 Surrogacy as Mutually Advantageous Exploitation

Let us imagine an idealised situation in which surrogacy were highly regulated, and many, if not most, of the harms discussed in the previous chapter were removed, rendering it net beneficial. Jeffrey Kirby asks us to do something similar in a paper where he admits that, as it stands, commercial surrogacy is likely to be exploitative of surrogates in India. For Kirby, this is because there is an unjust distribution of benefits and burdens,[392] inadequate provision of information to surrogates,[393] and the terms and labour conditions have been exclusively determined by brokers and medical practitioners.[394] He suggests that surrogacy in India would be rendered "nonexploitative" or, at least, "significantly less exploitative" by establishing a "comprehensive, enforceable regulatory framework based on national legislation that secures the following set of three achievable

[392] Jeffrey Kirby, 'Transnational Gestational Surrogacy: Does It Have to Be Exploitative?', *American Journal of Bioethics* 14, no. 5 (4 May 2014): 24–32, https://doi.org/10.1080/15265161.2014.892169, p. 27.
[393] Kirby, p. 29.
[394] Kirby, p. 30.

enhancements to the experiences of surrogate women: public education and enabled choice, enhanced protections, and empowerment."[395]

The reforms suggested by Kirby include implementing a public education programme whereby women who are interested in becoming surrogates are required to attend a workshop that fully explains the practice and the burdens that may accrue. As well as this, a maximum maternal age of 34 could be implemented, and the number of embryos transferred would be limited. Further, there could be mandatory psychological health screening evaluations and counselling accessible throughout and after the pregnancy. Finally, in order to address empowerment, Kirby recommends a deliberative engagement approach, whereby women who have had direct surrogacy experience as well as those who provide candidates for surrogacy (the poor, rurally-based women) are meaningfully included in decision-making. An example of this would be that while market forces are allowed to drive the upper end of the surrogacy fee range, the lower end of the range is established through stakeholder-engaged deliberative negotiation.[396]

I suggest, however, that such reforms would simply remove some of the harms, and make Indian surrogacy a case of mutually advantageous exploitation as opposed to harmful, rather than rendering it non-exploitative. This is because the reforms do nothing to address what I have identified as the conceptual root of exploitation, that is, the ***vulnerability*** of the surrogates. Further, as I will argue, as long as use of vulnerability persists, the benefits gained will be unjust, and continue to constitute unfair advantage taking. Surrogacy, even with these reforms, would continue to attract vulnerable women, with basic unmet nets, and few other earning options. Implementing a higher minimum rate of pay does not preclude this, and indeed may encourage it. While surrogates would perhaps give better-informed consent as a result of the compulsory workshops, their *voluntariness* in the two senses of voluntariness discussed in Chapter Two would still be

[395] Kirby.
[396] Kirby, p. 31.

questionable.[397] Crucially, the occurrence of poor and vulnerable women remaining attracted in the first instance remains, and so mutually advantageous exploitation persists.

5.3 The Paradox of Exploitation

There are many at this point who might not see anything wrong with permitting mutually advantageous exploitative transactions. Better-regulated surrogacy is a win-win. It provides poor women with a much-needed route out of poverty, and a rare opportunity to be the arbiter of their own fortune. Indeed, after outlining various ways in which commercial surrogacy fulfills his exploitation condition, acknowledging that it involves the coercion of poor women and an unjust distribution of burdens and benefits, Stephen Wilkinson concludes that not allowing it would be worse.[398] This is because these women would be "exploited anyway,"[399] and so they should not be "deprived of the opportunities paid surrogacy may provide just in order to stop them from being exploited."[400] This kind of view, therefore, asks how it can be *worse* to transact exploitatively with a surrogate, rather than not transact at all, and therefore not benefit her at all.[401]

The idea that it seems difficult to show how a mutually advantageous exploitative interaction can be morally *worse* than no-interaction at all since there is no party to the

[397] To recall, while B is ostensibly eager to transact in exploitation, there is also a way in which her voluntariness is compromised. Despite being voluntarily chosen, or consented to, the transaction may also be considered less voluntary than previously thought in the sense that it only arises out of a particular set of constrained circumstances, and might not have been agreed to otherwise. B's voluntariness is therefore compromised, when considered against a situation of greater justice. Compared with an ideal baseline state of voluntariness, the degree of B's voluntariness ranks low. This defect in choice and reference to background injustice is what my concept of vulnerability reflects; and these issues persist despite Kirby's reforms. Indeed the only reform that could be seen as addressing the issue of vulnerability is Kirby's proposal to provide training for local decent-wage jobs to women during their pregnancies, but again his does nothing to address the initial vulnerability motivating the transaction.
[398] Wilkinson, 'The Exploitation Argument against Commercial Surrogacy'.
[399] Wilkinson, p. 186.
[400] Wilkinson, p. 185.
[401] As well as leave her susceptible to other forms of exploitation.

transaction for whom it is worse, is sometimes referred to as the "non-worseness claim," or the paradox or puzzle of exploitation. First introduced by Wertheimer,[402] the non-worseness claim has been spelled out by Matt Zwolinkski as follows:

> It cannot be morally worse for A to interact with B than not to interact with B if: (1) the interaction is better for B than non-interaction, (2) B consents to the interaction, (3) such interaction has no negative effects on others.[403]

Similarly, the paradox of exploitation refers to the notion that two apparently sound premises lead to a seemingly contradictory conclusion: that the transaction may still be exploitative,[404] despite being consensual and Pareto superior. The paradox speaks to the question as to why it should be considered *morally worse* for A to transact with B in an exploitative manner, rather than not transacting at all, when this transaction is consensual and mutually beneficial to B. The non-worseness claim and paradox of exploitation seem to suggest, therefore, that the wrongfulness of, and reasons to intervene in, mutually advantageous exploitation are not clear, or at least, are significantly less clear than in harmful exploitation.

By contrast, I will suggest that the paradox may be dissolved, and the non-worseness claim rejected, by offering a consequentialist argument that *B does not benefit as much as is necessary* to justify nonintervention in the transaction, and that there *do* turn out to be negative externalities, in terms of the perpetuation of exploitation and the effects this has on society at large. In order to do so, I unpack the consequentialist assumptions built into the paradox, and argue that a commitment to welfare consequentialism actually requires exploitative transactions to be interfered with, due to their suboptimal nature, and the fact that their existence necessarily entails the existence of a *better non-exploitative*

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402 Wertheimer, *Exploitation*, pp. 289-93.
403 Zwolinski, 'Sweatshops, Choice, and Exploitation', p. 708.
404 And therefore wrongful, and that this has certain implications in terms of whether or not that transaction should be permissible.

alternative. This would call into question the extent to which such transactions really are mutually advantageous, as opposed to harmful.

5.4 The Consequentialist Argument

The consequentialist argument I offer builds upon Richard Arneson's proposed solution to the paradox. Arneson holds that the fact that it *seems* wrong to engage exploitatively, even though both A and B would both prefer this to not transacting at all, stems from a generally accepted rule against exploitation. We hold this kind of rule as a result of growing up in a wide array of human cultures, which has us trained to accept broadly deontological views. A moral rule against exploitation is one such example of this kind of rule. Arneson argues that we should neither romanticise nor demonise these rules. Rather, what we can reasonably expect from them is that they incorporate, "to some degree…the sense of what we truly owe one another, achieved by distancing ourselves in thought from distorting factors."[405] According to Arneson, following such rules tends to bring about the morally best outcome, as people are generally selfishly partial. Indeed, ""Follow the established rules" is generally a good decision guide even if the established rules are very imperfect as assessed from an act consequentialist perspective."[406] Analogously, Arneson argues that "a generic norm against exploitation, using others unfairly, is very likely to be a stable component of a set of moral rules socially established across many cultural settings, which is approved as part of multi-level act consequentialism."[407] Multi-level act consequentialism advocates following intuitive moral rules of thumb, and using critical faculties to diverge from these rules to produce

[405] Richard Arneson, 'Exploitation and Outcome', *Politics, Philosophy and Economics* 12, no. 4 (2013): 392–412, p. 406.
[406] Arneson.
[407] Arneson, p. 407.

optimal consequences, when it is deemed necessary, such as when two rules seem to conflict in a particular case.[408]

The rule we appear to hold against exploitation, therefore, which explains why it seems wrong to transact exploitatively, follows a pattern of long-term consequences. Indeed, "the various substantive anti-exploitation norms would make sense in that establishing and upholding them would tend to have reasonably good consequences as compared to feasible alternatives."[409] Arneson argues that establishing and sustaining norms against exploitation, which he characterises as "norms against excessive profit-taking when one happens to have bargaining leverage,"[410] will tend to "foster more deals in which those with bargaining leverage refrain from using it to extract a greater share of the cooperative surplus and that the overall consequences of such deals are sufficiently better in consequentialist terms that establishing and sustaining the norms are right choices from the act consequentialist perspective."[411] The norm against exploitative transactions may seem to induce actions that have worse consequences than actions which obey the act consequentialist principle. It *seems* wrong to *not transact* with B when the action is exploitative but ostensibly in B's interests. This is because it *is* wrong to not transact, according to an act consequentialist. A multi-level approach, however, recognises that there exists an anti-exploitation norm that forbids this, because it is better for inducing deals that are more beneficial, overall.

The consequentialist argument I offer against exploitation builds upon this. I argue that the state will generally bring about better long-term consequences by seeking to prevent exploitative transactions than by legitimising them. The benefits accrued to both B, and society at large, by such exploitative transactions, are not great enough to offset the costs of legitimising these transactions. Seeking to prevent exploitative

408 Richard Mervyn Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 2007).
409 Arneson, 'Exploitation and Outcome'.
410 Arneson, p. 411.
411 Arneson.

transactions, and therefore perpetuating an anti-exploitation norm that fosters long term political change, would plausibly generate better consequences overall. The paradox and non-worseness claim are therefore dissolved by interrogating the claims that exploitative interaction is better for B than non-interaction, and that such interaction has no negative effects on others. The significance of Wertheimer's distinction between mutually advantageous and harmful exploitation is therefore questioned. I will now elaborate on how exploitation does not actually turn out to be better overall for both B, and society at large, and suggest that a commitment to welfare consequentialism entails intervening in exploitative transactions, rather than permitting them.

5.4.1 Consequences for B

First let us consider the idea that participating in an exploitative transaction is permissible because it has good effects on B, or is in B's best interests. This view has been outlined by Wilkinson in two different papers on surrogacy and exploitation.[412] [413] Despite acknowledging that surrogacy is likely to be exploitative because surrogates are both underpaid and coerced by their impoverished circumstances,[414] Wilkinson argues that the state should not adopt a restrictive regulatory regime in order to stop this exploitation, and provides two arguments for this. The first is consistency, that it would be "inconsistent to ban (or otherwise legislatively discourage) commercial surrogacy because it is exploitative whilst at the same time permitting various other practices which are arguably just as exploitative (e.g. some forms of prostitution or poorly paid cleaning or factory work)."[415] I will set aside this issue for now, and return to it in the following chapter on the peculiarity of embodied labour. For now, I focus on Wilkinson's second

[412] Wilkinson, 'The Exploitation Argument against Commercial Surrogacy'.
[413] Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements'.
[414] These are two conditions stipulated by Wilkinson as comprising exploitation.
[415] Wilkinson, 'The Exploitation Argument against Commercial Surrogacy', p. 183.

argument, regarding the welfare of prospective surrogates: "given that they in reality have no other (or no better) way of gaining access to the money that they need, is it really right to deprive them of the opportunities that paid surrogacy may provide just in order to stop them from being exploited?"[416]

Built into this argument, therefore, is the assumption that permitting exploitation is the best possible course of action for promoting the surrogate's welfare. This is what I dispute, therefore calling into question the significance of distinguishing between supposedly harmful and mutually advantageous exploitation based on consequences. Given the serious admission of exploitation, and on Wilkinson's view, of coercion also, it seems counterintuitive to then permit it, in the same breath. Wilkinson prioritises the short-term, immediate, and I argue, ultimately suboptimal gain.

Permitting mutually advantageous exploitative transactions might not turn out to be the best course of action from a consequentialist point of view. The previous chapter suggested that surrogacy in India is typically harmfully exploitative, where the expected harms from the lack of consent and practices used can be seen to outweigh the expected benefits, which would call into question the welfarist justification of surrogacy. I suggest that even in the absence of these harms, the putative benefit of legitimising mutually advantageous transactions, can be questioned, given the prior situation of the exploited, and the long term consequences of such contracts. I expand on this in the next section, *5.4.2*, suggesting that the nature of exploitation is such that it necessarily produces suboptimal consequences.

Ethnographic research suggests that surrogates can be left in a worse position, physically and financially, after surrogacy. As outlined in the empirical overview of surrogacy in the first chapter, Pande encountered many surrogates multiple times during

[416] Wilkinson, p. 185.

her periodic visits to clinics, as they were undergoing surrogacy multiple times.[417] This could be taken to indicate that undertaking surrogacy just once did not provide a route out of financial difficulty. In a section in her book entitled "Where Did All the Money Go?" Pande revisits surrogates she had interviewed years before. Savita, a cleaning lady at the clinic who then became a surrogate at the same clinic, told Pande that there had been no improvement in her living standard and that she continues to be a cleaning lady at the clinic:

> "I couldn't save anything. A lot of it went for my husband's treatment [medical expenses]. Then my granddaughter fell sick with tuberculosis and though I spent a lot in her treatment we couldn't save her. I did not ever want this, but now my daughter is also trying to become a surrogate."[418]

Pande found that Savita's story was not unusual: "Many former surrogates reported that they spent their entire earnings on family medical expenses and their husbands' businesses."[419] Puja, a second-time surrogate, tells Pande, "But what should I do? This inflation does not allow me to stop [becoming a surrogate]."[420] Another surrogate, Mansi, tells Pande, "the money [from surrogacy] is not as much, you know. It seems like it would be enough for 10 years but it actually is nothing. Life is very expensive nowadays." These narratives indicate that persisting structural economic circumstances lead surrogacy to be at best, a short-term superficial solution. Indeed, Pande concludes that her longitudinal research found that "the lives of most surrogates did not change,"[421] and that "few were able to save up enough to get out of the cycle of poverty."[422]

The fact that in many observed cases, surrogacy has not had a long-term beneficial impact indicates that it may not be useful to consider exploitation of this sort

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[417] Pande, Amrita, *Wombs In Labour: Transnational Commercial Surrogacy in India*, p. 19.
[418] Pande, Amrita, p. 191.
[419] Pande, Amrita.
[420] Pande, Amrita, p. 193.
[421] Pande, Amrita, p. 194.
[422] Pande, Amrita.

to be the optimal course of action, in terms of surrogates' welfare. Analogous research into those who have sold kidneys suggests something similar; almost all of the sellers are trapped in crippling cycles of debt,[423] indicating that the money gained is used on short-term necessities, while wider structural poverty persists. It seems, therefore, that we should be wary of justifying exploitative transactions on welfarist grounds. Given the social context, such as the financial and social circumstances of those involved, exploitative transactions will rarely, if ever, be sufficiently beneficial to override considerations about the wrongfulness of permitting exploitation. This wrongfulness, pertaining to the long-term consequences of perpetuating exploitation, unjust benefit gained by exploiters, and impact on relational equality will be the focus of the rest of this chapter. This discussion has been intended to shed light on the problems contained within the distinction between harmful and mutually advantageous exploitation. It seems that even ostensibly mutually advantageous exploitation can be reconceived as harmful, if certain factors, such as long-term welfare, are taken into consideration.

5.4.2 Consequences for society

Another way in which I dispute the reliability of the harmful/mutually advantageous distinction is by looking at consequences for those beyond the immediate two contracting parties. An assumption contained in the non-worseness claim is that mutually advantageous exploitation does not generate any negative externalities. Part of what makes the exploitative transaction permissible, due to not creating a worse outcome, is that it is assumed to have no negative effects on others. I would like to suggest, however, that as well as often not being the best course of action for the exploited party, a permissive approach to exploitative transactions does not generate the best consequences

[423] Nancy Scheper-Hughes, 'The Global Traffic in Human Organs', *Current Anthropology* 41, no. 2 (2000): 191–224, https://doi.org/10.1086/300123.

for society at large. This is because exploitation, by its very nature, produces suboptimal consequences. As long as there is exploitation, there is the possibility of a *better non-exploitative alternative*, a situation in which both parties (rather than one, dominant party, as in exploitation) are sufficiently capable of striking an alternative arrangement.

Adopting Arneson's term, I would like to suggest that permitting exploitative transactions perpetuates an ***exploitation norm***. Such a norm, leads to the propagation and proliferation of exploitative transactions, thus generating overall suboptimal consequences. Insofar as permitting exploitative transactions perpetuates such a norm, therefore, we should not view the permissive approach as the best possible course of action for overall welfare. Rather, taking seriously the idea that exploitation is wrongful, even when it appears to benefit B, would plausibly lead to the reduction of exploitative transactions. This would, in turn, have better consequences for society at large, as suboptimal exploitative transactions are reduced, and fair trade agreements are reached.

When theorists such as Wilkinson acquiesce that certain transactions are exploitative, and that exploitation is wrongful, yet do not suggest that this ought to provide a case for intervention, they neglect the possible negative effects of perpetuating an exploitation norm. Such a norm may serve to normalise and condone exploitative practices, reducing the impetus to change the situation. Wilkinson does appear to be concerned with what the state should do in response to exploitative surrogacy, rather than just being concerned with the permissibility of individual transactions, asking: "if it were exploitative, would this provide a sufficient reason to prohibit (or otherwise legislatively discourage) it?"[424] I suggest that permitting exploitative transactions could actually be detrimental, long-term, from a welfarist point of view. While Wilkinson acknowledges "it would be much better if they could be offered non-exploitative ways of earning money," he continues "(on the assumption that this is not going to happen in the

[424] Wilkinson, 'The Exploitation Argument against Commercial Surrogacy', p. 169.

near future) ought we to harm them (by taking away their chance to be paid surrogates) in order to save them from exploitation?"[425] However, it may well be that better options are not available to the exploited individual now, or in the near future, in part *because* of the continued support for exploitative transactions as transitional solutions. It may be the case that this approach serves to alleviate societal responsibility. Putting this kind of positive spin on exploitation may have penetrating effects, reducing the motivation to push for a different socioeconomic situation. While this may be speculative, it at least only as speculative as an approach like Wilkinson's, which posits the benefits of exploitative transactions, without considering their parallel and corresponding negative effects.

Similarly, in a paper focusing on the Indian commercial surrogacy industry, Vida Panitch admits the situation is one of wrongful mutually advantageous exploitation.[426] She suggests that only by improving the surrogates' bargaining power, will the transaction be rendered non-exploitative. For Panitch, "the true problem lies in the state's failure to secure the material and social conditions of Indian women's empowerment," therefore "the solution would seem to lie with a concerted effort on its part to satisfy their reproductive rights by securing the social and material conditions of their empowerment."[427] She proposes, therefore, that the state "employ a share of the profits of surrogate tourism to address the conditions of vulnerability that affect their bargaining power and make them open to exploitation at the hands of surrogate tourists. A significant portion of the state revenue from commercial surrogacy in India ought to be invested in female empowerment goals, as measured by resource, agency, and achievement gains. These gains depend crucially on investment in women's education,

[425] Wilkinson, p. 185.
[426] Panitch, 'Global Surrogacy'.
[427] Panitch, p. 335.

literacy, health, employment options, and general resource shares."[428]

Panitch reiterates the consequentialist sentiment held by Wilkinson and others by arguing that preventing such transactions would "deny an economic option to women with few others," as well as deny the state resources that she is proposing it use to fund empowerment goals.[429] She is proposing to address the root cause of exploitation: women's vulnerability or disempowerment, by permitting their exploitation, and then redirecting and ring-fencing the funds gained. Perpetuating exploitation may not actually produce better consequences, however, as we have seen. Optimal consequences are plausibly produced by an alternative model of transaction that does not rely on the recruitment of the vulnerable, one that instead recruits parties who are in a position to strike better deals. The vulnerable, meanwhile, are helped through other means. This could have the effect of reducing poverty, and improving welfare, thus constituting better overall consequences.

Panitch's approach, despite identifying vulnerability as the key driver of exploitative surrogacy, is plausibly inimical to long-term goals of addressing said vulnerability and welfare. While transitional solutions are often necessary, and treating the symptoms rather than causes is sometimes the best available option, it is important to see that with exploitation, this may not be the case. Indeed, perpetuating an exploitation norm, rather than interfering with such transactions, may be inimical to long-term social justice goals. Transitionally, this solution serves to reproduce exploitation identified as wrongful. And there are plausibly long-term effects of perpetuating this permissive approach. An overhaul of institutional arrangements, including a concerted public policy effort and restructuring of the economy, is plausibly what is required to effectively enhance surrogate's capabilities to a threshold of minimum well-being, in a way that would mitigate vulnerability.

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[428] Panitch.
[429] Panitch, p. 336.

This line of reasoning gains support from an analogous argument made by Larry Temkin in the November 2017 Oxford Uehiro Lectures. Temkin gave a critique of Effective Altruism, a philosophical social movement that seeks to maximise the good using evidence-based analysis to determine the most efficient way of using resources to help others. Effective altruists advocate focusing on the social causes that are likely to do the most good, and so generate the most return for investment. Temkin argues, however, that donating to NGOs and charities may have detrimental long-term consequences. Rather, optimal consequences are achieved through structural change and good governance, and the donation of aid may be inimical to these goals.

Ultimately, Temkin argues, NGOs have to operate within existing power structures, requiring "the approval and support of the relevant local power brokers."[430] Accordingly, therefore, it is "hard to believe that in those areas that are controlled by some combination of powerful and corrupt dictators, generals, warlords, chiefs, gang leaders, policemen, politicians, or local leaders, they won't find a way, directly or indirectly, to get a piece of whatever funding or supplies are intended to help the needy." [431] Further, Temkin suggests that aid might create perverse incentives as donations "may directly or indirectly buttress the position of the very people who have caused the great need in the first place."[432]

Temkin's structural analysis could also be extended to consider the reasons why certain countries are more susceptible to unstable rule. Commentators suggest that factors such as the effects of colonialism combined with the current coercive, unjust institutional order are causally responsible for the instability of political institutions in

[430] Larry Temkin, 'Obligations to the Needy: Effective Altruism, Pluralism, and Singer's Pond Example (Draft Manuscript)', *Oxford Annual Uehiro Lectures*, 2017, p. 32.
[431] Temkin, p. 32.
[432] Temkin, p. 44.

impoverished countries.[433] Aspects of the institutional order facilitate such corruption: the international borrowing and resource privilege is exploited by elites in power who are permitted to borrow funds in the name of the country, thus saddling it with further debt.[434] Such policies encourage coup attempts, thus exacerbating a country's political instability.

Crucially for Temkin, national and local governments play a key role in poverty alleviation, and factors such as corruption cause international aid efforts to undermine the responsiveness of national governments to their people. Thus, in a similar manner to the way in which the perpetuation of exploitation has long-term adverse effects (if the structures that foster vulnerability are not altered), international aid may also have adverse effects, in the absence of parallel institutional reform.

It seems, therefore, that we must consider the harms incurred by exploitation beyond the circumstances of *individual* arrangements, and look at the impact on our socioeconomic structure. On this view, although some individual exploitative transactions may be relatively benign, or seemingly result in net benefits to the exploited, the overall effects of condoning such relationships may be detrimental to social and material relations. To further illustrate this, let us consider the analogous issue of proposals to introduce women-only carriages in order to tackle sexual assaults on public transport. In August 2017, the Labour MP Chris Williamson suggested that women-only carriages were an "idea worth exploring" to reduce sexual offences and create "safe spaces" in light of an increase in sexual offences on trains since 2013.[435]

Like allowing exploitative transactions, this policy would appear to have a positive impact, in that it might lead to fewer assaults on trains, as men and women are

[433] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2008), p. 114.
[434] Pogge.
[435] 'Labour MP Faces Backlash over Women-Only Carriages Idea', *BBC News*, 23 August 2017, sec. UK Politics, http://www.bbc.co.uk/news/uk-politics-41028234.

physically separated. While positively impacting some individual cases, this proposal does nothing to address the root cause of why such attacks happen, and indeed may be inimical to this aim. Rather than aiming to keep women safe overall, it restricts their movements to designated safe areas. Williamson recognises that there should also be a "push for behaviour change,"[436] just as Stephen Wilkinson and Vida Panitch argued that, alongside allowing exploitative surrogacy, there should also be efforts to improve the situation of the vulnerable.

However, as I suggested earlier, it may be that policies to pursue one of these ends will undermine the other. In particular, permitting exploitation may serve to reduce the impetus to introduce wider welfare-improving policies. Implementing superficial, short-term policies, therefore, may not be conducive to, and may even serve to deter, real social change. In the case of women-only carriages, such a policy might serve to normalise, and therefore longitudinally increase attacks, as it seems to suggest their apparent inevitability, and perpetuates a view of masculinity as fatalistically predatory. It employs a defeatist approach, rather than doing the necessary work to change social attitudes. Thus, it inadvertently normalises the view that men cannot control themselves, and that such incidents are unavoidable. The best we can do, therefore, is to minimise their prevalence through sheer physical obstruction. A suitably comprehensive preventative approach might involve improving (or rather, instating) relationship and consent education in schools, offering effective workshops for offenders, and taking allegations sufficiently seriously when they do arise. Analogously, it is plausible to opine that the transitional welfarist solutions offered by Wilkinson et al. do not serve long-term welfarist goals due to their normalisation of the exploitation sentiment, reducing the impetus for action.

[436] 'Labour MP Faces Backlash over Women-Only Carriages Idea'.

It is plausible to think that codes such as an exploitation norm, generated by a permissive approach, similarly filter down into our belief systems. The filtering down of such a norm affects the development of intuitions, which in turn appear to cohere with there being an exploitation norm, and the norm is perpetuated and self-fulfilled. The perpetuation of the norm, therefore, seems to be inimical to political change. How can there be political will or a push for change if such transactions are consistently deemed in the best interests of all parties?

Thus far I have argued that there are two ways in which exploitative transactions are suboptimal and may not be in the best interests of parties: through the effects on B, and through the effects on wider transactions. The suggestion is that while ostensibly benefiting B on an individual basis, exploitative arrangements may have wider effects on those who are influenced and portrayed according to those practices. Permitting such transactions on welfare consequentialist grounds could be misguided, therefore, due to the way in which the permissive approach perpetuates an exploitation norm. This norm, in turn, leads to long-term suboptimal transactions as companies participate in a "race to the bottom" with wages, for example, in an effort to undercut competitors. The approach that consistently permits exploitation achieves less overall welfare than one that reduces exploitation through better terms, and better wages. As well as this, the permissive approach could have the effect of suppressing the wrongfulness of exploitation, normalising exploitation as an acceptable mode of interaction. This in turn could detract from the political will needed to address the conditions that lead to exploitation, such as underlying poverty and vulnerability. Where is the outrage, after all, if such transactions are normalised, or accepted as "best possible scenarios"? The permissive approach, therefore, seems inimical to true political and economic change, which requires indignation and condemnation. Allowing such transactions is therefore

not likely to bring about the best consequences for society at large, if we accept that exploitation is wrongful, as even those advocating the permissive approach do.

5.4.3 Beyond consequentialism

In the above section I have presented a way of dissolving the paradox by suggesting that exploitation may not turn out to provide the best consequences after all, and thus that welfarist justifications turn out to fall short in their own welfarist aims. This may not be enough to justify intervention, however. The advocate of the permissive approach to exploitation might make the following two related objections. The first pertains to my assertion that an anti-exploitation norm would have better overall consequences, and the second pertains to the idea that my response neglects the theoretical possibility that exploitation can actually result in the better set of consequences. I shall briefly respond to these objections in this section, but the next section on use of vulnerability is intended to provide an alternative, non-consequentialist response to the advocate of the permissive approach.

So, my suggestion that the overall consequences of perpetuating an anti-exploitation norm are better than the consequences of perpetuating mutually advantageous exploitation may be disputed. As aforementioned, an anti-exploitation norm would promote fewer exploitative transactions, and may therefore lead to deals that are fairer in their allocation of the cooperative surplus, having better consequences in terms of overall welfare. However, it might plausibly be levelled by a proponent of the permissive approach that deals which allocate a much larger portion of the cooperative surplus to the party with better bargaining leverage, such as a major corporation, say, do actually have better overall consequences. Indeed, this is often the argument levelled for 'trickle down' economic policies, where banks and corporations are given better terms of

contract, as it is presumed that this will have good overall consequences for the economy. Low rates of corporation tax serve as one such example of a policy where the deal is skewed in favour of the party with the bigger bargaining leverage. This is done with the aim of making a country an attractive location for business, which, in turn, is believed to have better consequences in terms of further wealth creation. Similarly, a proponent of the permissive approach might argue that Nike's renowned use of sweatshop labour in the global south[437] (which could be conceived as mutually advantageous exploitation)[438] in fact, produces better consequences. As well as creating jobs in the global south, Nike's participation in exploitative practices to retain the greater share of the cooperative surplus make it a strong force for economic good in Europe and elsewhere, as it employs thousands, and encourages consumption.

On this objection, I am required to provide further argument to show that non-exploitative deals would in fact provide better overall consequences, as there are schools of thought that would argue otherwise. Time and space constraints impede my ability to appropriately address such a fundamental question relating to the most efficient and effective way to arrange an economy. However, it might be briefly responded that even a free market approach prioritises the competitiveness of markets, and insofar as exploitation is a result of a market failure, it is in the interests of a flourishing economy to limit it. An alternative and more fleshed out response will be provided in the next section, where I move away from consequences and suggest that the wrongfulness of consensual and mutually beneficial exploitation lies in the use of the circumstances that give rise to the transaction: vulnerability. Such unjust use pertains, in spite of good

[437] Karen McVeigh, 'Cambodian Female Workers in Nike, Asics and Puma Factories Suffer Mass Faintings', *The Observer*, 24 June 2017, sec. Global development, http://www.theguardian.com/business/2017/jun/25/female-cambodian-garment-workers-mass-fainting.
[438] Although on my critique of the distinction it is more likely to be harmful due to the health hazards posed and suboptimal of long-term gain.

consequences resulting from exploitation, and helps to explain why such transactions remain wrongful.

The second objection that could be levelled at my solution to the paradox is that I am merely passing the buck and avoiding the true problem it poses. While I argue that it would create a worse state of affairs and generate worse consequences for exploitation to go unrestrained, a proponent of the permissive view could simply alter the thought experiment so that exploitation really *did* have better consequences. The point is that we are meant to assume that the consequences of mutually advantageous exploitation *are* optimal. It is no good to assume or argue that they will not be, as this misses the point of what the paradox appears to show: the theoretical possibility that an exploitative transaction is both consensual and beneficial to B, and indeed optimal in consequentialist terms, yet seemingly wrongful. We are supposed to *imagine* a situation in which this is the case, and contemplate the paradox therein. In arguing that an anti-exploitation norm generates greater overall consequences, I may have avoided the true issue: the point is to imagine a world in which exploitative transactions, wherein the strong benefit from the weak, produce both immediate and overall good consequences. Would such exploitation still be impermissible? It seems that it would, but it remains to be shown why. This is what I turn to do in the next section.

5.5 Vulnerability and Exploitation

Thus far I have attempted to suggest, from a consequentialist perspective, what remains impermissible about mutually advantageous exploitation. In response to anticipated objections to my approach, I now offer an alternative non-consequentialist argument as to why exploitation is wrongful, in a way that justifies intervention. I suggest two such

ways in which exploitation's *use of vulnerability* provides reasons for interference. Firstly, I suggest that use of vulnerability necessarily gives rise to an unjust benefit, due to the way in which it trades on an objectionable and rectifiable injustice, thus constituting unfair advantage taking. Next, I suggest that as long as the use of vulnerability persists, and vulnerability itself is left in tact, exploitation, through such use of vulnerability, inflicts a status harm on exploited individuals, even in the face of purported good consequences. Qualitatively different to the objective harm seen in harmful exploitation, status harm is inimical to ideals of equal regard and relational equality, and should therefore not be imposed. Liberals who take institutional justice, social equality, and freedom seriously, therefore, have reason to intervene in exploitative transactions.

5.5.1 Unjust benefit and unfair advantage

The moralised account of exploitation that I employ suggests that even mutually advantageous exploitation is wrongful, and that this wrongfulness could be taken as a basis for justifying intervention into exploitation. This has to do with two aspects of my definition, which are jointly sufficient for wrongful exploitation to have occurred: the 'unfair advantage,' and the use of 'vulnerability.' That is, A exploits B when A takes unfair advantage of B's vulnerability. Vulnerability persists in mutually advantageous exploitation. While the terms of the transaction may be sufficiently beneficial, so as to constitute a case of mutually advantageous exploitation, rather than harmful exploitation, vulnerability, the key wrong-making feature at the root of my conception of exploitation, remains. Vulnerability, conceptualised in Chapter Three as necessarily hinged upon a conception of justice, persists such that the transaction invariably gives rise to an unjust benefit. Use of vulnerability, therefore, necessarily involves trading on injustice, and gives rise to the 'unfair advantage' element of the definition of exploitation.

The 'unfair advantage' element relates to the benefit that is gained, which is considered unjust due its deriving from an existing injustice, the vulnerability of B. When an offer is made to someone in a position of vulnerability, the benefit gained by the other party is to be considered unjust. This approach gains motivation from discussions on unjust benefit and duties of restitution in the literature on international justice. Here, it is sometimes suggested that the duties of developed countries to developing countries can be grounded in the principle of unjust benefits.[439] [440] Daniel Butt argues that benefiting from the plight of those in desperate need, however involuntarily, constitutes a morally relevant form of connection, which gives rise to rectificatory obligations.[441] In an exploration of who owns the responsibility to alleviate various cases of suffering, David Miller argues that exploitation constitutes unjust benefit, and requires remedial action on the part of A: "where A has unjustly benefited from the injury he has inflicted on P – he has stolen something of P's or exploited him, for example – then if A is made to compensate P by returning what he has taken or in some way undoing the damage he has inflicted, then this will help to cancel out A's unjust gain, and so restore justice between them."[442]

Such arguments are highlighted to give credence to the idea that if exploitation involves deriving a benefit from existing injustice, then the exploitation is itself unjust, and so redressing exploitation, through restitution or preventative action, serves to (at least partially) restore or reconstitute justice. In terms of my analysis, the unjust nature of the benefit contributes to the sense in which exploitation, in virtue of being the process that facilitates this, is wrongful. Taking unfair advantage, in terms of the benefit gained

[439] Andwander, 'World Poverty and Moral Free-Riding: The Obligations of Those Who Profit from Global Injustice'.
[440] Butt, *Rectifying International Injustice*.
[441] Daniel Butt, 'On Benefiting from Injustice', *Canadian Journal of Philosophy* 37, no. 1 (1 January 2007): 129–52, https://doi.org/10.1353/cjp.2007.0010.
[442] David Miller, 'Distributing Responsibilities', *Journal of Political Philosophy* 9, no. 4 (1 December 2001): 453–71, https://doi.org/10.1111/1467-9760.00136, p. 470.

being unjust, therefore, persists whenever there is use of vulnerability, formulated according to a prior conception of justice. The wrongfulness of consensual and mutually beneficial exploitation, therefore, lies in the unfair use of the circumstances that give rise to the transaction. Such unjust use pertains, in spite of any good consequences, and helps to explain why such transactions remain wrongful in a manner that supports intervention.

It is relevant that a benefit derives from injustice, because the existence of this injustice requires redress. Where basic needs are lacking, for example, justice demands they are fulfilled, rather than operationalised to the advantage of an exploiter. The wrong lays in the improper use of vulnerability, and the subsequent benefit being unjust. When someone is in need, preliminarily, a duty of rescue is owed. Need has *prima facie* moral force – to say someone is *in need* appears to demand a certain course of action. If a need remains unmet, this will ultimately lead to an individual's decline, due to needs being core aspects of human functioning.[443] There is much evidence to suggest Indian surrogates are vulnerable in this regard. India is a country with staggering levels of poverty, with 75.6 percent of the population living on less than two dollars a day.[444] Surrogates can earn around $6,000 (£3,800) for their services, which is far more than they are able to make through other means. Pande found that 34 of the 42 surrogates that she interviewed reported family income below or around the poverty line.[445] Indeed, for most of the surrogates that she interviewed, the money earned through surrogacy was "equivalent to almost five years of total family income."[446] Such statistics illustrate the profound poverty of the women who are choosing to become surrogates, and their palpable financial motivations.

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[443] As I suggested in Chapter Three, reducing vulnerability requires meeting a threshold of capabilities, or some other sufficiency theory of justice.
[444] Rachel Blatt, 'Cradle of the World', *The Indian Surrogate* (blog), 21 March 2009, https://indiansurrogate.wordpress.com/2009/03/21/cradle-of-the-world/.
[445] Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', p. 974.
[446] Pande.

Despite this transaction being mutually advantageous, its use of vulnerability and the way it trades on injustice constitute wrongful exploitation. Admittedly, my argument as to why exploitation is inherently wrongful is parasitic upon a prior conception of justice and subsequent assumption that there exists a societal obligation to ensure that all individuals, including prospective surrogates, obtain a minimal level of welfare, rather than remain vulnerable. However, this assumption is present in most accounts of a just society, and is fairly uncontroversial. That most theories of justice agree on the state's duty to provide a minimally decent life to its citizens, bolsters this view of wrongful exploitation, as it can quite clearly be shown that surrogates in India are not meeting this threshold of welfare, on a range of accounts, resulting in their being wrongfully exploited. Even where the terms of the bargain improve, therefore, this does nothing to mitigate the latent vulnerability, which is a crucial component of exploitation.

It will be disputed that this definition of exploitation lacks exclusivity: ***any*** benefit gained from using vulnerability will be unjust, and therefore constitute mutually advantageous exploitation. A first point of response is that the definition still retains exclusivity, as the type of vulnerability relevant to exploitation on my account, is justice-related. So the definition will only pick out the exploitation of those vulnerable according to conceptions of justice. Secondly, I am ready to accept a relative lack of exclusivity, and do not view this as counting against my approach. Indeed, our socioeconomic order is arguably characterised by mutually advantageous exploitative arrangements, so exclusivity would not reflect the empirical reality. I suppose what the objector might have in mind is the following sort of putative counterexample:

> A owns a factory. B is unemployed and socioeconomically vulnerable, across various measures, in the way outlined in Chapter Three. A offers B a job in his factory, at the state-enforced minimum wage. B accepts.

As my definition does not specify a price at which an employment offer becomes exploitative, and rather, defines exploitation as involving any benefit arising from making use of vulnerability, I would have to hold that this case constitutes wrongful mutually advantageous exploitation, despite the wage offered not seemingly drastically unfair. A is using B's vulnerability, and so is gaining (unjust) benefit, satisfying the unfair advantage element of exploitation.

I am ready to admit this as a case of exploitation, and consider there to be vastly more exploitation than theories such as Wertheimer's suggest. Crucially, however, there exist *degrees* of exploitation. The range of cases captured by my account differ in seriousness, severity, and attention demanded. As I outlined in Chapter Three, while defending Goodin's vulnerability-based account, although exploitation is a modal category, "there are gradations of how *badly* people are exploited, and that this is rightly analysed in terms of how much others have profited at their expense."[447] Some exploitation is more pernicious than others, therefore. Factors such as the level of B's vulnerability, the nature of good sold, and the level of benefit gained by A will all contribute to an assessment of how badly someone has been exploited, and thus how seriously they have been wronged. With, surrogacy, for example, the price paid to the surrogate should be contrasted with the profit gained by the ART clinic, to reveal the disparity and level of exploitation, despite the payment being higher than a surrogate's ordinary income. In Chapter Six, I provide an argument for viewing the exploitation of bodily labour as particularly pernicious and explain why it seems to receive particular attention. I admit, therefore, that there will be some cases that fall under my account of wrongful exploitation that do not seem highly exploitative or like the type of exploitation that warrants state intervention. Despite this, however, my investigation in Chapters Two and Three suggests that vulnerability seems to be a promising common denominator of

[447] Goodin, 'Exploiting a Situation and Exploiting a Person', p. 182.

the kind of interaction we might want to characterise as exploitative, and therefore that a vulnerability-based account is worth preserving, perhaps more than alternative models that attempt to set out the conditions of a non-exploitative fair exchange, say. I advocate using discretion in determining which exploitative transactions we are to tackle, rather than prioritising exclusivity.

5.5.2 Relational equality

I will now provide a second argument as to why the use of vulnerability involved in exploitation constitutes its wrongfulness, and therefore can be taken to justify intervention. This has to do with the 'status harm' that using, rather than ameliorating, vulnerability, inflicts on the vulnerable. This harm is qualitatively different from the objective harm involved in net harmful exploitation, and thus is compatible with exploitation being mutually advantageous in terms of net utility. Status harm plays a more morally important role in my account, however, due to its effect on relational equality. Such a harm plausibly has a signaling effect about vulnerable groups and their social position, both to themselves, and to society. As well as being theoretically contrary to liberal principles of equal regard and relational equality, the effects of this signaling are also likely to be more tangible than it would seem. It is not hard to imagine that participating in exploitative transactions could have such signaling effects, given analogous research showing that poverty negatively impacts upon self-esteem.[448] I suggest, therefore, that we should take seriously the status harm that exploitation invariably inflicts on the vulnerable, and the impact this has on realising relational equality.

[448] Timothy J. Haney, '"Broken Windows" and Self-Esteem: Subjective Understandings of Neighborhood Poverty and Disorder', *Social Science Research* 36, no. 3 (1 September 2007): 968–94, https://doi.org/10.1016/j.ssresearch.2006.07.003.

Elizabeth Anderson introduced her conception of democratic equality in response to what she identified as the ills of luck egalitarianism. Discussions surrounding luck egalitarianism dominated political philosophy, and Anderson viewed this approach as reflecting a "mean-spirited, contemptuous, parochial vision of a society that represents human diversity hierarchically, moralistically contrasting the responsible and irresponsible, the innately superior and the innately inferior, the independent and the dependent."[449] In response, Anderson suggests that the point of a theory of equality is to oppose such hierarchies, and to tackle the relations between superior and inferior persons, as well as the distribution of goods. Her vision of equality, therefore, "seeks a social order in which persons stand in relations of equality."[450] She envisions a democratic community, as opposed to a hierarchical one. Exploitation, therefore, is inimical to the realisation of this aim, as it is a necessarily hierarchical and dominating relation. This, I suggest, is due to the way in which it requires and permits the perpetuation of vulnerability, engendering a social relation that inevitably benefits the stronger party, thus reinforcing both parties' social positions. Indeed, Anderson herself identifies exploitation as an "oppressive relationship" that true social equality negates: "equals are not exploited by others. This means they are free to secure the fair value of their labour."[451] Relational equality requires a more expansive understanding of the social conditions of freedom. On this approach, even exploitation, entered into by consent or contract, is taken as a violation of individual freedom, because a free life requires that one stands in relations of equality with others.

Wertheimer briefly touches on the objection that permitting mutually advantageous exploitation is inimical to justice and relational equality in his discussion of the moral force of exploitation, before dismissing it. He identifies the relational equality

[449] Anderson, 'What Is the Point of Equality?', p. 308.
[450] Anderson, p. 313.
[451] Anderson, p. 315.

objection as the problem that "surrogacy involves highly asymmetrical and unjust personal relations."[452] He acknowledges "relational inequality is a serious matter, and it must be included in any "all things considered" assessment of whether a woman would be benefited or harmed by entering into a surrogacy transaction."[453] But if, when appropriate weight is given to these considerations, a woman can plausibly maintain that she would benefit by such an arrangement, it is hard to see why such relations should be prohibited on account of justice if the welfare of the potential surrogate is the focus of our concern."[454]

Wertheimer's response appears to appeal to the idea that paternalistic restrictions are not justified, if people have decided for themselves to contract into a mutually advantageous arrangement. To this, it might be responded that ostensible consent is not the only, or indeed most significant, aspect of a contract – greater significance needs to be paid by the state to the status harm that participation in exploitative practices inflicts. Further, the exploited themselves might not have given enough significance to the status harm that will transpire when conducting their "all things considered" assessment. In the following section on the social construction of choice I offer a further argument for state intervention into practices that seemingly exhibit consent, yet perpetuate disadvantage.

Following Anderson we have seen that individual freedom requires standing in equal relations with others, and is not realised by participating in exploitative arrangements. Wertheimer's point also seems to be similar to Wilkinson's welfarist defense of surrogacy and so could be susceptible to the same response that I gave earlier: that permitting exploitation engenders further exploitative transactions, which are longitudinally detrimental to welfare. Wertheimer does not seem to be tackling the crux of the relational equality objection in this response, therefore. The idea is that inequality

[452] Wertheimer, 'Two Questions about Surrogacy and Exploitation', p. 236.
[453] Wertheimer.
[454] Wertheimer, p. 237.

in social relations and in how members of society view each other can have as penetrating and detrimental effects as inequality of welfare. Indeed, my argument suggests that this is a value that should be prioritised over utility.

Wertheimer also omits to note that society consistently intervenes "on account of justice" and individual welfare, in arrangements that the participants themselves believe they would benefit from. Indeed, there are strict rules surrounding election campaign finance and prohibiting the buying and selling of votes, due to the potentially justice-contravening features of such arrangements, despite the willingness of individuals to enter into them. Similarly, consensual cannibalism and extreme sadomasochistic behavior (such as dismemberment) are prohibited on such welfarist grounds.

Further, in his dismissal of the relational equality objection, it appears that Wertheimer does not fully appreciate its import if he suggests an inequality-reinforcing transaction is an appropriate way to improve the situation of a member of a disadvantaged class. Allowing such mutually advantageous exploitative transactions is not a viable solution to instituting justice and improving vulnerability, as relational equality is also a feature of justice, and this turns out to be undermined. Even if an exploitative transaction really is mutually advantageous, the status harm it invariably gives rise to is qualitatively distinct.

Wertheimer considers the argument that injustice is a "free-floating evil" and is still bad even if it hurts no one, and that we ought to prevent such transactions even if they are beneficial to all concerned, because injustice is bad in itself. This has parallels with my claim that the unjust benefit gained through vulnerability is wrongful, via the process in which it was gained. Transactions which use vulnerability and lead to such a benefit can be wrong, for reasons outside the wellbeing of the two contracting parties, and despite their provision of consent. He dismisses the view that injustice is wrong even if it harms no one (and the two parties benefit), arguing that it is acceptable for an

individual to make the decision whether or not to participate in such transactions, but it is questionable "whether society can justifiably prevent someone from participating in a beneficial transaction because it is unjust."[455] I have suggested, however, that the injustice involved in exploitation is not a "free-floating evil," but rather, it affects societal relations.

There are two points of rebuttal, the first being that it is part of the state's very basis and justificatory function that it exerts a level of control over its members in light of considerations such as justice. As I have argued, society often limits behaviours that people may conceive as personally beneficial, but that it deems unjust or harmful; it is illegal to sell votes, and people are not permitted to sell themselves into bonded labour or extreme forms of sadomasochism. Indeed, labour laws also exist for this very reason – to prevent over-work and to set a minimum wage, despite both parties potentially perceiving this as in their interests.

Secondly, it should be questioned whether injustice is really a "free floating evil," in that it harms no one. I have already suggested that unjust transactions inflict a status harm that is inimical to relational equality, negatively impacting the way in which society's members perceive each other. Further, if surrogacy is already associated with stigma in India, there is a danger of surrogates internalising a sense of inequality about their position and decision to become surrogates. As well as this, there is a danger of surrogates coming to be viewed as a breeder class in a situation whereby some women's bodies are seemingly more disposable and fungible than others, especially as surrogates are typically drawn from a particular demographic. The inequality entailed by a relation in which some bodies are available for sale, while other people are able to buy these bodies, does not seem to be an issue that is best characterised as a mere "free floating evil."

[455] Wertheimer, p. 236.

Indeed, the sale of the body and its communicative impact is an issue I explore further in the next chapter.

Why do theorists such as Wilkinson and Panitch seem reticent to follow through with the implications of identifying a practice as wrongfully exploitative, and even coercive? It might have to do with the demanding nature of what is required to take exploitation seriously, given its pervasive nature, and the inflexible state of various institutions. This is an issue that I consider next, in the section on the social construction of choice, where I point to ways in which we already interfere in various practices, in order to build an analogous case for intervention here.

5.6 The Social Construction of Choice

In this section I provide a third, overlapping argument as to why state intervention into exploitative practices might be permissible. In order to do so, I draw upon Clare Chambers' work on the social construction of choice, arguing that even outcomes that result from a free choice can be unjust, and therefore permissibly interfered with. Chambers argues that we must pay consideration to how society forms people's preferences, and how people's preferences affect society; this process of social construction occurs in a manner that places constraints on individual autonomy. An individual's free choice, therefore, should not be considered to be the final and unproblematic beginning of normative theory. Chambers' argument functions as a critique of liberalism. Liberal theory, she suggests, "tends to support and protect people's freedom to make harmful choices that threaten their well-being or their equality, rather than protecting their freedom to resist inequality and supporting them in doing so."[456]

[456] Clare Chambers, *Sex, Culture, and Justice: The Limits of Choice* (Pennsylvania: Pennsylvania State University Press, 2008), p. 4.

I suggest that when liberal theorists argue for permitting mutually advantageous exploitative transactions, which, as I have argued, are inimical to relational equality and equal regard, liberal values of freedom and equality are compromised. It seems that, as well as this, a commitment to liberalism would involve recognising when such transactions have been the result of unjust circumstances, adaptive preferences, and social construction, and intervene accordingly. In order to illustrate this point, I end the section by drawing an analogy with female genital mutilation (FGM), arguing that in the manner that most liberals would accept interference with this practice, they should similarly accept interference with exploitative practices.

5.6.1 Justifying state intervention

In Chambers' compelling work on the social construction of choice, she makes the case for state intervention into harmful practices that appear to reflect individual choice. In order to do so, she provides a theory of social construction, and argues that in light of this, choice cannot be a normative transformer. Rather, "social construction should actively affect the legislative agenda when two factors are present: the disadvantage factor and the influence factor. The disadvantage factor occurs when an individual or group of individuals suffer disadvantage as a result of their own choices – particularly (though not only) if the disadvantage is severe, enduring and related to the advantage of those who choose differently. The influence factor occurs when there are identifiable pressures on the choosers to make the disadvantageous choice. Where both factors are present, the disadvantaged suffer from an injustice, and the liberal state ought to intervene."[457] Chambers argues that together, the two factors "express the idea that if an individual is

[457] Chambers, p. 264.

encouraged to make choices that disadvantage her, then the ensuing inequality is unjust."[458]

Exploitation, and in particular, exploitative surrogacy, could be seen as possessing these factors. The **disadvantage** suffered by surrogates can be seen by the fact that they access a benefit by having to endure exploitation, a wrongful practice inflicting a status harm, while others have greater opportunities to receive benefit, without being exploited in this way. As I have just argued, exploitation has all-things-considered disadvantaging effects in terms of relational equality. The prior inequality of surrogates' social position leads to participation in an exploitative practice, which itself manifests as disadvantage. In light of Chambers' suggestion that harm and practices involving self-harm count as a disadvantage,[459] as suggested earlier, exploitation can be seen as inflicting a status harm on individuals, affecting both how they see themselves, and how society views them. Chambers' **influence** factor can be seen in the way in which the background situation, and surrogates' pre-proposal vulnerability, including their poverty and lack of options, significantly motivates their decision to participate in the practice. For Chambers, social norms are enough to count as influence. An analogous case could be made, therefore, for economic pressures. Mutually advantageous exploitative surrogacy, therefore, could be interfered with, on this analysis.

5.6.2 Disadvantage

What, then, is meant by disadvantage? Why is the disadvantage resulting from an individual choice to enter into surrogacy problematic? We can't expect absolute equality of outcomes, after all – that would be utopian, or even dystopian to some. While it is possible to believe that justice and equality do not require identical choices and outcomes

[458] Chambers, p. 120.
[459] Chambers, p. 265.

for all, it remains that "liberals ought to be interested in why there should be consistent discrepancies between the choices made by members of different groups."[460]

Let us consider the case of gendered career differences. Using this example, Chambers critiques Brian Barry's assertion that liberal action is limited to the elimination of discrimination, i.e. implementing formal equality, rather than attempting to rectify some outcomes in choices. While Barry accepts that part of the difference in the career success of men and women is down to discrimination, he argues that any differences beyond this, down to individual choice, say, are not in the realm of a theory of justice: "Suppose…that women were as highly qualified as men but disproportionately chose to devote their lives to activities incompatible with reaching the top of a large corporation. An egalitarian liberal could not then complain of injustice if, as a result, women were underrepresented in the 'top corporate jobs.'"[461]

As I write, women remain underrepresented in top positions across various fields. Assuming that this is not to do with outright discrimination in hiring processes (although there is certainly research to show implicit bias is a factor), there has to be another explanation for this difference in representation. Chambers suggests that childcare and domestic responsibilities are factors which still prevent women from achieving corporate success, and which look like women simply choosing to spend time on things aside from their career. She argues that Barry is committed to the idea that "it might simply be the case that women disproportionately choose to focus on childcare than on career success and that if this choice does not result from discrimination in education or employment practices, liberals need not worry about it."[462]

However, Chambers argues that the difference in *disadvantage* that different groups experience for their group-based choices should make us concerned. And in the

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460 Chambers, p. 119.
461 Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity Press, 2001), p. 94.
462 Chambers, *Sex, Culture, and Justice: The Limits of Choice*, p. 120.

case of women "choosing" childcare over a career, the way in which this disadvantages women while advantaging men, is crucial to its assessment. Women who choose to become full-time housewives say, suffer a lower income (if accessing any of their own) and financial dependence on others, which in turn leaves them vulnerable in case things go awry. Women who work but take time out to have children are likely to find it difficult to return to work, and to be disadvantaged as compared with women and men who have had no such hiatus. Crucially, men are *advantaged* by this unequal division of labour, as their careers are not sacrificed to meet childcare or domestic needs. This relative advantage and disadvantage, therefore, needs to be assessed, rather than accepted as an unproblematic result of free choice. Differences in group choices and outcomes matter, then, when they cause significant group advantage and disadvantage. I would also like to offer the case of girls "choosing" fewer science subjects and maths at A-level, and at university, as an example of group differences with implications in terms of (dis)advantage. The disadvantage suffered by girls is that they are not then able to go onto careers in this field; their options are severely limited, by this early individual 'choice.'

If we accept that these gendered advantages and disadvantages are problematic, a similar argument holds for the disadvantages that result from the perpetuation of exploitative practices. As discussed earlier, these disadvantages take the form of status harms and the perpetuation of B's unequal position in society, while A's dominant position is strengthened. An appropriate response to the uncontroversial recognition that women remain held back in their careers due to unequal domestic labour is to implement affirmative action policies,[463] improve free childcare services, and offer equal paternity leave. Similarly, therefore, appropriate responses to exploitation also require ameliorating

[463] The kind of policies I have in mind go beyond preventing formal discrimination. Instead, such policies would recognise the potential of a woman, which is often stifled by her social environment, and so has a *predictive* component as well, rather than solely focusing on making comparisons of extant achievements with her male counterparts.

the conditions that foster the choice to enter into an exploitative transaction, and to intervene in such practices if allowing them to perpetuate is inimical to the prior goal of improving societal conditions, as argued in earlier sections. It is plausible, after all, that simply accepting inequalities in career outcomes due to the belief these are chosen, rather than taking active steps to redress the balance, could have the effect of entrenching women's position, causing them to be taken less seriously, as a class, thus furthering career inequality.

5.6.3 Influence

It has been argued that following the recognition that women's career choices are shaped by external factors such as childcare, the resultant inequality and disadvantage perpetuated is problematic. How exactly do these external factors take hold? Women remain in fewer numbers in top positions, despite ostensible formal equality. It seems that "free choice," seen in women choosing different priorities, and "undue influence," such as hiring discrimination, may not be so clearly differentiated. Analogously, why does commercial surrogacy consistently recruit from a particular cross-section of society? Why does it matter that certain people are more likely to be exploited, even as a result of their own 'choice'? According to Chambers, the second factor we should be wary of when considering differences in group outcomes is *influence*. Individuals, she argues, "may be encouraged by their social context, to make choices that harm them."[464]

Chambers limits 'influence' to identifiable processes of influence. One identifiable pressure on mothers to choose to stay at home is the knowledge that "if they do not, then nobody else will."[465] This discrepancy does not arise from nowhere: "there are significant social norms that encourage mothers to stay at home to look after their

[464] Chambers, *Sex, Culture, and Justice: The Limits of Choice*, p. 123.
[465] Chambers, p. 125.

children…the media are full of articles about the harm done to children if their mothers go out to work. There are scare stories about the dangers of professional child-minders, the educational damage to children who are not looked after by full-time mothers, the importance of early bonding between mother and child…"[466] By contrast, working fathers are not pressured to make such a choice, as studies almost always focus on working mothers rather than working fathers. So, we see ways by which a woman's generally disadvantageous choice to stay at home rather than work, or take years out after giving birth, is shaped by societal norms and pressures. When this occurs, it cannot be clearly said that the different outcomes are just.

Both the disadvantage and influence conditions need to be present for a practice to be considered unjust. In the absence of social influence and social norms, women who choose to shoulder more of the domestic burden would still be disadvantaging themselves "but the systematic and unequal pressure that constitutes oppression would be absent. Without the influence factor…the disadvantage factor does not necessarily indicate injustice."[467] Similarly, in the case of surrogacy, in the absence of vulnerability (the influence factor), and the resultant exploitation (the disadvantage factor), the practice need not merit intervention. It may remain problematic for other reasons (to be discussed in the next chapter), but if individuals are not contracting out of economic need, and meet a minimum threshold of capability, then the exploitation condition is not satisfied, as there is no use of vulnerability. As long as vulnerability persists, however, the possibility of wrongful exploitation remains, and disadvantage follows.

Vulnerability, therefore, through the way in which it gives rise to a socioeconomic imperative to transact, serves a similar conceptual function to that of social influence on Chambers' account. Chambers asks us to consider, therefore, the social context that causes people to adopt certain preferences and practices. It might be

[466] Chambers.
[467] Chambers, p. 130.

the case that women consistently choose to stay at home with children, but when this leads to disadvantage we need to look at *why* this is the case. Similarly, it might be the case that poor Indian women consistently choose to become surrogates more than any other group. But when this gives rise to exploitation, a disadvantaging phenomenon, we need to start looking at what influences this group decision. While surrogacy might be the perceived best option for many Indian women, it is crucial to consider *why* this is the case. If the answer is 'identifiable social pressure,'[468] or indeed, financial, then there is reason to intervene.

As a final point of consideration on this matter, I would like to offer the statistic that the suicide rate amongst men is far higher than amongst women; nearly 75% of British suicides are men.[469] This leads to a clear disadvantage in outcomes; one gender is choosing self-destructive behaviour more than the other. Suicide is the biggest killer of men under 45.[470] Rather than deeming this group difference the result of individual men's choices, it is instructive to consider the various societal pressures and gender norms that contribute to this phenomenon. Some cited reasons for this difference in outcome are that men exhibit relatively low levels of help seeking for psychological difficulties, have less formal contact with the healthcare system, and exhibit more impulsive risk-taking behaviour.[471] These reasons themselves are plausibly the result of social influence and differences in social conditioning between the genders, with masculine norms promoting self-reliance and discouraging men from showing emotion. Individual choice therefore, does not seem to be the end of the story when we see damaging group trends, and group differences.

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[468] Which then results in disadvantage.

[469] 'Male Suicide: It's Time to Face the Stark Truth about a Growing Crisis', The Independent, 10 September 2016, http://www.independent.co.uk/voices/world-suicide-prevention-day-men-emotions-childhood-biggest-killer-in-uk-under-45-a7235766.html.

[470] 'Male Suicide'.

[471] 'The Silent Epidemic of Male Suicide | BC Medical Journal', accessed 29 August 2017, http://www.bcmj.org/articles/silent-epidemic-male-suicide.

5.6.4 Female genital mutilation (FGM)

Thus far, following Clare Chamber's social constructivist approach, it has been argued that if disadvantage and influence are present, the state of affairs in question is unjust, even when seemingly brought about by an individual's free choice. This can merit policy intervention. Liberals should be concerned about such cases because they illustrate the limitations of individuals' abilities to escape contexts that limit, rather than enhance, their choices.[472] It is likely, however, that liberals would still exhibit reticence in intervening in exploitative practices, due to a bias towards favouring an individual's freedom to choose the best option, in the face of limited options. In order to demonstrate the wrongheaded nature of such a view, however, I will now draw an analogy with FGM, to which plausibly most liberals would be opposed, in order to show they should view exploitative transactions such as commercial surrogacy in a similar manner.

FGM is the practice of deliberately cutting female genitalia for non-medical reasons. It involves the partial or whole removal of the labia and/or clitoris, and/or the sewing up of the vagina. It is a cultural, rather than religious, practice, associated with female purity, fertility, and cleanliness, and is performed on young girls usually before they reach puberty. It is often viewed as a condition of marriage, and there is therefore great social pressure on women to be cut. Women who have it performed on their daughters are said to genuinely believe that they are doing what is in the best interests of the child. FGM can cause serious harm, including infections and abscesses, pain during intercourse, incontinence, and psychological damage.[473]

It seems uncontroversial to suppose that most liberals are opposed to this practice. Chambers argues that such practices are chosen only in response to unjust social norms, taking place under profound patriarchal influence. Society is therefore both

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[472] Chambers, *Sex, Culture, and Justice: The Limits of Choice*, p. 157.
[473] *Daughters of Eve*, accessed 29 August 2017, http://www.dofeve.org/about-fgm.html.

culpable for, and able to remedy, the harm caused.[474] Insofar as Indian commercial surrogacy is also chosen in response to unjust social norms, taking place under profound economic influence, there are similar reasons to intervene. A liberal who accepts Chambers' argument for intervention into FGM, but favours a permissive approach to mutually advantageous transactions such as surrogacy, might want to dispute that the analogy holds. I will now try to dismiss such an objection.

One potential disanalogy relates to harm. FGM is indubitably harmful, while surrogacy, in this chapter, is considered to be net beneficial, and therefore a mutually advantageous arrangement. Perhaps, however, in considering the context in which it occurs, it is plausible to imagine that FGM is similarly all-things-considered net beneficial. To be clear, here I am departing from Chambers' analysis. Chambers herself considers FGM to be a case of consensual self-**harm** and uses this case to justify paternalistic intervention into consensual harmful practices. I, however, use the case of FGM to draw out parallels with exploitative surrogacy (which Chambers may well also view as a consensual self-harmful practice). Thus, I reframe FGM as conceivably net beneficial, in order to suggest that just as we would justifiably intervene in FGM, we may want to do the same in another net beneficial case: surrogacy. This is not intended to justify FGM. Rather, I merely seek to draw attention to the phenomenal social pressure on women to be cut, and to have their daughters cut, in certain cultures. Given the intense social pressure under which this choice is made, FGM is plausibly chosen in the best interests of the women and girls involved. It is therefore believed that any such harms are outweighed by the benefits, or by potential harms from non-compliance. This analysis does not negate the highly problematic nature of FGM. Rather, it just highlights the social pressure and context in which it is performed.

[474] Chambers, *Sex, Culture, and Justice: The Limits of Choice*, p. 211.

Consider the practice of selectively aborting female foetuses due to cultural demands to have a male child. For an impoverished couple in rural India, the costs of having a daughter would be bankrupting. A gender-selective abortion would therefore be all things considered, in terms of utility, net beneficial. This should not therefore entail that there is nothing wrong with the practice. Quite the opposite, in fact, as it points to a deeply problematic social context that requires remedy. Similarly, an exploitative surrogacy arrangement being chosen as in a woman's best interests does not preclude it from being problematic. The economic pressure to earn money to survive is key, such that almost *any* job would be better than no job. Almost every proposal made to someone vulnerable in the ways outlined in Chapter Three would be an offer of improvement, and therefore net beneficial, but there is something objectionable in the conclusion that such an arrangement's beneficial nature removes any reason to intervene.

Further, proponents of a permissive approach towards exploitative surrogacy often argue that it would be wrong to take away an earning option from women with so few options. It would result in worse consequences, therefore, to intervene and not permit women to transact this way. Margaret Radin refers to this as a "double bind." A restrictive approach would further limit the options available to already disadvantaged women and will force them to "remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers."[475]

Analogously, intervening in FGM might also be seen to have significantly worse consequences for the women and girls involved. As FGM seems to be a prerequisite for participation in other cultural practices, such as marriage, the first cohort to be prevented from undergoing FGM would plausibly experience significant social exclusion. Yet we would be less inclined to call the positives and negatives of prohibiting FGM a "double bind." The existence of these transitional costs does not entail, therefore, that a

[475] Margaret Jane Radin, 'Market-Inalienability', *Harvard Law Review* 100, no. 8 (1987): 1849–1937, https://doi.org/10.2307/1341192, p. 1917.

permissive approach to FGM is the right one. The aim of the ban is presumably to change social attitudes, and transitionally, there will be costs in doing so. Indeed, an FGM ban could be considered to have immediate bad effects on the women and girls who believe it necessary to have it performed. However, these bad effects are presumably absorbed by the higher long-term costs of not intervening in the practice. Analogously, intervening in mutually advantageous exploitative surrogacy arrangements might have immediate bad consequences. But if one takes seriously Chambers' social constructivist account of social pressure and influence, and the fact that such influences can result in disadvantage, then exploitative practices such as surrogacy could be viewed in a similar manner to FGM, as the social costs of non-intervention are much higher.

It might be suggested that I have not paid enough significance to the pain and trauma of undergoing FGM. Although both exploitative surrogacy and FGM might stem from significant social influence, and result in disadvantage, FGM is much more harmful, and therefore gives more reason for intervention. However, this objection avoids the crux of the issue, which is that FGM could conceivably be thought of as net beneficial on this type of distinction, given the strength of the influence of that dictates it must be performed, and the costs associated with diverging from this expectation. Not undergoing FGM is seen to be worse, which is why mothers impose it on their daughters in the first instance. It may also be disputed that FGM differs because it is imposed on young girls non-consensually, and therein lies the problem. While this is true, it is also possible to imagine a case in which an adult might choose to undergo FGM in order to confirm to cultural expectations and successfully enter into a marriage, after facing previous difficulty. There would still be something wrong with this situation, despite the FGM being "chosen." This has to do with the problematic social context that gives rise to such a decision. Similarly, while there are, of course, crucial issues surrounding lack of sanitation and anesthetic in the way FGM is currently practiced, it is possible to imagine

that even if these issues were resolved,[476] we would still view it as problematic, and that this has to do with it resulting from a harmful social norm: extreme patriarchal influence. According to Chambers' argument, the practice is unjust and should be interfered with because society is both culpable for and able to remedy it. Analogously, as exploitative surrogacy is a result of extreme economic influence, that society is similarly culpable for and able to remedy, similar intervention may be justified.

5.7 Conclusion

In this chapter I have provided three arguments as to why state intervention in exploitation is justified even if the exploitation is net beneficial to the exploited party, and thus mutually advantageous. I began by offering a consequentialist approach that criticised the reliability of distinguishing between harmful and mutually advantageous exploitation. Here, it was argued that exploitation might not actually produce better consequences either for B, or for society at large, to make legitimising exploitation the optimal option for the state. Following this, in response to the possibility that a permissive approach to exploitation really would turn out to have better consequences, I provided a second non-consequentialist argument appealing to the unjust nature of the benefit gained, and the status harm inflicted upon the vulnerable, which conflicts with realising ideals of relational equality. Use of vulnerability, which obtains in mutually advantageous exploitation, gives reason for intervening in such transactions. Finally, I drew upon Clare Chambers' work on the social construction of choice, arguing that even outcomes that result from a free choice can be unjust, and therefore permissibly interfered with. Here I invoked examples of other problematic group differences, such as women's "choice" to stay at home, and male suicide rates, in order to suggest that we

[476] That it was performed safely by a trained surgeon, with appropriate anesthetic, say.

need to look beyond individual choices when such choices result in group outcomes, and disadvantage. In order to demonstrate the wrongheaded nature of the liberal reticence to intervene in exploitative practices,[477] I drew an analogy with FGM, to which plausibly most liberals would be opposed. This was done with the aim of showing that exploitative transactions such as commercial surrogacy can be viewed in a similar manner. While my argument has focused on reasons to intervene in commercial surrogacy, it could plausibly be extended to other harmful consensual and/or exploitative practices that result in disadvantage, and arise from problematic social influence.

[477] Due to these practices being chosen and seemingly being the 'best' option.

Chapter Six

Body Exceptionalism and Embodied Labour

6.1 Introduction

In the previous chapter I provided three arguments for the wrongfulness of mutually advantageous exploitation, which ostensibly occurs in the absence of the kind of harm outlined in Chapter Four. These arguments for exploitation's wrongfulness were intended to provide grounds for state intervention into mutually advantageous exploitative practices. While these arguments give the state the theoretical moral power to intervene in light of exploitation's wrongfulness, I did not purport to conduct a complete cost-benefit analysis of the various policy approaches, including prohibition, so my approach only offers only a prima facie case for intervention.[478] Rather, my aim was to show that a commitment to exploitation's wrongfulness, and to liberal principles of justice and relational equality, motivates a case for state intervention in exploitation practices, through means such as prohibition, or more generally discouraging and delegitimising such transactions.

While the bulk of this thesis has considered surrogacy in relation to the concept of exploitation, and the wrongfulness therein, this final chapter will consider questions related to the embodied nature of commercial surrogacy, and its relevance to the wrongfulness of exploitation when it occurs. The nature of the labour is often abstracted away in philosophical examinations of surrogacy, which instead focus on the conditions

[478] An argument for prohibition, after all, requires modeling the perceived costs of prohibition, such as the potentiality of driving the practice underground (including a full analysis on the likelihood of this happening, based on analogous data), and considering these costs in relation to projected benefits. Rather, I have provided a solely philosophical treatment of the issue, based on a conceptual analysis of exploitation.

of the transaction, exploring features such as consent and price. In treating embodied labour as ordinary employment, the visceral and tangible role that the body and lived bodily experience play are obscured. Yet it seems the *nature* of what is being sold is of utmost importance. This is because there is nothing new about exploitation; our current economic order permits a vast number of exploitative arrangements, from zero hour contracts to poorly-paid cleaning jobs, which arguably do not attract the same level of philosophical debate. Yet practices such as commercial surrogacy, organ sales, and the use of human bodies for clinical research, seem particularly concerning.[479] Further, if the exploitation element were removed from surrogacy and organ sales, it is plausible that there would still be a special concern for this type of labour. The exploitation of embodied labour, when it occurs, therefore, could be seen as *particularly* pernicious, and worthy of greater philosophical and policy attention.

My aim in this chapter, therefore, is to consider what might be particularly pernicious, or wrongful, about the exploitation of labour that involves the human body in the intensive way that surrogacy unavoidably does. In order to do so, I defend body exceptionalism, which Nir Eyal defines as the view that "we should treat the body and perhaps other elements of the self differently than we do material resources."[480] In order to argue for the distinctiveness of embodied labour, I begin by interrogating Cécile Fabre's sufficientarian thesis, which implies that the body is no different from other material resources. Thus, in the manner that we redistribute wealth through taxation, body parts should also be coercively redistributed from the healthy to the sick, in order to obtain a minimum threshold of justice, including in the area of health.[481] Fabre's

[479] An argument will be provided in support of the claim that people seem to view labour that involves the human body, like surrogacy, differently to cleaning or working in retail.
[480] Nir Eyal, 'Is the Body Special? Review of Cécile Fabre, Whose Body Is It Anyway? Justice and the Integrity of the Person', *Utilitas* 21, no. 02 (June 2009): 233, https://doi.org/10.1017/S0953820809003513, p. 234.
[481] Cécile Fabre, 'Justice and the Compulsory Taking of Live Body Parts', *Utilitas* 15, no. 02 (July 2003): 127, https://doi.org/10.1017/S0953820800003915.

argument seems to imply that if you are committed to sufficientarianism, then the body has no special moral status. I argue, however, that even if we accept sufficientarianism, it's not obvious we should reject the special status of body rather than rejecting (her conception of) sufficientarianism. In support of this, I consider the social significance of the human body, and consider how this might impact upon our collective assessment of Fabre's proposals. In particular, I claim that the body holds peculiar salience, and that bodily invasion typically has harmful social effects. This critique of Fabre is intended to elevate the body as special, in order for me to make the claim that embodied labour can plausibly be viewed as distinctive, and thus as worthy of special concern.

Following my defence of body exceptionalism, I suggest that the special nature of embodied labour has normative implications. Embodied labour is descriptively and morally distinct from 'ordinary labour,' due its use of, and impact on, the body. I define embodied labour as labour where the body itself is the *site* of the labour. This means there is no clear demarcation between the service provided, and the point of the service provision – the body acts as both of these things. In particular, I consider why the exploitation of embodied labour seems to generate peculiar concern.[482] I give two arguments for this. Firstly, I suggest that this might have to do with a special kind of alienation that occurs when the body itself is the site of the labour. The body is used, or acted upon, and the agent's role is minimised. This requires a greater level of detachment, compared with other labour. Following Carole Pateman, I hold that this results in a more heightened loss of autonomy than other forms of labour.[483]

Secondly, embodied labour typically places further constraints on existing corporeal vulnerability, a universal state we all experience as embodied beings. This

[482] I am bracketing questions to do with commodification and whether the body ***ought*** to be for sale, though this is clearly a related concern. Rather, I start from the position that the exploitation of surrogates and kidney sellers seems to generate particular concern, and offer two explanations as to why that might be.

[483] Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

recognition of our universal corporeal vulnerability helps to explain why embodied labour is instinctively not the kind of labour we would like to undertake, probably due to the direct impact it has on the body, which is felt in a tangible way. As Anne Phillips notes, "bodies alert us to reciprocity…because all bodies need nourishment, all bodies feel pain…"[484] As humans, we are all inherently vulnerable, in that we have basic needs, and our body is our main and vital resource. The straining impact of embodied labour is seen acutely in the exploitation of already medically vulnerable populations, particularly the global poor. It is individuals from low socioeconomic backgrounds who typically enter into such contracts. The exploitation of embodied labour, therefore, seems particularly concerning, due to the way in which the vulnerability which serves as a pre-condition to exploitation, intersects with and exacerbates an individual's inherent corporeal vulnerability. Insofar as exploitation involves the unfair instrumentalisation of vulnerability, as I have argued it does, this unfair use is particularly concerning when it impacts so starkly on another type of vulnerability: our inherent frailty as human beings.

6.2 Body Exceptionalism

In this section I defend Nir Eyal's account of our deeply entrenched intuitive response to trespass into the body, and later use it to suggest what is particularly concerning about embodied labour. Eyal invokes the conception of body exceptionalism in his critique of Cécile Fabre's sufficientarian conception of justice. Fabre argues that if one thinks that the needy have a moral right, as a matter of justice, to the material resources they need in order to lead decent lives, then one must also be committed to conferring on the sick a moral right that the healthy supply them the body parts they need, as these are also

[484] Phillips, *Our Bodies: Whose Property?*, p. 37.

necessary to lead such a life.[485] This may, in some cases, require the forced extraction of bone marrow, corneas, blood, and kidneys, from healthy live donors. She concedes that although it has the moral power to do so, the state should not actually enforce these rights as a matter of policy, due to "public opposition."[486] Rather, she is arguing, for consistency's sake, that a commitment to redistribution of material resources for sufficientarian purposes necessitates a parallel commitment in regards to body parts.

Her argument proceeds as follows:

(P1) "Some individuals do not lead a decent life, for they lack material resources. In cases where they lack such resources through no fault of their own, for example through being born in a certain family or social class, they have a prima-facie right that those who have the material resources to lead a decent life help them, by way of taxation. More specifically, they have prima-facie rights to minimum income, housing, education, and healthcare."[487]

(P2) A decent life requires that one is able to achieve well-being.[488]

(P3) "We must have access to body parts in order to lead a decent life, let alone to survive."[489]

(P4) The distribution of body parts is largely a matter of brute luck.[490]

(P5) "In order to decide how much help they [the sick] can legitimately ask from the healthy, one must assess the costs they would incur were the healthy not to help them, as well as the magnitude of the burden the latter would have to shoulder if called upon to help."[491]

(C1) "…the sick have a right against the healthy that the latter give them some of their body parts."[492]

(C2) "***…one can deny that the body should be made inviolate***."[493]

For Fabre, therefore, (C2) follows from the truth of (C1), which follows from commitment to sufficientarian justice (P1-5). She could therefore be seen as prioritising sufficientarian justice over claims of bodily inviolability. I will argue the inverse of this, that bodily inviolability should be prioritised. Fabre claims that her sufficientarian

485 Fabre, 'Justice and the Compulsory Taking of Live Body Parts', p. 129.
486 Fabre, p. 131.
487 Fabre, p. 134.
488 Fabre, p. 132.
489 Fabre, p. 135.
490 Fabre, p. 140.
491 Fabre, p. 136.
492 Fabre, p. 130.
493 Fabre (emphasis added).

proposal would ***not*** violate the bodily integrity of the healthy, through a negative critique of three arguments asserting that it would. I dispute the arguments she offers to dismiss the prioritisation of bodily inviolability. Following this, I offer my own positive argument for bodily inviolability, building on the approach offered by Nir Eyal in his 'body exceptionalism' thesis. This defence of bodily inviolability and discussion of body exceptionalism is intended to give foundational support to my forthcoming arguments on the specialness of the body in relation to embodied labour. I use this section on Fabre and Eyal, therefore, as a theoretical primer, supporting the arguments I offer in section 6.3 (Embodied Labour). Crucially, the arguments surrounding bodily inviolability and body exceptionalism are intended to be independent albeit ***complementary*** to my later arguments on embodied labour, and do not logically entail them. Rather, I am offering various ways of thinking about the special nature of the body, in this chapter, with the aim that they will build upon and reinforce each other. I will not be disputing the premises in Fabre's argument, as it is not necessary for me to undermine the truth of her sufficientarian thesis to make my argument about the specialness of the body. Rather, even if Fabre's sufficientarianism is true, bodily inviolability is not something we should jettison.[494]

I will now focus on dissecting Fabre's assumption that the differences between material and bodily resources are irrelevant to sufficientarian justice. She identifies two possible objections to her view: that it violates bodily integrity to have your body parts coercively harvested, and that forced bodily redistribution interferes with peoples lives

[494] It is worth pointing out, however, that Fabre, somewhat controversially, argues that whether or not the sick require such a transplant is largely a matter of brute luck. This view faces the same objections levelled at luck egalitarianism and its distinction between brute and option luck. Such objections hold that it is often hard to distinguish between situations that have arisen as a result of choice or luck, due to the interplay between the two. This issue is particularly salient in the context of healthcare and transplants, as there are often multiple contributing factors to disease. Many diseases have both a hereditary *and a* lifestyle component, whereby an individual's actions can activate an existing pre-disposition. Indeed, the NHS links certain conditions, such as smoking-related bronchitis, and alcoholism-related liver disease, to lifestyle, a connection suggesting their "chosen" nature. It might present a problem to Fabre's thesis, therefore, regarding issues of fairness, if choice and responsibility were seen to play a role in an individual's need for a transplant.

much more than taxation.

6.2.1 Bodily integrity

Fabre's argument rests on the claim that the healthy do not have an absolute right to full bodily integrity. Recognising that it begs the question to merely assert that there is no relevant difference between material and bodily resources, Fabre proceeds to dispute one potential relevant difference: that redistributing bodily resources would violate bodily integrity.[495] Fabre's imagined objector can either hold that bodily integrity, "having control over one's body…is important in its own right…one has an absolute right that nothing be done to it, or with it, without our consent…"[496] or that the right to bodily integrity "serves other, fundamental values, and that it is therefore important enough to be protected by an absolute right."[497] She dismisses the first view, arguing that, "there is very little that can be said…it is unclear why our interest in bodily integrity should be given importance in its own right."[498] She therefore turns her attention to the second way of defending bodily integrity: by appeal to other values. Fabre offers two ways of formulating this objection, dismissing both, in order to claim that bodily integrity cannot be invoked as prior to her sufficientarian thesis.

First she considers the idea that "we need to have control over our body to lead a decent life," responding that "it is unclear why we need to have control over the *whole* of our body in order to lead such a life."[499] However, the idea that we need control over the *whole* of our body to retain bodily integrity (and therefore to lead a decent life) needs to be accepted by Fabre, for the sake of argument, as this is arguably what an absolute right

[495] Fabre, 'Justice and the Compulsory Taking of Live Body Parts'., p. 142.
[496] Fabre, p. 143.
[497] Fabre, p. 144.
[498] Fabre, p. 143.
[499] Fabre, p. 144.

to full bodily integrity necessary entails.[500] I will therefore respond to her more substantive point, which is that "in conferring on the healthy the absolute right to control what is done to their body, we would allow for a world where a number of people are left without the body parts that they need in order to lead a decent life: we would, in fact, undermine the very value from which bodily integrity gets its appeal."[501] To promote the value of a decent life, thus, might require undermining the bodily integrity of some individuals.

However, it could just as straightforwardly be responded that violating bodily integrity would undermine the very aim of a decent life underpinning her sufficientarian thesis. Where one person's bodily integrity is interfered with in order to help others who would be in an 'even worse' position, it could plausibly be held that the one who has had their bodily integrity interfered with is now in a worse position, given the primacy of the principle of bodily inviolability. There may thus be a trade-off between preserving a decent life for those who would have their body parts redistributed, and preserving a decent life for those who need those body parts. Thus, promoting the value of a decent life might sometimes require undermining the principle of sufficientarian justice, when this interferes with bodily integrity. Ultimately, it depends on which principle is prioritised, and Fabre is asserting the priority of sufficientarianism, through this negative critique of an absolute right to bodily integrity. It seems, however, that Fabre has not adequately specified what justifies the priority of sufficientarian justice – there is no positive argument as to why this should be prioritised.

Rather, Fabre offers a negative justification by disputing three potential arguments for prioritising bodily integrity. The third and final argument she considers is

[500] Conceptually, it simply wouldn't be a right to full bodily integrity if it allowed that part of your body could be violated non-consensually. Rather, this would be more like a right to partial bodily integrity. So if we are debating whether the right to full bodily integrity should be an absolute right, we need to start from the position that such a right covers control of the whole body.
[501] Fabre, 'Justice and the Compulsory Taking of Live Body Parts', p. 144.

that "in denying the healthy the absolute right to control what happens to their body, one fails to treat them as separate persons."[502] Fabre comfortably rebuts this objection by correctly interpreting Kant as suggesting that "we can treat one another as means provided we also treat one another as ends,"[503] and thus that "violating someone's bodily integrity does not, in and of itself, imply that one is not regarding them as having their own projects and attachments."[504] Persons are not solely being treated as a means, by her sufficientarian proposal, therefore. However, this is not how I would formulate the objection from bodily integrity. Rather, I will build upon Eyal's approach and appeal to the social significance of the body in order to support our intuitions surrounding non-consensual bodily invasion.

Thus, Fabre too readily dismisses the prioritisation of bodily integrity. I have suggested that two of the three arguments she provides do not do the work to dismiss bodily integrity outright. The argument that does work, her response to the Kantian objection, is not the whole story, as it is arguably not the best way to characterise the objection. Rather, I hope to retain the priority of bodily integrity by providing my own positive argument in section 6.2.3. I will suggest that bodily inviolability and the corresponding body exceptionalism are the values that should be preserved. Fabre's argument for the redistribution of bodies does appear to hold if you are committed to sufficientarian justice and you prioritise this over bodily integrity. However, it is not clear we should hold sufficientarianism as prior. Indeed, the implication – that kidneys, blood, and bone marrow, could all be forcibly extracted from live donors serves as *reductio ad absurdum* of an unbridled sufficientarianism. I will suggest that intuitive considerations and insights from sociology on the social significance of the body provide a compelling

[502] Fabre, p. 144.
[503] Fabre, p. 145.
[504] Fabre.

case for giving the body a special status, such that bodily integrity provides a side-constraint on the pursuit of sufficientarian justice.

6.2.2 Freedom from interference

Before, presenting my own positive thesis as to why bodily integrity should be preserved, it is worth pointing out that the other objection Fabre tackles (the idea that her proposal would interfere with people's lives too much, more so than taxation) seems to be reducible to issues surrounding bodily integrity. While these two objections are certainly distinct (you can be interfered with without having your bodily integrity violated, and vice versa), in this context, 'interference' seems to inescapably relate to bodily interference, in a way that strengthens the case for body exceptionalism. The final objection Fabre identifies is as follows:

> (A) If we know that we may be called upon at any time to give some of our body parts, we always have to factor that in in decisions we make to take a trip, go for job interviews, spend time with our children, etc., and as a result it is hard for us to introduce some sort of routine in our lives. (B) If our body parts are not ours to control but can be used by someone else, and if we are under a duty to make them available to the needy, we are under a duty, by implication, to maintain them well, and not to engage in practices which might damage them or render them unusable, and which might thereby render us ineligible as suppliers (such as unsafe sex, smoking, dangerous sports, etc.). (C) Moreover, simply to risk incurring the serious, sometimes life-threatening, consequences of a surgical operation would also prevent us from making mid- and longterm plans. In short, being held under a duty to transfer body parts to the sick would place unacceptable constraints on our autonomy. [505]

Fabre responds to (A) by asserting that disruption to lives can be minimised by giving notice of operations, several weeks in advance.[506] However, this does not seem to get to the heart of the objection. The objection to interference, I believe, relates to ***bodily*** interference, and thus to bodily inviolability, not mere inconvenience. Being given several

[505] Fabre, p. 146.
[506] Fabre.

weeks notice of when your body will be coercively interfered with, I believe, does not mitigate the over-hanging feeling of dread of not knowing when, or if, it will occur. And I believe this underlying angst is more to do with *bodily* interference than interference entailed by having no routine. Consider the following pair of cases:

(Case 1) The UK is under critical threat of terrorism due to a breakdown in relations with Ireland. In the wake of Brexit, a hard border has been imposed between the North and the South. A terrorist attack occurs almost every week in locations across the UK. In response, the government has implemented a compulsory search policy of all its residents. At some point, every resident in the UK will have to undergo a forced strip search, including a full body examination. Residents are given several weeks advance notice of the day of their forced body search. Paramilitary groups have invented explosives that can be stored in the human body without prematurely self-detonating. It is believed that two weeks notice won't be enough time for those involved to undergo the procedure to have the explosive surgically removed ***and*** make a full recovery, so giving such notice is not a hindrance to the government's plans, and will still serve to expose those involved.

(Case 2) The UK is under critical threat of terrorism due to a breakdown in relations with Ireland. In the wake of Brexit, a hard border has been imposed between the North and the South. A terrorist attack occurs almost every week in locations across the UK. In response, the government has adopted a policy of mass surveillance of its residents. It collects residents' Internet browsing habits and colludes with email providers to gain access to their emails. While having the power to access all data at once, it only accesses it on an individual basis. If an individual's data is going to be accessed, they are given several weeks advance notice of this, and will also have to bring in their laptop to be searched. The government has access to highly sophisticated software that is able to detect deleted files.

If the issue with Fabre's policy were merely to do with 'interference,' and concerns about maintaining "some sort of routine," then there would be no perceptible difference between the above two cases. The level of interference – that is, the inconvenience caused by not knowing exactly when this will happen to you (which Fabre purports to mitigate by giving advanced notice) remains the same in both cases. However, the intervention described in the first case, involving a full body search, ***seems*** morally worse.[507]

[507] It may be responded that the case of a forced full body search is not analogous to a forced transplant in the relevant sense, as your ***privacy*** is also invaded in a full body search. However, to this, I would respond

It seems, therefore, that when two cases are analogous in all relevant respects, except that one involves significant bodily violation, the one involving this violation is morally worse. Thus, it appears that there is something special about bodily interference after all, such that violations of bodily integrity feel worse than non-bodily interference. This would give support to the idea that the principle of bodily inviolability is something that should be preserved. Further, the freedom from interference objection that Fabre is attempting to dismantle seems to be better captured by the desire to be free from ***bodily*** interference, as this seem to be what is really at stake in her imagined scenario, thus giving support to the idea that there ***is*** something special about the body.

Let us return to Fabre's articulation of the interference objection. In response to objection (B) Fabre notes that the duty on the healthy to help the sick does not imply that they are under a duty to remain healthy in case people need their organs. Arguing by analogy, she suggests that the duty on the better off to give a share of their wealth to the poor, through taxation, does not imply that the wealthy then have to work to the best of their productive abilities, in case more people need resources in the future.[508] The healthy, once selected for a donation, and only then, must ensure that they will remain eligible on the day the transplant is to take place.

However, Fabre's response does not pay due attention to the peculiar nature of bodily resources. In reality, as the body is an inescapably terminal and vital resource, this forced operation is bound to have *some* felt effect on it. Prior general health will inevitably have some impact on how the operation goes, and thus on the donor's subsequent long-term health. Therefore, a prudent donor would feel compelled to look after their health, in order to ensure optimal recovery after the operation. It could also impact upon an individual's anxiety levels if they believed they were not living as healthily

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by questioning how your privacy remains intact when you are forcibly lying unconscious on a hospital bed having had a part of your body extracted, and are at the whim of doctors. Both situations involve significant infringements of privacy.

[508] Fabre, 'Justice and the Compulsory Taking of Live Body Parts', p. 147.

as they could, knowing that a forced extraction was looming in the background. The felt requirement to stay healthy, therefore, is *not* best characterised as a duty to keep our body healthy so as not to make us ineligible as a supplier, as Fabre suggests. Rather, the requirement to stay healthy is concerned with helping *oneself*, if one were called upon. An operation plausibly has more physical and psychological impact on you than redistributive taxation does, immediately and perceptibly, at least. A concern to maintain one's health in anticipation of a forced operation, therefore, is plausibly more pressing than a concern about taxation, in an individual's psyche. These disruptions and concerns more appropriately speak to the issue of ***bodily*** interference, therefore.

6.2.3 The positive thesis for body exceptionalism

Thus far I have offered a negative critique of Fabre's arguments wherein she seeks to dismantle an absolute right to full bodily integrity. To recall, Fabre makes the argument against such a right through a negative critique of three potential ways of justifying it as an absolute right. I have responded to these objections, and now seek to present a positive thesis as to why such a right to bodily integrity should be preserved, regardless of the truth of sufficientarianism.

My argument has to do with the specialness of the body. I suggest that acts involving the body are of a peculiar nature, in a way that merits their special treatment, including the preservation of a right to full bodily inviolability. To argue this, I draw upon our intuitions surrounding the body. To buttress these intuitions, I explore the social significance of the body, drawing upon insights from sociology, which would serve to explain, and go some way towards justifying, the reactions we have about bodily invasion. Finally, I argue that in light of this, non-consensual bodily interference would

plausibly have a negative social impact. The effects of bodies being coercively interfered with are far-reaching, therefore, and support the claim the body should be inviolate.

6.2.3.1 The intuition

In support of my claim that bodily inviolability should be preserved, even if we accept Fabre's sufficientarian thesis, I draw upon the intuitions that we seem to have about bodily invasion. I have already provided one set of cases to draw out this intuition, showing the increased resistance we would plausibly have to a forced body search, compared with a forced search of our data. I will now provide another case to give intuitive support to the specialness of the body.

Intuitively, it seems that it would be (particularly) wrong to force embodied labour, for example, as compared with other types of 'ordinary' labour that we routinely do force.[509] To recall, embodied labour, such as commercial surrogacy, is identified as the type in which the body is the site of the labour; it is both the service and point of service provision. So, let us turn to the case and the intuition it supports:

> Highly economically developed nation-states such as the United Kingdom provide welfare benefits to unemployed adults. Such benefits are intended to support an individual until they can take up employment, and are provided under the strict condition that individuals actively seek such employment. Jobseekers are sanctioned, and their benefits withdrawn, unless they are able to demonstrate job-seeking activity. Claimants are also sanctioned and threatened with withdrawal of welfare if they refuse to take jobs they are offered, or fail to apply for a job if advised to do so. As the government becomes more restrictive of welfare, and more forceful in 'getting people to work,' various controversies have emerged surrounding the nature of the labour on offer to jobseekers. Many would agree that certain jobs should not be conscripted. It seems uncontroversial to suggest that the state should not offer commercial surrogacy, prostitution, and paid clinical research participation as potential job options to the unemployed,

[509] I am not referring to force in the structural or Marxist sense, wherein all labour under capitalism is considered to be forced. Rather, I suggest that the labour that currently imposed upon jobseekers under our current benefits system is forced, without appealing to Marxism.

> for example. It would plausibly inspire revulsion if the state were to revoke an individual's benefits if they did not take up such offers of employment.

It seems plausible, therefore that the following belief set is widely held:

(1) the state should not force jobseekers into clinical trials, commercial surrogacy, and prostitution

(2) the state may permissibly force jobseekers into other employment areas, such as retail.

It is also worth noting that the possibility of the state offering such jobs is not that far removed from reality. Indeed, my motivation for outlining this concurrent pair of beliefs stems from the public outcry over recent actions of the UK Department of Work and Pensions. The government faced criticism for its youth contract which allows employers to claim wage incentives of up to £2,275 for each new recruit aged 18-24 who has been receiving benefits for at least six months through Jobcentre Plus.[510] Employers that are allowed to claim government money under this scheme include strip clubs, massage parlours, and pornography producers. Strip clubs and porn studios are ***not allowed to claim the subsidy for actual performers***, but the establishments can receive the cash for any camera staff, bar staff, door staff, receptionists or cleaners they employ. So, there appears to be a tacit belief that sex work should not be amongst the jobs encouraged and subsidised by the government, but other roles in sex work institutions may be. This is reminiscent of another real life case in which jobseekers using the

[510] 'Strip Clubs, Massage Parlours and Porn Films Eligible for Government Subsidies | The Independent', accessed 28 October 2017, http://www.independent.co.uk/news/uk/home-news/strip-clubs-massage-parlours-and-porn-films-eligible-for-government-subsidies-9131999.html.

government's jobs website, Universal JobMatch, received messages encouraging them to apply for jobs that were actually ***calls to participate in clinical trials***.[511]

These cases suggest two things. Firstly, the outcry over prostitution or clinical trials being suggested to jobseekers – compared to the silence surrounding the myriad 'ordinary' jobs that are imposed without criticism – suggests that certain jobs are viewed differently in the public imagination. Secondly, it appears that even the government would stop at imposing certain jobs – it promptly withdrew the clinical trials advertisements, and jobseekers are encouraged only to take up camera, bar, and receptionists' jobs in the sex industry, rather than performer roles. These two observations support my hypothesis that the aforementioned two beliefs are held concurrently, and that the explanation might have to do with the salience of the body. It seems, therefore, that certain jobs cannot be conscripted, and that most people commonly share intuitions surrounding this. This could plausibly be because forcing these jobs would involve non-consensual bodily invasion, provoking widespread and deep discomfort, indicating that there is something special about the body.

6.2.3.2 Nir Eyal's body exceptionalism

It seems, therefore, that intuitions surrounding the body are particularly entrenched and inevitable. This is the very point made by Nir Eyal in his compelling critique of Fabre's account, and defence of body exceptionalism. His argument for body exceptionalism, and thus objection to Fabre's unrestrained sufficientarianism, is that "people usually see trespass into a person and into objects that they associate with a person – especially into

[511] 'Jobseekers Encouraged to Take Part in Clinical Trials by Government Jobs Website', *Scriptonite Daily* (blog), 11 September 2013, http://www.scriptonitedaily.com/2013/09/11/governments-online-jobsearch-posts-jobs-encouraging-desperate-uk-poor-into-clinical-trials/.

a person's body – as utterly disrespectful towards that person and her autonomy."[512] This consideration counts heavily against Fabre's proposal, he argues. That we have such intuitions about bodily invasion means that invading the body is likely to cause psychological harm, either to the individual, or to third parties if not the individual themselves. I have suggested in the above discussion that our intuitions surrounding the body, in the context of embodied labour, themselves directly suggest that the body is significant/special. As well as this, I will defend Eyal's contention that our intuitions surrounding the body have another role: they support the idea that bodily invasion causes psychological harm. I defend this approach through a discussion on the social significance of the body, which will serve to flesh out and support the claims made by Eyal surrounding bodily invasion and disrespect.

In making his argument for body exceptionalism, Eyal defends the view that there appears to be a 'prophylactic membrane'[513] that surrounds our bodies, whereby there are deep and widespread perceptions about disrespect associated with bodily invasion. Leaving aside the question as to whether or not we *should* have this revulsion towards bodily violation, the point is we do seem to, and this has real implications. Forced kidney extraction involves trespass into the body that most of us are likely to view as disrespectful (due to intuitions surrounding bodily invasion). Thus, the widespread perception that an act or policy is disrespectful of someone is *enough to jeopardise that person's self-respect, and affect third party perceptions of that person*. The intuition regarding invasion therefore has an instrumental effect, in terms of jeopardising self-respect and/or causing disrespect.

It is irrelevant whether or not organ confiscation actually is disrespectful. It is enough that it is merely ***seen*** that way: "Actions broadly seen as disrespectful of someone

[512] Eyal, 'Is the Body Special?', p. 237.
[513] A term borrowed from Ronald Dworkin, who argues that we should draw around the body 'a prophylactic line that comes close to making [it] inviolate, that is, making body parts not part of social resources at all.'

are likely to be seen in that way by that person as well and to undermine her opportunity for self-respect. Whether or not organ confiscation is truly disrespectful, Fabre may have to concede that its widespread and intractable perception as a humiliating violation counts heavily against it, because it can thwart opportunities for self-respect."[514] Further, acts broadly seen as disrespectful of someone may impose severe 'dignitary harms' on that person and violate Fabre's sufficiency principle even without thwarting an individual's own self-respect. This is because such acts could reinforce third parties' disrespectful feelings, "provoking stigma or dehumanization."[515] Indeed, I argued in the previous chapter that permitting exploitation that is mutually advantageous ignores or misunderestimates the impact that such transactions can have on third party perceptions of a) exploited people, encouraging negative perceptions of them and b) the kind of societal arrangements that are permissible, supporting a predatory view that promotes the use of, rather than help for, the needy.

6.2.3.3 Social significance

It is instructive at this point to look to sociology for some insights into the social significance of the body, in order to support the contention that forced invasion into the body would a) plausibly have this intuitive reaction and b) would have these wider societal implications in terms of how people view each other's bodies.

The sociologists Mary Kosut and Lisa Jean Moore note that the body "is the ultimate division in sociology between structure and agency…the body is our first

[514] Eyal, 'Is the Body Special?', p. 238.
[515] Eyal, p. 239.

introduction to the performance of the self and identity"[516] suggesting that bodies have special semiotic value. Further, according to Pierre Bourdieu, bodies reproduce social structures, and become imbued with marks of social class within society, again emphasising the power to ***signal*** that bodies have. For example, the working class tend to develop instrumental relations to their bodies, viewing them as a means to being able to work, for example, while the dominant classes have the time and resources to treat the body as a project, focusing on cultivating health and/or a physique.[517]

Having a body also alerts us to the significance of other people's bodies. This is something I use to explain why the exploitation of embodied labour seems more pernicious than 'ordinary' labour, in the next section. The idea here is that our own experience of embodiment might be what allows us to empathise with others. Our vulnerability to pain, necessarily felt in the body, is universal. Realising this unlocks empathy. Anne Phillips notes "bodies matter; and mentally erasing them is one of the ways we erase our commonality."[518] [519]Judith Butler also identifies normative implications as arising from the body. For Butler, the body provides a point of departure for thinking about responsibility because it "is a social phenomenon: it is exposed to others, vulnerable by definition. Its very persistence depends upon social conditions and institutions, which means that in order to "be," in the sense of "persist," it must rely on what is outside itself."[520]

Thus far I have identified three ways in which the body is socially significant: (1) it is our route to performing the self and identity, (2) it reproduces social structures, thus holding symbolic power, (3) it alerts us to the significance of other bodies, in a way that

[516] Mary Kosut and Lisa Jean Moore, 'Introduction: Not Just the Reflexive Reflex: Flesh and Bone in the Social Sciences', in *The Body Reader: Essential Social and Cultural Readings*, ed. Mary Kosut and Lisa Jean Moore (New York: New York University Press, 2010), p. 2.
[517] Pierre Bourdieu, 'Sport and Social Class', *Information (International Social Science Council)* 17, no. 6 (1 December 1978): 819–40, https://doi.org/10.1177/053901847801700603.
[518] However, she also recognises that the body is also what can divide, in that it produces "the almost visceral disgust that sustains racism, misogyny, homophobia, and so many hatreds of the other." p. 109.
[519] Anne Phillips, *The Politics of the Human* (Cambridge: Cambridge University Press, 2015), p. 109.
[520] Judith Butler, *Frames of War: When Is Life Grievable?* (New York: Verso, 2009).

can have normative implications. I will now build upon these insights to suggest how forced invasion might have the societal effects discussed earlier.

It was argued earlier that due to intuitions surrounding the body, we are likely to view trespass into the body as disrespectful. Thus, the widespread perception that an act or policy is disrespectful of someone is *enough to jeopardise that person's self-respect, and affect third party perceptions of that person*. Even if an individual themselves is not affected, that enough people have this intuition means that such acts will have social import. Thus, Fabre's proposal of forced transplantation could provoke stigma or dehumanisation by third parties. In support of this it is worth considering sociologist Erving Goffman's classic work on stigma. Stigma, Goffman suggests, is embarrassing not only for the stigmatised person but for those who are confronted with the stigma and have to react to it. A man who is experiencing incontinence after an operation, for example, is therefore expected to conceal this, as the recognition of loss of bodily control is embarrassing for the observer.[521] The nature of stigma is that the observer displays feeling, as well as the sufferer, due to societal demands on the body (such as bodily control). Analogously, even if an individual themselves does not experience a loss of self-respect after Fabre's forced organ extraction, intuitions surrounding the body and wider societal demands are such that others' perceptions of that individual will be affected.

6.2.3.4 Fabre's body exceptionalism

In this final argument for preserving bodily integrity, I suggest that Fabre herself may have fallen foul to a sort of body exceptionalism, inadvertently appealing to the special moral status of the body. This potential concession serves to illustrate the strength and universality of our intuitions towards the body, supporting the claim that it should be

[521] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin Books, 1963).

inviolate. Fabre outlines a potentially unpalatable implication that is thought to follow from the claim that the sick have a right to some of the body parts of the healthy. Regular sexual intercourse is also one of the things most human beings need in order to lead a decent life. Many people suffer from severe sexual deprivation, however, as they cannot get sex by meeting potential partners in the usual ways. They might be severely disabled, very ill, or too shy to attract sexual partners, for example. If the healthy are under a duty to make available some of their body parts to the sick on the grounds that the sick need those body parts in order to lead a decent life, then by the same token, it seems that individuals are under a duty to make themselves available to the sexually deprived whose life is not, for that reason, decent.[522]

Fabre maintains that this is different, however, because the act of making our organs available to someone merely involves divesting ourselves of the organ, "and although the medical procedure whereby the organ is removed is invasive of our body, at no point are we required to subject ourselves to directly interacting, physically, emotionally and mentally, with him, through the act of transfer itself."[523] By contrast, sexual intercourse consists in "making one's body itself available to someone else and in interacting, in the most intimate way possible (*physically*,[524] if not emotionally), with that person." [525] Therefore, to require that an individual engages in "such intimate relationships without their consent would constitute too much of a violation."[526] Here, Fabre seems to be implying that the *physicality* of the act of sex (plausibly its use/invasion of the body) plays a normative role in our collective evaluation of it. Indeed, she states that sex is making one's *body* available to someone. She seems to be conceding that while (physical) invasion of the body is not alone sufficient for special moral significance, it is

[522] Fabre, 'Justice and the Compulsory Taking of Live Body Parts', p. 141.
[523] Fabre.
[524] (Emphasis added.)
[525] Fabre, 'Justice and the Compulsory Taking of Live Body Parts'.
[526] Fabre.

relevant to it, i.e. in combination with some other factor, which she identifies as intimacy. The body therefore does generate ***some*** significance. Fabre has thus opened herself up for critique from an approach that considers bodily use, in combination with some other factor, to explain why her organ extraction policy is also wrong.

Why mention the body at all if there were not something special about its use in this act? If the body were not of special concern, it would seem that she would not feel the need to make any statement on the physicality of the act. This indicates that she is operating with a latent body exceptionalism, which deals with making exceptions to specific types of bodily invasion i.e. those which are also invasions of intimacy. She is thus acknowledging that the body/physical violation can generate an exception to her thesis, in some way. Arguably, therefore, she has not succeeded in showing that differences between the body and material sources are entirely irrelevant to matters of justice – as she is highlighting the relevance of the physicality of the act of sex as a constraint on its redistribution.

Perhaps, in order to show that it is not just the *bodily* involvement of sex that sets this good apart from others, Fabre continues that "sex, for most people, is a rather complicated affair; it does not merely consist in the mutual use of bodies, but is *tightly bound up with our sense of ourselves, our self-esteem, our perception of others.*"[527] Here I have two points of rebuttal. If sex is not just to do with the mutual use of bodies, but is rather about our self-esteem, how exactly does it derive this special justice-exempting other meaning? After all, it seems plausible to think of other acts, that do not involve the body, but which also relate to our sense of selves, self-esteem, and perception of others, which may not be exempt from redistribution. For example, working as a teacher (or, plausibly any job that one is interested in) is plausibly related to our sense of selves, self-esteem, and perception of others. Yet as employees of the state, teachers are consistently

[527] Fabre, p. 142 (emphasis added).

redistributed by the state, to whichever school is in need, a phenomenon seen most acutely with supply teachers. As we see nothing wrong with teachers being employed or "redistributed" in this way, it would be the physical nature – and so body exceptionalism – of sex that sets it apart.

Secondly, the view that sex is important because it is bound up with these psychological feelings about ourselves and others seems to be a rather prescriptive way of viewing it. For some people, sex simply does not have the connotations she describes. Characterising it in this way also has the implication that if someone did not view sex in this way – perhaps someone with an intimacy disorder, such as a sex addict – then it would be justifiable to force them to engage in sex with the sexually needy, as for them it would not be bound up with their sense of self. It remains, however, that this would not be justifiable. This is either because the physical element of the act is enough to render it different, or because the physical and psychological elements are jointly sufficient in rendering it outside the bounds of justice, again indicating *some* importance placed on the body by Fabre. This importance placed on the body, however minimal, is enough to leave room for debate about where to draw the line regarding whether an act is too invasive on the body to be redistributed as a currency of justice. Any acknowledgement of the significance of the body by Fabre allows the debate to be shifted to *which* bodily acts exactly would be exempt, rather than *whether* they can be, as she originally intended.

It seems, therefore, that the intuitions surrounding the body are so entrenched and inevitable that its violation in the way Fabre suggests will plausibly have negative effects. In section 6.2.3, therefore, I have argued against Fabre's prioritisation of sufficiency over bodily inviolability. I have done so by defending Nir Eyal's view that the body is special, because we have intuitions surrounding it, such that invasion of it would have negative personal and/or social effects. I have buttressed Eyal's approach by providing support for this intuition through showing that most plausibly hold the view

that certain jobs, such as surrogacy, kidney selling, and clinical research participation, should not be conscripted, and that this is plausibly due to the special way in which we view the body and its invasion. Following this, I also found support for his approach through sociological insights on the body. Finally, I suggested that Fabre herself may be operating with a latent body exceptionalism in her argument against the forcible redistribution of sexual activity. I will now come to explain what bearing this way of thinking about the special status of the body has on the treatment of embodied labour.

6.3 Embodied Labour

While all jobs involve the body in some sense, in that we are embodied beings that undertake labour using our bodies, it seems that certain jobs are distinctly concerned with the body. Anne Phillips contends that feminist theory's focus on recognising ourselves as embodied beings prevents us from thinking that the body provides a clear demarcation for telling us what ought to be for sale.[528] After all, if all labour involves the body, then it cannot be the body that dictates whether or not an activity is problematic. Either all activities are problematic because of their use of the body, or none are. Similarly, Martha Nussbaum observes, "all of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body. Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators—we all do things with parts of our bodies for which we receive a wage in return."[529] She makes this comparison in order to remove the stigma from prostitution, seeking to argue that use of the body cannot be what differentiates it as a profession.

[528] Phillips, *Our Bodies: Whose Property?*, p. 5.
[529] Martha C. Nussbaum, '"Whether from Reason or Prejudice": Taking Money for Bodily Services', *The Journal of Legal Studies* 27, no. S2 (1998): 693–723.

I maintain, however, that it is still possible to talk about a difference in degree, in terms of how much labour makes use of the body. A footballer uses their body to a greater degree than a sedentary office ordinarily would. However, I also would like to invoke a difference in ***kind,*** between jobs, in terms of ***how*** they involve the body. I suggest that embodied labour is a type of labour where the body itself is the ***site*** of the labour, and that this raises unique considerations. To be clear, I do not dispute that other jobs, that do not constitute embodied labour, can also be problematic. Indeed, there are myriad jobs that pose health risks, or are exploitative, and these should also be condemned. Rather, my aim here is to explore what is peculiar about embodied labour, in that it does appear to provoke particular concern. As discussed in section 6.2.3.1, there do appear to be particular intuitions surrounding jobs that involve the body. Indeed, most people plausibly would hold that commercial surrogacy, kidney selling, and clinical research participation, should not be conscripted. Contrastingly, 'ordinary' jobs, in retail, or cleaning, say, do not provoke the same reaction. My aim is not to justify this discrepancy in thinking about different jobs. Rather, it is to explain why it might be the case: the particular salience of the body.

I therefore offer two distinct explanations as to why we might (plausibly, albeit perhaps erroneously) view embodied labour as more concerning, and thus the exploitation of such labour as more pernicious. This would serve to explain why there appears to be a particular concern for kidney sellers and surrogates, over low-paid office workers. To be clear, I do not mean to make the claim that embodied labour is necessarily more problematic than ordinary labour. Rather, I believe many of us hold intuitions that it is. And I am interested exploring how these intuitions seem to generate particular concern for the exploitation of this labour. I offer two such ways in which contracts involving embodied labour might be considered particularly problematic, compared with 'ordinary labour.' The first is that they appear to involve a heightened

loss of autonomy, which has parallels with selling oneself into slavery, and are therefore something we cannot appropriately consent to. Embodied labour, therefore, might present a starker sense of the loss of autonomy than is present in most employment contracts. This is not to claim that there ***is*** necessarily a greater loss of autonomy in such contracts. Rather, the loss appears more striking due to the relinquishing of the body. This still has relevance in terms of how such jobs are viewed in the public imagination, and how third party perceptions of bodily violation have tangible social effects. Secondly, I suggest that embodied labour, with its focus on the body as the site of the labour, puts a strain on our universal corporeal vulnerability. This is the idea that, as humans, we are all inherently vulnerable, in that we have basic needs, and our body is our main and vital resource. The use of, and particular impact on, the body, which we are able to imagine in a visceral way, generates particular concern.

6.3.1 The distinctiveness of embodied labour

The distinctiveness of embodied labour is notoriously difficult to determine. It seems that while such labour makes particular use of the body, it cannot be mere bodily use alone that distinguishes it. While I am sympathetic to Phillips' observation that "markets in sex or reproduction occupy the outer edges of a continuum that is, in some way, a feature of all labour markets,"[530] I disagree, however, with the implication that "it is not that selling sex or one's capacity to bear a child is so entirely distinct from any other kind of paid employment."[531] Indeed, I suggest, there is a difference in kind, between surrogacy and 'ordinary' labour.

How is embodied labour distinct, therefore? Phillips considers Pateman's distinction between activities to which the body is incidental, and those for which it is

[530] Phillips, *Our Bodies: Whose Property?*, p. 10.
[531] Phillips.

the whole point. She suggests that this distinction seems incomplete, as "we are happy enough for people to make a living through many activities to which the body is the point: dancing, for example, or professional football."[532] She also dismisses the potentiality that cases like surrogacy are more troubling instances of labour because "intrusions deep into our bodies are more troubling to our sense of our selves than those that merely touch the surface."[533] Phillips considers this to be unconvincing, as it rests on a controversial assumption about a core "deep" self, surrounded by a "contingent" periphery. However "the body being the whole point" and "involving deep intrusion into the body" are not how I choose to characterise embodied labour. I suggest that it can be defined as labour where the body itself is the *site* of the labour. This means there is no clear demarcation between the service provided and the point of service provision – the body is both of these things. This is why organ sales, commercial surrogacy, and payment for research participation,[534] are all instances of embodied labour on my analysis, and dancing, modelling, and footballing are not. A dancer, model, and footballer, while relying strongly on their bodies, still provide a distinct service outside of themselves and their bodies. So, it is not just that 'the body is the point,' but rather that with embodied labour it is the manipulation of the human body itself, and the bodily effects that follow, that constitute the labour. This has the effect of minimising the agent's role, which I will argue is relevant to the way in which this labour is particularly subordinating, constituting a starker loss of autonomy.

At this point, some counterexamples might be levelled to my definition of embodied labour. One such example might be the colonoscopy artist, a hypothetical occupation Martha Nussbaum develops to explore the consensual invasion of one's

[532] Phillips.
[533] Phillips.
[534] It might be interjected that this is only true for physically invasive research rather than psychological research. However, even in psychological research, neurological effects have a physical manifestation in the brain. Insofar as the mind has neural correlates, it is still the body that is being acted upon.

bodily space, in order to suggest that if we do not consider this role debasing, we should think the same about prostitution. The colonoscopy artist "uses her skill at tolerating the fiber-optic probe without anesthesia to make a living…she permits an aperture of her body to be penetrated by another person's activity…far more deeply penetrated than is generally the case in sex...to test untested instruments."[535] The role involves some bodily risk. Would this be embodied labour, on my analysis? It seems that it would; the body is the site of the labour, with its intentional manipulation constituting the whole service. The service created is the bodily effects that follow, reinforcing the lack of division between the service and point of service provision. I do not see a problem with accepting this hypothetical case an example of bodily labour, as I am not citing bodily invasion as the problematic upshot of embodied labour [as Nussbaum intends the point to be], but rather, it is the relative lack of agency[536] required on the part of the labourer, that characterises such labour.

On this point, it might be levelled that prostitution counters this definition of embodied labour. After all, a sex worker is likely to be undertaking various actions to ensure a quality service, thus countering the idea that minimal agency is involved in embodied labour. I am uncertain about how well sex work fits with my analysis of embodied labour, therefore, and am willing to exclude it or remain agnostic for now. However, there is plausibly a gradient of how passive and active a sex worker can be. Sex work might range from minimal participation, in the manner of a blow up doll, to a more involved service, including dinner and the pretence of courtship. The more services a sex worker provides, the more she may be able to charge. The fact that there is this range does not preclude the idea that prostitution can, at its most basic level, involve the passive relinquishing of a body. It seems plausible to opine that the body and its natural functions can suffice in delivering the service, without much active involvement from the

[535] Nussbaum, "'Whether from Reason or Prejudice'", p. 701.
[536] I am not considering the ability to withstand pain as agency.

sex worker. However, due to the possibility of considerable agency from the sex worker, I do not count this as an instance of embodied labour. It might share overlapping features, and may be problematic for other, or similar reasons, but it will be excluded for the purposes of my analysis, which focuses solely on the body being acted upon.

Finally, embodied labour should also be distinguished from hazardous labour, such as mining and oilrig work. Here the effects upon, or risks to, the body, could be just as great as embodied labour (and so the labour may be equally or more problematic for this reason). Here, however, the body is not acted upon. Rather, involving significant agency, the body is used as a tool towards completing another task. The body itself is not the task. It is therefore useful to make the distinction between labour that makes demands on the body, such as hazardous labour, and embodied labour, where the body is both the site and service. So while a considerable number of professions make demands on the body, which people tolerate in exchange for income, security, or interest, not all do so in the manner of embodied labour. I do not seek to suggest that embodied labour is the only problematic labour. Rather, it is problematic in a specific way, and seems to generate peculiar concern, and I offer two possible explanations for this, stemming from its embodied nature. While we ought to be concerned with hazardous labour as well, we ought not necessarily be concerned with it for the same reasons.

6.3.2 Loss of autonomy

One of the ways in which the exploitation of embodied labour seems to generate peculiar concern, I believe, has to do with a perceived greater loss of autonomy. There appears to be a special kind of alienation, occurring when the body itself is the site of the labour. This, I suggest, is because the body is used, or acted upon, and the agent's role is

minimised. Thus, it requires a greater level of detachment, compared with other labour. Further, in treating embodied labour as ordinary employment, the visceral and tangible role that the body and lived bodily experience play in the labour are obscured. Building upon Carole Pateman's critique of all labour contracts, I suggest that embodied labour contracts pose a heightened form of subordination.[537] Prior to making this case, I believe it necessary to paint a rich picture of what pregnancy and surrogacy involve, in order to support the claim that such labour is plausibly perceived as particularly onerous, detaching, and subordinating.

Normally in discussions on the ethics of commercial surrogacy, the nature of the labour is abstracted away. Discussions surrounding whether surrogacy is exploitative are idealised and tend to ignore the tangible aspects of what this labour involves. Embodied labour is treated as an ordinary job, like any other. The dominance of liberal contract theory has meant that *consent* is prioritised as the barometer of the permissibility of a transaction, as opposed to what the transaction itself involves. Even if there were harms associated with a transaction, as there so often are in embodied labour cases,[538] if it has been consented to, and the individual has decided for herself that these harms are outweighed by the perceived benefits, then this is seen to be enough to deliver a verdict on its permissibility. Further, the dominant western idea of dualism – that we are selves distinct from our bodies, has allowed for the notion of property in the body to take hold, as the body is viewed as a separate alienable entity that can be subject to contract.

I seek to counter the abstraction by drawing upon Iris Marion Young's essay, "Pregnant Embodiment: Subjectivity and Alienation," where she suggests that the pregnant subject experiences her body as both herself, and not as herself, as it goes

537 Pateman, *The Sexual Contract*.
538 Indeed, I suggest harm is built into the nature of the Indian commercial surrogacy industry, in Chapter Four.

through various changes, and gives rise to another life.[539] Young's account is useful in this context for the rich picture it provides of the pregnant woman's lived body experience. Young discusses the bodily alienation felt by pregnant women, whose body is subject to rigorous control by the practices and institutions of medicine.[540] Surrogacy could be seen as a heightened case of this, as this pregnancy is not even for the surrogate herself, and so plausibly results in further alienation.[541] A surrogate has to go undergo heavy medical intervention in order to be prepared for an artificial pregnancy; this includes: birth control pills, hormone shots, oestrogen injections, progesterone injections, with side effects that include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light-headedness and vaginal irritation. Pregnancy, let alone artificial pregnancy, is an intense bodily experience, and so treating surrogacy as labour like any other ignores this crucial lived body experience.

Young continues that "the pregnant woman experiences herself as a source and participant in a creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she is this process, this change."[542] This illustrates how the body itself is the site of the labour; the uncontrollable bodily function of pregnancy *is* the labour. Embodied labour is therefore distinct from ordinary labour where the individual provides a service using the body, because the body, or its natural function, *is* the service. Crucially, this impinges upon the level of agency required. Although it might not merely "wash" over her, pregnancy does occur with minimal participation from the labourer. It is a strange kind of labour. Even if the pregnant woman were to do nothing in the nine months, the labour would still be accomplished, underlining that it is the body that is fundamental to the labour, rather than a worker's agency. There could be no further

[539] Iris Marion Young, 'Pregnant Embodiment: Subjectivity and Alienation', in *On Female Body Experience* (Oxford: Oxford University Press, 2005), p. 46.
[540] Young, p. 47.
[541] I do not wish to endorse the prescriptive position that all women view pregnancy this way, but am merely seeking to introduce some depth and description to draw attention to what this labour involves.
[542] Young, 'Pregnant Embodiment: Subjectivity and Alienation', p. 54.

action required by the surrogate after she relinquishes her body. Indeed, this is exemplified by the recent controversial case in which a brain dead woman was kept alive for seven weeks in order for her baby to be safely delivered by C-section.[543] The fact that a surrogate's role can be relegated in this way supports the idea that it is the body itself that is the labour, as opposed to an agent providing a service.

Carole Pateman argued that every contract based on "property in the person," including all employment contracts, gives one individual control over another's use of his or her own body, and therefore culminates in civil subordination.[544] This occurs whether they are "freely consented to" or not. Locke, and other early contract theorists, attempted to distinguish a wage labourer from a slave in terms of the duration and content of the contract: in wage labour, the employer enjoys only a "temporary power" over the use of particular, contractually specified, capacities of the worker. For Pateman, however, it is a fallacy that labour power can be separated from the person of the worker. In contracts in which an individual sells their labour power, therefore, because a worker cannot be separated from their capacities, they sell command over the use of their body and their self. She therefore rejects all contracts as invalid and unequal in the sense of being akin to slavery.

It may well be that the way in which every labour contract reduces autonomy is problematic. Whether this is the case or not is not something I wish to tackle in this thesis. I do believe, however, that her argument can be more comfortably applied in the case of embodied labour contracts, such that they provide a heightened example of the problem inherent to labour contracts. It appears to be clearer in the case of embodied labour that the labour is inseparable from the self. The idea that the worker is an example of a free labourer is dependent on the claim that it is it is the labour power that is the

[543] 'Karla Perez: Brain Dead Pregnant Mother Kept Alive for Two Months To', The Independent, 1 May 2015, http://www.independent.co.uk/news/world/americas/karla-perez-brain-dead-pregnant-mother-kept-alive-for-two-months-to-save-her-baby-10219153.html.
[544] Pateman, *The Sexual Contract*.

commodity, not the worker. But it seems more plausible to hold that the worker *is* the commodity, in embodied labour, given the role the body plays as the site of the labour, and the lack of skill or capacity required in cases like surrogacy. At least ordinary labour appears to pay recognition to an individual's selfhood, in the way it requires agential action and response. Employing the body in the way that embodied labour does, however, appears to deny self-determination and the necessity of the self, through removing agency.

Embodied labour, therefore, appears to provide a heightened example of the loss of autonomy and civil subordination that Pateman argues is present in all labour contracts.[545] It would seem that although all jobs require some level of detachment from the body and emotions (in order to focus on the task at hand, even though one really might want to be elsewhere), embodied labour, due to the particular use of the body, and lack of involvement of agency, requires a higher level of detachment from self. It is a more extreme case of pretending that you are not your body/self.

It may be objected that an individual may plausibly choose to enter into such an arrangement, and should be free to do so. As well as this, they may not themselves necessarily experience a loss of autonomy through the sale of their body, but may experience enhanced autonomy through the opportunity to earn money this brings. This objection is a regurgitation of the liberal contract model's focus on choice and consent. I suggest that 'choice' is not the only or most important condition of autonomy – there are certain material conditions that affect the structure of people's choices, making choices socially constructed, and not necessarily free, or, beneficial. Indeed, in the previous chapter I made the argument that when people's choices are the result of prior injustice, and result in disadvantage, they may plausibly be interfered with. Further, just as it would undermine the very significance of freedom to allow someone to sell themselves into

[545] To reiterate, I am not claiming that embodied labour necessarily involves a greater less of autonomy, just that the loss of autonomy appears starker, due to the removal of agency.

slavery, the very significance of autonomy is undermined through a transaction that is built upon a denial of agency.

Moreover, it would be telling to determine how many people would still "freely choose" embodied labour after being given an adequate range of other options. The fact that most surrogacy is undertaken by the world's poor for the world's rich suggests the 'free choice' seems to be constructed by material circumstances. Regarding the issue that an individual may not feel a loss of autonomy through selling their body, I grant this may be the case in individual transactions, but it is illuminating to employ a structural lens. Bodily labour being bought and sold this way could allow for certain power relations to develop, creating a societal division between those who sell their bodies, and those who buy, which is also what I suggest in the previous chapter. Given the social significance of the body, this division could appear starker than existing divisions of labour, creating a social order that is constrictive of autonomy in indirect ways. As Eyal points out in relation to forced organ confiscation, even if an individual feels no loss of self-respect, third parties may still view certain individuals with disrespect as a result of the strong intuitions surrounding bodily invasion.

6.3.3 Corporeal vulnerability

Thus far I have argued that embodied labour is distinguishable from ordinary labour, and seems particularly inimical to autonomy. This could serve to explain the heightened concern for the exploitation of surrogates and kidney sellers, and disparity in how embodied and ordinary labour are viewed. Now I will turn to the second explanation as to why the exploitation of embodied labour seems particularly concerning. This has to do with the way in which we are all vulnerable as embodied beings. Catriona Mackenzie distinguishes between three different types of vulnerability: **inherent**, **situational**, and

pathogenic.[546] **Inherent** vulnerability is intrinsic to the human condition - by virtue of our embodiment, human beings have bodily and material needs, are exposed to physical illness, injury, disability, and death, and depend on the care of others for extended periods during our lives. (I will also refer to this as **corporeal** vulnerability, to emphasise that it necessarily and inescapably derives from our embodied nature.) **Situational** vulnerability is context specific and is caused or exacerbated by social, political, economic, or environmental factors. Situational and inherent vulnerability can be related and causally connected, and either can give rise to the other. Mackenzie identifies **pathogenic** vulnerability as a subset of situational vulnerability. It includes vulnerabilities arising from injustice such as oppression and social domination. Situational and pathogenic vulnerability are the kinds of vulnerability I invoked in Chapter Three, as comprising exploitation.

Where does this leave embodied labour and its relation to vulnerability? I would like to suggest that the way in which embodied labour exhibits, or relates to, both inherent corporeal vulnerability and situational (as well as pathogenic) vulnerability at once, is pertinent. In cases of commercial surrogacy, organ selling, and research participation, where individuals are contracting out of economic deprivation, as they overwhelmingly are, according to the ethnographic data on the issue, their situational, and often pathogenic vulnerability, is intersecting with and compounding their inherent vulnerability, as this labour necessarily impacts the body. Insofar as exploitation involves the unfair use of situational/pathogenic vulnerability (also identified in Chapter Three), this is particularly concerning when it impacts so starkly on another type of vulnerability, our inherent frailty as human beings. Embodied labour typically and unavoidably places further constraints on existing inherent corporeal vulnerability. It is intuitively not the

[546] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability', in *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press, 2014).

kind of labour we would like to undertake, probably due to the direct impact it has on the body, which we are able to imagine in a visceral way. This feeling is similar to how we experience inherent vulnerability, in the form of our urgent bodily needs, in a physical way. In serving to exacerbate this inherent corporeal vulnerability, therefore, embodied labour has a particularly problematic relationship with vulnerability, and rouses special concern.

Mackenzie stipulates that a just society is one in which social and political structures are responsive to, and seek to mitigate the effects of, inherent vulnerability, ensuring that the burdens do not fall disproportionately on the disadvantaged. Yet often in the case of embodied labour, the desperate background circumstances of those who typically undertake it mean that inherent vulnerability is indeed exacerbated, and the burdens are distributed unfairly onto those who are disadvantaged and situationally vulnerable. Nancy Scheper-Hughes points out that medical claims to "surplus bodies" of the vulnerable have a long history, from the corpses of gallow prisoners in Europe being offered to surgeons to dispose of as they wish, to the corpses of paupers in Brazil being confiscated from poorhouses and sold to hospitals.[547]

Surrogates in India are typically poor and uneducated, and are a medically vulnerable population, due to the link between poverty and poor nutrition, and their lack of access to healthcare. Further, as I outlined in the first chapter, they also comprise the same cross-section of society that has been subject to prior medical control, through forced sterilisation. Surrogates, therefore, seem to be drawn from an already vulnerable population. This is problematic, because differences in our inherent vulnerability as human beings should be mitigated as much as possible through societal interventions. Corporeal vulnerability is a feature of all human life, after all. When this inherent corporeal vulnerability is being impacted by economic and social factors (as in situational

[547] Scheper-Hughes, 'The Global Traffic in Human Organs'.

vulnerability), therefore, it seems particularly unjust.

Ethnographic data suggests that after surrogacy, the corporeal vulnerability of surrogates is indeed exacerbated. There are cases of surrogates being left in pain afterwards, rendering them unable to work in other jobs, and therefore in a worse position than they began. Treating embodied labour in as ordinary labour crucially obscures the inherent frailty and vulnerability of the human body, and the strains that embodied labour inevitably places upon it. This is why when exploitation of embodied labour occurs, it is particularly pernicious, as it involves the use of already vulnerable individuals whose bodies, that they are so heavily dependent on, are being made more vulnerable.

It may be objected that my analysis of inherent vulnerability being compounded by embodied labour contracts only works if individuals are contracting into embodied labour through vulnerability in the first instance. This is because, on my account, pre-existing situational vulnerability is playing a causal role in exacerbating inherent vulnerability. Further, someone might object that it is possible to imagine a case in which embodied labour does not exacerbate inherent corporeal vulnerability. I accept that my argument is contingent upon certain empirical considerations, but as I am reasoning in the non-ideal, where the world's poor do serve as surrogates and research subjects for multinational companies, the argument holds weight. I would also suggest that it seems implausible to imagine that embodied labour could have no such negative effect on the body, given the body's finite and inherently deteriorative nature, even with the best quality after care. The highly idealised situation in which embodied labour would have no effect on corporeal vulnerability is not an accurate reflection of the current reality, and does not capture typical instances of embodied labour.

6.4 Conclusion

In this chapter I have suggested that embodied labour is reasonably distinct from ordinary labour, primarily due to its unique use of the body as the site of the labour. I defended Nir Eyal's account of body exceptionalism, suggesting that even Cécile Fabre may have been operating with something similar, indicating the universality and depth of this intuition. My critique of Fabre suggested that bodily invasion would plausibly have harmful social effects. In support of this, I explored the social and cultural significance of the body, arguing that beliefs surrounding the body, and bodily invasion, are so entrenched that bodily inviolability should be preserved. The strength of our intuitions surrounding the body also has implications for the sale of labour. I gave two possible arguments as to why embodied labour merits special concern, both ordinarily, and when it results in exploitation. The first was the way in which the use of the body as the site of the labour leads to a more profound loss of autonomy, provoking the special concern people appear to have for this type of labour. Embodied labour involves the body being acted upon, with essentially no requirement of agency from the labourer, making this labour particularly subordinating. The second argument given for embodied labour's meriting special concern was the way in which, in real world situations, it uses and intersects with material vulnerability, impacting upon our inherent vulnerability in doing so. Thus, while the account of exploitation I defend in Chapters Two and Three captures a wide range of cases, in this chapter I have sought to suggest why it might be legitimate to be particularly concerned with the exploitation of surrogates, and why the exploitation of this labour might be considered particularly pernicious, and therefore merit special intervention.

Concluding Remarks

In the introduction of this thesis, I posed the following questions: is commercial surrogacy exploitative? Is the Indian commercial surrogacy industry typically exploitative of the women who become surrogates? What is exploitation? If there is no general consensus, what is the best way to define exploitation for the purposes of my investigation? If exploitation typically involves the unfair use of vulnerability, what is vulnerability? How do the facts of the Indian case satisfy the exploitation condition I have defended? What follows from the admission of exploitation? Is exploitation necessarily wrongful? Is it wrongful in a way that justifies regulatory interference? Why the special concern for this particular case of exploitation, when there exist many exploitative practices and jobs?

In response, it has been suggested that, on balance, Indian commercial surrogacy appears to be typically *ex ante* harmfully exploitative, on the canonical definition put forward by Alan Wertheimer. It therefore merits intervention, by Wertheimer's own lights. Exploitation, although essentially contested, has been defined as invoking the unfair use of vulnerability, in some form, due to the way in which putatively opposed analyses seem to share some vulnerability component. Crucially, vulnerability has been defined in terms of institutional justice. That is, vulnerability necessarily results from failures in the justice of the basic structure. Having identified vulnerability as central to exploitation, I identified Sen and Nussbaum's capabilities approach to be sufficient in demonstrating one plausible way of cashing out what is meant by vulnerability, that is particularly relevant to the disadvantaged themselves and to Indian surrogates. Crucially, this approach is able to reflect the plurality of disadvantage, that is, the different intersecting dimensions that could comprise vulnerability. Following this, it was argued that features such as a lack of proper informed consent, the use of risky medical practices

such as implanting many foetuses at once, foetal reduction, and routine caesareans, as well as the use of surrogacy hostels, constitute sufficient harm so as to render Indian surrogacy typically *ex ante* net harmful.

I then provided three arguments for intervening in mutually advantageous exploitative transactions such as surrogacy, if the harm identified were to be removed. Firstly, it was suggested that even in mutually advantageous exploitation, the benefits gained are suboptimal, as there is plausibly an alternative non-exploitative arrangement that would produce better overall consequences; thus a commitment to welfare consequentialism actually entails interference with exploitation. Following this, I made the non-consequentialist argument that as mutually advantageous exploitation still involves the unfair use of vulnerability, it is wrongful, and this justifies intervention. The unfair use of vulnerability involved in exploitation is wrongful in two ways: firstly, it necessitates that the benefit gained is unjust, due to it trading on prior rectifiable injustice. Secondly, it inflicts a status harm on the vulnerable, which renders it inimical to ideals of relational equality. Finally, I made an argument for intervention from social construction. In response to claims that interfering in exploitative transactions is too idealistic to be politically feasible, and under current constraints B's 'best option' or 'free choice' shouldn't be interfered with, I invoked Clare Chamber's argument on the social construction of choice. Here, I suggested that the social influence that led to a surrogate's choice to enter into surrogacy is a matter of (in)justice, and so should be limited where possible.

Finally, I considered what is peculiar about labour that involved the body in the intensive way that surrogacy unavoidably does. I identify surrogacy as belonging to a class of "embodied labour" along with cases such as kidney selling and payment for clinical research participation. I suggest that the embodiment aspect of the *nature of the labour* in transactions such as surrogacy make them of special concern, and the

exploitation of this type of labour particularly pernicious. This has to do, firstly, with the special status of the body and the heightened loss of autonomy that embodied labour appears to involve. Secondly, embodied labour typically places further constraints on existing corporeal vulnerability, a universal state we all experience as embodied beings, as our body is our main and vital resource. Treating embodied labour in the same way as ordinary labour crucially neglects the inherent frailty and vulnerability of the human body, and the strains that embodied labour inevitably places upon it.

Implications and indications of future research

Most obviously, the implications of this research are seen in its application to the policy context. What should be done about surrogacy in India, if it could be considered exploitative in this way? Crucially, the Indian state has already responded to such attention by instating a ban on international surrogacy, and limiting domestic surrogacy to an altruistic model. My evidence-based approach could also be seen as having vindicated the findings of the Warnock report, which cited the potential for exploitation as a key concern, and advocated the adoption of an altruistic model in the UK.

As well as this, the research presented has more general relevance to a wider range of exploitative practices. It has been suggested that mutually advantageous exploitative transactions are more prevalent than some accounts admit, and that certain implications follow from this. Crucially, I have argued that the short-term benefits of permitting such transactions pale in comparison to the long-term detrimental consequences of permitting exploitative relations. Rather, adopting an interventionist approach would perpetuate an anti-exploitation norm, leading to deals that are fairer in their allocation of the cooperative surplus, having better consequences in terms of overall welfare. Further, exploitation has been positioned as inimical to liberal ideals of relational

equality and equal regard. The notion of "free choice" espoused by the liberal contract model has been dissected to reveal that when such a choice is the result of significant social or economic influence and results in disadvantage, then there are reasons to intervene. These findings may make us re-think our current economic order, therefore, which currently permits a vast range of mutually advantageous exploitative transactions.

This observation reveals a further route of research. It has been suggested that the definition of exploitation employed captures all market use of vulnerability that is the result of institutional injustice. Further, it was also suggested that embodied labour provides a heightened example of what is potentially subordinating about all labour contracts. What, then, might mitigate exploitation, and the subordination involved in labour? The relationship between vulnerability and all labour contracts undertaken in the absence of considerable personal wealth should be explored. This research could, therefore, tie in to a justification for a universal basic income. A universal basic income (UBI), most famously defended by Philippe Van Parijs, is "an income unconditionally paid to every member of a society (1) on an individual basis (2) without means testing and (3) without work requirement."[548] Van Parijs suggests that this idea should be appealing to anyone committed to real positive freedom, and to equality that does not redistribute wealth equally, but "in such a way that those with least real freedom should have as much of it as possible."[549] This is because a UBI would give individuals the power to decide what sort of life they want to live, in particular, by increasing their bargaining power, in a way that could be said to mitigate the vulnerability that drives entry into labour contracts: "it is about the power to say no to the dictates of a boss, a bureaucrat, or a spouse. And it is about the power to say yes to activities that are poorly paid or not paid at all, but are nonetheless attractive either in themselves or because of

[548] Philippe Van Parijs, 'The Universal Basic Income: Why Utopian Thinking Matters, and How Sociologists Can Contribute to It', *Politics & Society* 41, no. 2 (2013): 171–182.
[549] Van Parijs.

the training and the contacts they provide."[550] It would be worth exploring, therefore, the relationship between vulnerability, positive freedom, and the UBI as a means of realising these ideals, and as a route towards mitigating exploitation. Focusing on the exploitation of Indian surrogates, therefore, has facilitated the exploration of fundamental questions pertaining to the best way in which to arrange a society, the kind of social relations that are desirable, and what true freedom consists in.

[550] Van Parijs.

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