

**A STUDY OF EXPLOITATION FOR THE
CRIMINAL LAW**

JENNIFER COLLINS

EXETER COLLEGE

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Abstract

What is the state's duty to penalize serious interpersonal exploitation using the criminal law? Does the state discharge this duty appropriately? These are large questions and this thesis sets out to reassess one part of the puzzle of exploitation. The focus is upon interpersonal exploitation and property offences in England and Wales. Criminal law commentators frequently state that several property offences are justified on the basis that they penalize exploitation. For example, the tendency has been to assume that section 1 of the Fraud Act 2006 performs this function, together with its accompanying sentencing guidelines. One of the objectives of this thesis is to expose the precarious foundations of relying upon existing property offences to censure exploitation. For example, it is not clear what the scope of the wrong of exploitation under discussion actually is. This thesis argues that analysis of the relationship between wrongful interpersonal exploitation and property offences has been woefully superficial in English law and is ripe for reappraisal.

The second objective is to identify and to elucidate a hitherto neglected wrong of acquisitive exploitation. An analytical account of the wrong is presented which will be of interest to criminal law theorists. Acquisitive exploitation represents a distinctive method of using vulnerable persons, under the cover of dishonesty.

With a careful account of wrongful acquisitive exploitation in hand, the third objective is to raise questions about criminal liability for acquisitive exploitation. Ought the criminal law to penalize acquisitive exploitation, and, if so, how? Are there grounds for penalizing acquisitive exploitation more consistently and with improved labelling? These questions must be thoroughly debated. A credible opening bid is presented in relation to them—first, by considering whether acquisitive exploitation might be used to more fairly label property offences; and second, by assessing justifications for a substantive acquisitive exploitation offence.

For Chris

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Chapter 1

An Introduction to Wrongful Interpersonal Exploitation and Criminal Law

1.1 Introduction

When and how ought the criminal law be used to penalize exploitation of persons? These are among the most pressing questions to be addressed by criminal law theorists. Against a backdrop of significant public and political concern about exploitation in England and Wales, legal efforts to tackle exploitation have expanded, spanning across branches of the common law. In July 2014 the Supreme Court issued a bold decision in *Hounga v Allen*, blocking the application of the illegality doctrine in a case involving illegal work status.¹ According to the majority, using illegality to strike out Ms Hounga's claim in tort law did not take into account the fact that she had been trafficked into the United Kingdom for the purposes of forced labour. They argued that a 'prominent strain of current public policy against trafficking' requires protection of victims of human trafficking, and this might on occasion require that the illegality doctrine is itself bypassed.² This is a significant first step given that public policy usually operates to block a claim in tort or contract law. *Hounga* raises questions as to how far application of this public policy in relation to human trafficking for exploitation might extend. For example, should it extend to protect all vulnerable migrants, regardless of whether or not they have been trafficked? Ought this public policy

¹ [2014] UKSC 47.

² *ibid* [52].

displace application of illegality in contractual claims, as well as discrimination claims? What other common law doctrines, besides illegality, are open to being scrutinized on the ‘public policy’ basis of protecting persons against human trafficking for exploitation and/or other core examples of interpersonal exploitation?³

Alongside apparent willingness to reassess existing civil law and regulatory measures in the light of serious exploitation, there is mounting pressure to use coercive measures to penalize interpersonal exploitation. One significant pressure point comes from international obligations. In an important judgment in *Rantsev v Cyprus and Russia*, the European Court of Human Rights read into Article 4 of the European Convention of Human Rights a right not to be subjected to human trafficking.⁴ Following *Rantsev*, it is now an open question as to which other ECHR rights ought to be read so as to protect individuals from serious interpersonal exploitation.⁵ There is logical scope for Article 5 ECHR (the right to liberty) to be engaged in relation to labour exploitation, for example. If a right protected by the ECHR is engaged, this begs the question as to what European human rights law requires of states. Strasbourg jurisprudence has developed so as to require effective criminal procedures and preventive measures in certain circumstances.⁶ In the last decade there has been a new emphasis on positive duties upon states to create criminal law measures to ensure

³ For example, Immigration Rules 159A-159H, enacted on 6 April 2012, tie a migrant worker’s visa to the employer to whom they entered the UK, even if that working relationship is exploitative. See Kalayaan, ‘Still Enslaved: The Migrant Domestic Workers who are Trapped by the Immigration Rules’ (April 2014) <www.kalayaan.org.uk/documents/tied%20visa%202014.pdf> accessed 29 March 2015. On 25 February 2015, the House of Lords voted for an amendment to the Modern Slavery Bill to end the ‘tied visa’ system, but this was overturned by the House of Commons on 17 March 2015.

⁴ (2010) 51 EHRR 1 [282].

⁵ We return to this discussion in s 1.4 below.

⁶ *Aydin v Turkey* (1998) 25 EHRR 251; *Osman v United Kingdom* (2000) 29 EHRR 245.

ECHR compliance.⁷ At a national level, there has been powerful rhetoric from the government in England and Wales committing to tackle exploitation using the criminal law.⁸ This thesis' starting point is that however strong the rhetorical pull to use criminal law measures, there must be critical analysis of the following question: in what circumstances is it justifiable to enact criminal law legislation which penalizes or seeks to prevent serious exploitation? A principled criminal law response to interpersonal exploitation has yet to be mapped.

The distinctive contribution of this thesis is that it grapples with one part of this larger 'mapping' task. It focuses on one important and under-theorized type of interpersonal exploitation, critically analyzing its relationship to criminal law in England and Wales. I call this form of exploitation 'acquisitive exploitation', and it is introduced in chapter 2 of this thesis. My starting claim is that study of acquisitive exploitation is necessary because there is widespread confusion among academics and practitioners as to the relevance of exploitation when an individual's property interests have been targeted. Frequently the idea of 'exploitation' is introduced in the context of property offences and their accompanying sentencing guidelines. Penalizing exploitation is routinely used as a justification for criminalization. But rarely is the meaning of 'exploitation' in this context explained, nor is it distinguished from other forms of serious interpersonal exploitation. This gap is exposed in this thesis, and my aim is to fill it with careful normative analysis of the nature of the wrong and its principled relationship to criminal law.

⁷ See Andrew Ashworth, 'Human Rights and Positive Obligations to Create Particular Criminal Offences' in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013).

⁸ Theresa May, 'Slaves May Work in Your Nail Bar Too' *The Telegraph* (London, 24 November 2013) <www.telegraph.co.uk/comment/10470717/Theresa-May-Slaves-may-work-in-your-nail-bar-too.html> accessed 29 March 2015.

In this first chapter the net is spread widely so that a firm foundation is put in place for our discussion of acquisitive exploitation in later chapters. Sections 1.2 and 1.3 explain why criminal law theorists should be interested in *specific* types of wrongful interpersonal exploitation as opposed to a general concept of exploitation. Thus the foundation is laid for chapter 2, where it is argued that acquisitive exploitation is one such wrong requiring excavation and that scant attention has been paid to it so far. Section 1.4 considers *why* the state should use the criminal law to censure any type of wrongful interpersonal exploitation. This is a question rarely examined but essential to any principled analysis of exploitation and criminal law. Sections 1.5 and 1.6 briefly examine criminal law measures to penalize exploitation and adjustments within the criminal justice process in England and Wales to tackle interpersonal exploitation. This provides a context for critique of the current criminal law response to acquisitive exploitation in chapter 2. A brief summing up of this chapter's foundational work is given in section 1.7. Finally, section 1.8 offers a road map of the subsequent chapters.

1.2 'Wrongful interpersonal exploitation'

What does it mean to exploit another person? Rather than focusing on the exploitation of resources or other things, this thesis focuses on exploitation as an *interpersonal* concept. 'Exploitation' of persons is a fiendishly difficult concept to explain. The simple statement that 'A exploits B when A takes unfair advantage of B' is the general starting point for many commentators who have written about *interpersonal* exploitation.⁹ In short this statement tells us very little. Alan Wertheimer notes that

⁹ Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP 1988) 179, and Alan Wertheimer, *Exploitation* (Princeton University Press 1999) 10. We will mainly use the singular in this thesis, but 'an exploiter' can also be read as 'exploiters' plural.

this is a ‘lowest common denominator’ approach to exploitation.¹⁰ The aspiration to further elucidate what is ‘unfair’ about interpersonal exploitation is represented in many liberal writings on exploitation, including Wertheimer’s. The difficulty that remains is that ‘unfairness’ is a vague word and can be given a wide variety of meanings. It is clear that if exploitation is to be explained using ‘unfairness’ there will be ‘as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment’.¹¹

What is immediately clear is that there is no necessary connection between unfairness and exploitation. Just as it is not always problematic to exploit something (such as a natural resource), neither is it always unacceptable for one person to exploit another person. One reason for supporting the exploitation of resources is that it enables extraction of the full benefit from a particular resource, which is responsive to the challenges of limited resources. Such resourcefulness may be considered prudent or may even be congratulated. This point carries over into our study of *interpersonal* exploitation. While interpersonal exploitation may not be a matter for congratulation it may nonetheless be considered reasonable or justifiable in certain circumstances. For example, an individual may use another person’s characteristics (their gullibility, good nature, generosity or their intelligence) to further his own interests. Why should he not be able to fully utilize the opportunity or opportunities available to him through another person? There is the sense that exploitation is the means by which the shrewd or savvy advance their own interests.

¹⁰ Wertheimer (n 9) 10.

¹¹ Richard Arneson, ‘Exploitation’ in Lawrence Becker and Charlotte Becker (eds), *Encyclopedia of Ethics* (Garland Publishing 1992) 350.

Since interpersonal exploitation may not amount to ‘unfair’ or ‘wrongful’ conduct or results at all, the challenge is to explain *when* interpersonal exploitation is ‘unfair’ or ‘wrongful’. This thesis builds upon Joel Feinberg’s theoretical work into interpersonal exploitation, and this is a point we return to in chapter 2.2. This is necessary because Feinberg answers this ‘unfairness’ question at a high level of abstraction. Feinberg’s account rests on there being three elements to any exploitation claim: how A uses B; what it is about B that A uses; and how the process redistributes gains and losses. For Feinberg, however, whether or not conduct is exploitative hinges on an additional claim of unfairness. To this end, he argues that (unfair) exploitation is ‘profitable utilization of another person that is either unfair on balance to him, or which in virtue of its other unfairness-producing characteristics *would be unfair on balance to him but for his voluntary consent to it.*’¹²

This statement requires further unpacking. Broadly, Feinberg’s aim is to examine unfairness using several scenarios. The first is concerned with situations where the exploitee (B) did not consent to the exploiter’s (A) conduct. Establishing an exploitation claim requires two factors to have been present – A must have gained *and* A’s use of B must have been unfair. It must then be asked whether A’s *prima facie* exploitative conduct was justified in the circumstances. The salient question here is: in the light of all relevant circumstances, was A justified in exploiting B? In the second scenario, B has consented to A’s conduct. Again, the methodology is two-part. First, Feinberg argues that we should adopt the simple counterfactual ‘but-for’ test to find an exploitation claim in these kinds of cases. The relevant question is: but-for B’s consent would A’s use of B have been unfair to B? If the answer is yes and this is a *prima facie*

¹² Feinberg (n 9) 200.

instance of exploitation, the next step is to ask: was A's use of B 'morally wrong (or "unjust" in itself) even though it was not unfair-on-balance to B?'¹³

This does not do a great deal to answer the key question: what is this unfairness at the heart of both categories of exploitation? Feinberg's next step is to argue that:

A fuller account of the characteristics that distinguish exploitation from mere profitable utilization would follow the outline of exploitation's main structural elements, listed above, and their main combinations and variations. Which ways of using or 'playing upon' another's traits or circumstances (...) tend to be unfair to him? Which traits or circumstances of B (...) are such that their utilization by A tends to be unfair to B? Which ways of changing the balance of gains and losses between the parties (...) tend to be exploitative and which not?¹⁴

This focuses attention back on the three elements which Feinberg argues form the basis of any exploitation claim. This time, however, he refers to them as 'unfairness-tending characteristics'.¹⁵ They seem now to be a means of identifying the required unfairness aspect. On the face of it, Feinberg's account is fairly unremarkable in settling upon an unfairness criterion. As we noted above, theorists agree on the following minimal presentation: A exploits B when A takes unfair advantage of B.¹⁶ However, it is possible to read Feinberg's account of exploitation's unfairness in at least two ways.

¹³ Note that it is Feinberg's argument (n 9) 201, that the conduct is not 'unfair-on-balance' to B because of the presence of B's consent. Rather, the basis for legal censure here is because A is 'subject to adverse moral criticism for his exploitation of B'.

¹⁴ *ibid* 201.

¹⁵ *ibid* 204.

¹⁶ See Steven Walt, 'Comments on Steiner's Liberal Theory of Exploitation' (1984) 94 *Ethics* 242, 'Whatever else it involves, exploitation involves taking unfair advantage. Theories of exploitation are theories which explicate the notion of taking unfair advantage.' For an overview of the 'definitional landscape', see Wertheimer (n 9) 10-12. For a view that exploitation need not involve unfairness, see Allen Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136 at 147.

On the one hand, we could argue that Feinberg encourages us to take unfairness as the vantage point *into* a study of interpersonal exploitation. This interpretation of Feinberg moves our focus to understanding the structural elements of exploitation more completely because they are ‘unfairness-tending characteristics’ or, in other words, they lead us to exploitation. While these characteristics are not necessary and sufficient conditions for exploitation, Feinberg argues that:

[W]e can hope to say of certain elements that, insofar as they are present in a relationship between A and B, that relationship tends to be unfairly exploitative, and, insofar as they are absent, that relationship tends not to be unfairly exploitative.¹⁷

Alternatively, we might argue that Feinberg’s thesis is premised on the identification of exploitation’s core structural elements *plus* an unfairness claim. On this view, the three descriptive elements together do not point us toward unfairness, rather they ‘can raise further questions’ and must often be accompanied or supplemented by unfairness to constitute a valid exploitation claim.¹⁸ Feinberg seems to attach the unfairness aspect as an afterthought; he hastens to add that ‘in addition’ pejorative interpersonal exploitation is assumed to be unfair ‘or otherwise subject to adverse criticism.’¹⁹ Further:

The correct short answer to this question, of course, is that there is an element of wrongfulness in exploitation that distinguishes it from non-exploitative utilization. It is more difficult to characterize the nature of that wrongfulness however, and the problem in its full complexity cannot be settled here.²⁰

¹⁷ Feinberg (n 9) 201.

¹⁸ *ibid* 179.

¹⁹ *ibid* 179.

²⁰ *ibid* 199.

Feinberg does little to spell out what this unfairness aspect is, instead opting for the proviso that we would need a complete normative theory to adequately understand it.²¹ This position has attracted criticism and Feinberg has been accused of missing out an important aspect of an exploitation claim. Mitchell Berman, for example, argues that Feinberg's analysis is:

[S]trikingly incomplete because it offers no help in elucidating what Feinberg himself recognised is the additional criterion necessary to constitute exploitation in the pejorative or wrongful sense--namely that it is *unfair*.²²

Moral and political philosophers have used Feinberg's presentation as a departure point, resulting in a number of attempts at explaining what this unfairness could be.²³ The ambition, presumably, is to get further than Feinberg did by engaging fully with the elucidation task. For example, Alan Wertheimer builds on Feinberg's analysis by arguing that exploitation's unfairness includes 'mutually advantageous' exploitation. This means that exploitation extends to scenarios where the exploitee, as well as the exploiter, gains from the transaction. Wertheimer argues that exploitation can be affected by the *extent* to which the parties benefit; we must look at the net effect on B. And so, 'there is an important sense in which any marginal gain to one party within the zone of agreement is indeed at the other party's expense'.²⁴ In any transaction, both parties will have a reservation price, which is 'the value that the person must receive if

²¹ *ibid* 201.

²² Mitchell Berman, 'On the Moral Structure of White Collar Crime' (2007) 5 *Ohio State Journal of Criminal Law* 301, 304-05.

²³ See Robert Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed), *Modern Theories of Exploitation* (Sage Publications 1987); Arneson (n 11); John L Hill, 'Exploitation' (1994) 79 *Cornell Law Review* 631; Wertheimer (n 9); Robert Mayer, 'What's Wrong with Exploitation?' (2007) 24 *Journal of Applied Philosophy* 137; Mikhail Valdman, 'A Theory of Wrongful Exploitation' (2009) 9(6) *Philosophers' Imprint* 1.

²⁴ Wertheimer (n 9) 21.

he or she is to agree to the transaction'.²⁵ The zone of agreement is the difference between the parties' reservation prices. Wertheimer's point is that 'while the parties may prefer any outcome within the zone of agreement to the non-agreement solution, they are not indifferent to the distribution of the *social surplus* within the zone of agreement.'²⁶ On this account, exploitation can be both disadvantageous to B and mutually advantageous to A and B.

But how should this 'social surplus' be divided? Wertheimer's account requires that there is a principle of fairness for the 'distribution of the social surplus' for the particular transaction in question.²⁷ Rick Bigwood, writing in the contractual domain, has argued that Wertheimer is elucidating a moral principle of substantive fairness and not a principle of distributive justice. He notes that Wertheimer finds the content of that unfairness in the 'fair market value' generated by a competitive market. It is the 'market' price which tells us 'when the pay-offs between the parties are unfair hence exploitative'.²⁸ Bigwood ultimately thinks that this end-state account is inconsistent with a liberal account of contract law, which characteristically focuses on the contract agreed by the parties themselves, as opposed to reasons external to the contract.

This thesis uses Feinberg's work in particular as a starting point for evaluating interpersonal exploitation. But as we have argued above, Feinberg does not provide an

²⁵ *ibid* 20.

²⁶ *ibid* 21 (my emphasis).

²⁷ *ibid* 68.

²⁸ Rick Bigwood, *Exploitative Contracts* (OUP 2003) 168-69, '[M]arket-price standards of fairness in transactions nonetheless remain *external* to the parties and their *particular* transaction.' Ultimately Bigwood rejects this approach for liberal contract law, citing an emphasis on pure procedural corrective justice as inconsistent with an end-state analysis of contract law. He is persuaded by the argument that the value of contractual performance is entirely what the parties consider it to be; the courts will not look into the adequacy of the consideration given and so there is no reference to a market-value.

answer to the unfairness at the heart of exploitative wrongdoing, and in this sense is not the logical end of the matter. We return to this aspect of Feinberg's work in section 2.2 of this thesis. How does this thesis' work differ from theorists such as Feinberg and Wertheimer? It puts forward a *specific* normative account of a type of *wrongful* interpersonal exploitation. The remainder of this section is used to establish the warrant for this study.

Is it significant whether the pejorative adjective 'unfair' or 'wrongful' is employed? The challenge for either approach lies in seeking to elucidate one concept which is open to debate ('exploitation') using another ('unfairness' or 'wrongfulness'). I prefer to investigate *wrongful* interpersonal exploitation in this thesis. First, this approach acknowledges that wrongfulness is not 'built into' interpersonal exploitation, but is a separate consideration.²⁹ A second advantage is that we begin with a better understanding of what drives a 'wrongfulness' enquiry, whereas the challenge of explaining 'unfairness' is left at large. There has been important work in criminal law theory identifying how an assessment of wrongfulness should be conducted. For example, James Edwards and Andrew Simester argue that '[C]onduct is wrongful when, all things considered, one ought not to do it. One need find no breach of duty to find something wrongful; it is enough to find conduct the reasons for which are defeated by the reasons against.'³⁰ In other words, an assessment of normative reasons must be given before conduct is considered wrongful. This is preferable to assertions

²⁹ See Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 11, '[T]he concept of exploitation, when applied to persons, is part of an attempt to pick out those uses of persons which are morally wrong, distinguishing them from those which are innocent.' cf Robert Goodin, 'Exploiting a Situation and Exploiting a Person' (n 23), '[A]n act of exploiting a person always constitutes a wrong.'

³⁰ James Edwards and AP Simester, 'Wrongfulness and Prohibitions' (2014) 8 *Crim L and Philosophy* 171, 172. See AP Simester, 'Enforcing Morality' in Andrew Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

that conduct is ‘unfair’, and thus exploitative, which do not require supporting reasons. Using Edwards and Simester’s approach, conduct ‘is wrongful in the bare wrongfulness sense if the reasons in favour of that conduct are defeated by the reasons against’.³¹ The possible reasons given are not limited in any way, ‘A reason is a consideration of any kind that counts for or against an action.’³² In practice this is not a simple balancing act because some reasons exclude, rather than outweigh, consideration of other reasons.³³

A third advantage of this approach is that the need to give reasons to explain wrongfulness lays firm foundations for subsequent questions about interpersonal exploitation and criminalization. As Andrew Simester and Andreas von Hirsch have argued in recent times, ‘[T]he criminalisation of conduct should require a plausible claim of wrongdoing.’³⁴ The reason why wrongfulness is a necessary condition for criminalization is tied to the effects upon individuals of state censure. The argument is that an individual’s rights are violated when they are ‘convicted and punished as a criminal without having perpetrated culpable wrongdoing’.³⁵ We should not confuse the issues of (i) identifying wrongful interpersonal exploitation and (ii) critically analyzing whether a type of wrongful interpersonal exploitation merits criminalization. However, as we will see in chapter 2 of this thesis, claims about property offences being used to criminalize exploitation are routinely made by the courts and by academics. Since we hope to interrogate these arguments in this thesis, it seems best to

³¹ Edwards and Simester (n 30) 172.

³² *ibid* 172.

³³ *ibid* 172.

³⁴ AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) 97.

³⁵ *ibid* 20.

analyze whether or not interpersonal exploitation meets a wrongfulness condition from the outset. The criminalization question is irrelevant if a wrongfulness threshold is not crossed.

As we have noted above, focusing on wrongfulness is far from straightforward. The contours of wrongful interpersonal exploitation are extremely contestable. How should we evaluate what is acceptable interpersonal exploitation and what is wrongful interpersonal exploitation? Is sharp conduct between individuals in business likely to fall on the side of acceptable behaviour?³⁶ What about preying on a vulnerable person's vulnerability? Is it significant if a person's characteristics are used (non-wrongful) as opposed to their personhood (wrongful)? What constitutes *serious* wrongful exploitation? These are large questions, and they will be explored in this thesis in relation to acquisitive exploitation. In other words, an account of exploitation is made specific rather than general. This follows from the fact that 'wrongful interpersonal exploitation' is used as an umbrella term in this thesis, encompassing a number of types of wrongs of exploitation. The argument relied upon here is that there must be a number of different types of wrongful interpersonal exploitation. Surely wrongful sexual exploitation is quite different from wrongful labour exploitation, which is again different from wrongful financial exploitation? This conceptual approach is supported by the Court of Appeal's judgment in *R v SK*:

In the modern world exploitation can and does take place, in many different forms. Perhaps the most obvious is that in which one human being is treated by another as an object under his or her control for a sexual purpose. But 'slavery or servitude' and 'forced labour' are not confined to exploitation of that sort.

³⁶ More will be said about whether exploitation is a result-word in ch 3 of this thesis.

One person may exploit another in many different ways. Sexual exploitation is one, domestic servitude, [...] another.³⁷

In principle it is possible to generate a general account of wrongfulness spanning sexual exploitation, labour exploitation and financial exploitation.³⁸ However, this glosses over the conceptual distinctions identified in *R v SK*, as well as skirting over the real life complexity of interpersonal exploitation. For example, the gist of sexual exploitation is quite different in nature from that of labour exploitation. In the former there will be a dynamic mix of techniques used to infringe sexual interests (such as grooming techniques), whereas in the latter measures used to limit employment options are at the fore. Moreover, fault elements are likely to be different. It is likely that when commentators refer to interpersonal exploitation in the context of property offences, they are referring to a wrong where an exploiter has an acquisitive intent in relation to property interests. No doubt such fault is missing in relation to sexual exploitation, for example, where an attack upon sexual interests is at the fore. It also follows that other wrongs may come under the broad umbrella term of ‘wrongful interpersonal exploitation’. For example, human trafficking is not synonymous with wrongful interpersonal exploitation. Trafficking provides opportunities for exploitation and is often undertaken for this purpose. However, there is sufficient consensus that human trafficking is enough part of the ‘problem’ of interpersonal exploitation to justify considering it a sub-category of wrongful interpersonal exploitation.³⁹ No doubt this is because it is difficult to identify the point in time at which human trafficking ‘crosses over’ into interpersonal exploitation. Conceptual clarity is improved if different types

³⁷ *R v SK* [2011] EWCA Crim 1691 [41].

³⁸ An approach adopted by Mayer (n 23) 137.

³⁹ For example, a right that no one shall be subjected to human trafficking has been read into Article 4 of the ECHR, which protects against serious labour exploitation. See *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [282].

of interpersonal exploitation are identified, and if wrongfulness is explicated in relation to a specific type of interpersonal exploitation. This could be done on the basis of the interests attacked—sexual, bodily, labour, financial interests, for example.⁴⁰ There is no simple formula which generates an explanation as to what is wrongful about a particular type of exploitation. The next step is to develop understanding of these exploitative wrongs by providing a rough taxonomy, exploring their contours and limits, and by trying to analogise them. However, this larger task cannot be pursued further in this thesis, and is an area ripe for further research.

Since there are different ways in which a person can wrongfully exploit another person, the state's duty to prevent or penalize exploitation must be reviewed in the light of a specific type of exploitation. The state may have a duty to prevent labour exploitation using the criminal law but not financial exploitation, for example. We return to this point in section 1.4 below. The specific type of exploitation in focus must be made clear before criminalization questions can be raised and debated. It is best to differentiate types of interpersonal exploitation, and to elucidate wrongfulness in relation to a specific type of exploitation. In this thesis our account of acquisitive exploitation is presented as one such account of wrongful acquisitive exploitation.

1.3 The real life complexity of 'wrongful interpersonal exploitation'

I have argued that 'wrongful interpersonal exploitation' is not a unitary idea, and that a particular type of exploitation's wrongfulness must be made specific rather than general. But there is no simple formula which generates an explanation as to what is wrongful about a particular type of exploitation. There will be common elements or

⁴⁰ Of course these wrongs may overlap in practice.

building blocks on which all types of exploitation are based.⁴¹ It will also be necessary to consider more specific concerns. Are some types of exploitation linked with targeting certain groups of persons? Does wrongfulness hinge on the fact that a type of exploitation causes certain results to occur? Or will a particular form of exploitative conduct suffice? Are the means used themselves wrongful?

In the 2010s we have already seen increased interest in censuring and preventing interpersonal exploitation accompanied by new conceptual work into the nature of exploitative wrongs.⁴² Most commonly this work on exploitation has been constructed upon the interests attacked—sexual, bodily, labour, financial interests—and we use this approach to distinguish a number of categories of wrongful interpersonal exploitation below.⁴³ These categories are not presented as exhaustive. One purpose is to briefly show that even apparently ‘settled’ categories of wrongful interpersonal exploitation are open to debate. As we will see below, there are ways in which our understanding of these wrongs needs to be developed. Given the preliminary nature of this chapter we will be able to do little more than point out areas of real controversy. Another reason is to show that the previously little analyzed type of exploitation explored in this thesis—what we introduce as ‘acquisitive exploitation’ in chapter 2—sits on the margins of what is already known about wrongful interpersonal exploitation. A detailed treatment of *this* wrong will follow in subsequent chapters of this thesis.

⁴¹ Joel Feinberg’s work on interpersonal exploitation in *Harmless Wrongdoing* (n 9) is a useful starting point. Feinberg (n 9) 179, argues that these include how an exploiter uses an exploitee, what it is about an exploitee that is used (for example, their character or a characteristic), and how the process of exploitation redistributes gains and losses.

⁴² Margaret Melrose and Jenny Pearce (eds), *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013).

⁴³ Of course, not everyone will agree with the examples which come within the headings of ‘labour exploitation’, ‘sexual exploitation’, and so on. Moreover, there will be blurred lines between these categories in practice because exploiters may engage in more than one form of wrongful interpersonal exploitation.

1.3.1 Sexual exploitation

Sexual exploitation has attracted considerable attention in recent years, in part due to high-profile convictions of grooming gangs in a number of English cities.⁴⁴ It is immediately clear that wrongful sexual exploitation is itself an umbrella term: child sexual exploitation (or exploitation of under-16s) is conceptually distinct from sexual exploitation of adults. This is because sexual exploitation of under-16s can have no reference to apparent consent of a child. The line becomes blurred where a 16 or a 17-year old is involved, since there is a stronger case to say that any apparent consent should be scrutinized. This follows from the age of consent being set at 16 in England and Wales. However, the Department of Education defines child sexual exploitation as exploitation of young persons under-18, and this follows the line drawn in the Sexual Offences Act 2003 in relation to familial and position of authority sexual offences.⁴⁵ Wherever the line is drawn in practice, the point is that sexual exploitation ought to be defined not only in relation to the interests attacked (sexual interests), but also in relation to persons targeted. The conceptual issues in determining wrongfulness will be different where a child is a victim.

Turning first to child sexual exploitation, this type of abuse can take a number of forms. The Department for Education describes the paradigm as involving a child or young person receiving something, such as ‘accommodation, drugs, gifts, or affection’ in exchange for their performing ‘sexual activities, or having others perform sexual

⁴⁴ There have been convictions for sexual exploitation in Barnsley, Bristol, Doncaster, Oxford, Rochdale and Rotherham between 2011 and 2014. For discussion of the Rotherham and Oxford cases, see Home Affairs Select Committee, *Child Sexual Exploitation and the Response to Localised Grooming* (5 June 2013) para 2.

⁴⁵ Sexual Offences Act 2003, ss 16-29.

activities on them’.⁴⁶ It is not essential that interaction between exploiter and exploitee is face-to-face. The wrong can be perpetrated by the posting of sexual images of a child on the internet, for example.⁴⁷ A key aspect of the wrong is that ‘those exploiting the child or young person have power over them, perhaps by virtue of their age or physical strength’.⁴⁸ It is clear that those who engage in child sexual exploitation rely upon a wide range of methods in order to establish such a position of dominance over an exploitee. Most recently the issue of ‘localized grooming’ has come to light, which involves the targeting of vulnerable children for sex. This form of exploitation has been said to operate in the following way:

The group typically makes initial contact with victims in a public place such as a park, cinema, on the street or at a friend’s house. The children are offered gifts and treats—takeaway food, sweets, cigarettes, alcohol or drugs—in exchange for sex, sometimes with dozens of men on the same occasion. There will be occasions where they are missing from home although such times may be less than 24 hours. The children sometimes identify one offender as a ‘boyfriend’, and might regard the sexual abuse by multiple offenders as ‘normal’. The gangs use younger men or boys to make the initial approach, reinforcing the misapprehension that the children are involved in consensual relationships with partners of a similar age. In a number of cases, victims are internally trafficked within the UK, being taken to other towns for the express purpose of being ‘given’ or ‘sold’ for sexual exploitation.⁴⁹

An intractable issue is whether apparently valid consent given by a 16 or 17 year-old at any early stage in a relationship ought to be considered valid, on the basis of an initial ‘consensual’ sexual relationship. Certainly this topic must be thoroughly debated, and there is still work to be done on the issue of consent and grooming processes in cases of young persons aged 16 or over. As a conceptual matter, can a young adult consent to sexual activity at the early grooming stage? What if an exploiter’s aim to attack sexual

⁴⁶ Department for Education, *Tackling Sexual Exploitation Action Plan* (2011) 4.

⁴⁷ *ibid* 4.

⁴⁸ *ibid* 4.

⁴⁹ Home Affairs Select Committee (n 44) para 8.

interests does not come to fruition? Is automatically discounting the relevance of consent at an early stage, in case it leads to exploitation, too high a conceptual price to pay for protecting vulnerable young adults?

There are other important issues surrounding child sexual exploitation which bear further analysis by criminal law commentators. For example, what should be the criminal law position, if any, where one child is sexually exploited by another?⁵⁰ In *R v G*, Baroness Hale argued that the strict liability offence of rape of a child under 13, found in section 5 of the Sexual Offences Act 2003, could be applied to a boy of 15 who thought he was engaging in consensual sex.⁵¹ Baroness Hale argued that strict liability should be applied to a child under-16 in order to protect children ‘from premature sexual activity of all kinds’.⁵² Given the boy’s lack of knowledge as to the complainant’s age, this seems manifestly unfair. As Andrew Ashworth has argued, ‘The harm is very serious for the victim, but to register a conviction without culpability as to this material element is also a great injustice for the defendant.’⁵³ This issue is not pursued further in this thesis given that our focus is upon acquisitive exploitation. However, as was argued in section 1.3 above, it is useful in this introductory chapter to identify ways in which understanding of other exploitative wrongs need to be developed and this is one such area.

⁵⁰ For example, sexual activity between children is dealt with by a Children’s Hearing system in Scotland. See chs 2 and 3 of the Children (Scotland) Act 1995.

⁵¹ *R v G* [2008] UKHL 37, [41]-[56].

⁵² *ibid* [45].

⁵³ Andrew Ashworth, ‘Should Strict Liability be Removed from all Imprisonable Offences?’ in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 122. See further Liora Lazarus, ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce’ in Lucia Zedner and Julian Roberts, *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012).

Sexual exploitation of adults presents its own unique issues, and we can only briefly touch on this complex topic here. One significant issue lies in identifying the line between ‘sexual exploitation’ and ‘sex work’. Catherine MacKinnon argues that prostitution is incorrectly categorized as ‘sex work’ when it ought to be recognized as sexual exploitation.⁵⁴ MacKinnon argues that any apparent consent should be interpreted as invalid, since prostitution is:

[A] product of lack of choice, the resort of those with the fewest choices, or none at all when all else fails. The coercion behind it, physical and otherwise, produces an economic sector of sexual abuse, the lion’s share of the profits of which goes to others. In these transactions, the money coerces the sex rather than guaranteeing consent to it, making prostitution a practice of serial rape. In this analysis, there is, and can be, nothing equal about it.⁵⁵

If one disagrees and argues that not every act of one person using another person sexually is a case of sexual exploitation then a list of factors which make conduct exploitative must be robustly presented and defended.

1.3.2 Labour exploitation

There is no definitive statement of labour exploitation but persons subjected to slavery, servitude and forced labour are recognizably exploited in this way. Protection against these serious forms of labour exploitation is given in Article 4 of the European Convention of Human Rights. Thus we can reflect upon how these terms have been defined in Article 4 jurisprudence as a means of elaborating the meaning of labour

⁵⁴ Catherine MacKinnon, ‘Trafficking, Prostitution, and Inequality’ (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 271, 273, ‘[T]he sexual exploitation approach sees prostitution as the oldest oppression, as widespread as the institutionalized sex inequality of which it is analyzed as a cornerstone.’ There are many accounts by sex workers contesting MacKinnon’s claims, see Kitty Holland, ‘I am not a Criminal or a Victim. I am a Sex Worker’ *Irish Times* (3 November 2014) <www.irishtimes.com/life-and-style/people/i-am-not-a-criminal-or-a-victim-i-am-a-sex-worker-1.1983583> accessed 29 March 2015.

⁵⁵ MacKinnon (n 54) 274.

exploitation. In *Siliadin v France* these ideas were said to constitute a ‘hierarchy of denial of personal autonomy’.⁵⁶ Slavery is the most serious, defined as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁵⁷ Whether a person is in servitude hinges upon whether coercion has been used to oblige a person to provide services for another person.⁵⁸ According to the court in *Siliadin*, servitude also requires ‘the obligation for the “serf” to live on another person’s property and the impossibility of altering his condition’.⁵⁹ Finally, the Article 4 prohibition of forced labour applies to work ‘exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁶⁰ In practice these forms of exploitative conduct are likely to overlap. Moreover, conduct which initially has nothing to do with labour exploitation may ‘turn’ exploitative. As Klara Skrivankova has usefully argued, ‘[T]he reality of forced labour is not a static one, but a continuum of experiences ranging from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour.’⁶¹ In 2012, the International Labour Organisation estimated that 20.9 million people were being subjected to labour exploitation globally.⁶² This estimate was posited as conservative given well-known difficulties regarding

⁵⁶ (2006) 43 EHRR 287.

⁵⁷ The court in *Siliadin v France* (2006) 43 EHRR 287, [122], used the definition of slavery given in the UN Slavery Convention 1927.

⁵⁸ *ibid* [124].

⁵⁹ *ibid* [123].

⁶⁰ ILO Convention No 29. This was used as ‘a starting point’ for interpretation of forced labour in Article 4 ECHR in *Van der Musselle v Belgium* (App no. 8919/80, Judgment of 23 November 1983) [32]; and *Siliadin* (n 57) [117].

⁶¹ Klara Skrivankova, ‘Between Decent Work and Forced Labour: Examining the Continuum of Exploitation’ (Joseph Rowntree Foundation 2010) 4.

⁶² ILO, *ILO Global Estimate of Forced Labour: Results and Methodology* (Geneva 2012) 1.

identifying labour exploitation.⁶³ Often the wrong remains unreported. Indeed, this is a challenge common to all the types of wrongful interpersonal exploitation explored in this section.

Several arguments bear close study for those interested in developing our conceptual understanding of labour exploitation. First, Article 4 identifies the very worst forms of labour exploitation. But what other forms of conduct in a labour market are seriously exploitative? Should our understanding of labour exploitation develop beyond the Article 4 presentation? What reasonable limits should be set to an idea of serious ‘labour exploitation’? It is not the purpose of this thesis to examine acquisitive exploitation’s relevance to unfair labour practices. This is because of our argument that it is convincing to differentiate ‘wrongful interpersonal exploitation’, and to elucidate wrongfulness in relation to a specific type of exploitation. Therefore, a specific account of labour exploitation would be relevant to unfair labour practices.

1.3.3 The distribution or sale of human organs

Another form of wrongful interpersonal exploitation is based on the distribution and/or sale of human organs. There is room for argument as to what activities should come within this category of exploitation. Stephen Wilkinson identifies three possibilities. First, a person may be exploited in this way when they have their organs stolen from them. Secondly, it may arise when a commercial market is designed to distribute ‘organs usable for transplantation from people who die “naturally” from accidents, age, or diseases’.⁶⁴ Thirdly, it can be said to involve the voluntary sale of one’s own non-

⁶³ *ibid* 11.

⁶⁴ Wilkinson (n 29) 101-102.

essential organs, such as a kidney.⁶⁵

Wilkinson's first example is deeply troubling, but it ought not to attract the label 'wrongful interpersonal exploitation'. Since an attack upon a body will be required in order to gain access to an organ this ought to be conceptualized as an offence against the person.⁶⁶ The case for this approach is easily satisfied in relation to Wilkinson's example of cases of Chinese prisoners being 'executed every year in order to provide fresh organs for transplantation in the times and places where they are most needed'.⁶⁷ This is better categorized as murder as opposed to exploitation. A more compelling example of exploitation is Wilkinson's second category. The principal motivation of an individual in these circumstances is to use someone's misfortune to make a gain for himself. A legal system has to decide whether or not this is considered to be exploitation.

Wilkinson's third category is also contentious. These are 'cases in which an organ for sale comes from a paid living donor, who, in some sense, volunteers'.⁶⁸ It is not by any means clear that this constitutes exploitation. There is uncertainty as to when organ sale (of a non-vital organ) is exploitative. How can a person be exploited in this way? Can someone be exploited if they give apparent consent? Is such apparent consent valid? Should valid consent be recognized because there are benefits to be gained from permitting this practice? Wilkinson notes that, in relation to a criminalization decision, 'the very substantial practical benefits that a commercial

⁶⁵ *ibid* 102.

⁶⁶ For discussion, see Imogen Goold, *Flesh and Blood: Owning Our Bodies and Their Parts* (Hart 2014).

⁶⁷ Wilkinson (n 29) 101.

⁶⁸ *ibid* 102.

market in human organs would deliver’ must be taken into account.⁶⁹ On this basis ‘the case for a legal prohibition must inevitably be a moral one (and, almost certainly, a non-utilitarian moral one)’.⁷⁰ Where should the line be drawn? Wilkinson argues that exploitation can be avoided in cases of consensual sale of a non-vital organ if a minimum fee is set. This is because this enables financial gain for persons in poverty.⁷¹ Certainly this is open to debate as a solution. It paints an optimistic picture that those in abject poverty have freedom to choose to sell their non-vital organs, as well as sufficient information on which to base their decision.

1.3.4 Human trafficking for the purpose of exploitation

Closely associated with the forms of wrongful interpersonal exploitation considered so far is trafficking for the purpose of exploitation. In conceptual terms, human trafficking is not synonymous with wrongful interpersonal exploitation. Trafficking provides opportunities for exploitation and is often undertaken for this purpose. However, there is sufficient consensus that human trafficking is enough part of the ‘problem’ of interpersonal exploitation to justify our considering it a category of wrongful interpersonal exploitation.⁷² No doubt this is because it is difficult to identify the point in time at which human trafficking ‘crosses over’ into interpersonal exploitation. The National Crime Agency identified 2,744 victims of human trafficking in 2013, of which

⁶⁹ *ibid* 103.

⁷⁰ *ibid* 103.

⁷¹ *ibid* 131-32.

⁷² For example, a right that no one shall be subjected to human trafficking has been read into Article 4 of the ECHR, which protects against serious labour exploitation. See *Rantsev* (n 4) [282].

602 were children.⁷³ This is a 22 percent increase on 2012 figures, but difficulties in reporting this form of exploitation mean that these figures do not reflect the prevalence of the practice.⁷⁴ Within reported figures, the level of trafficking for labour exploitation appears to exceed that of trafficking for other forms of exploitation.⁷⁵ In a 2012 report, the International Organization for Migration noted that demand for assistance to victims of human trafficking for labour exploitation for the first time exceeded calls for assistance to victims of trafficking for sexual exploitation.⁷⁶

The Palermo Protocol identifies human trafficking as involving three elements in the case of an adult.⁷⁷ First, the exploitative conduct used is transportation, recruitment, transfer, harbouring or receipt of persons. Secondly, exertion of control is exercised and this is achieved by threat, force, deception, abuse of a position of power, abuse of a vulnerable person, or by other forms of coercion. Thirdly, a trafficker's conduct is undertaken with an intention to exploit. Presumably this includes intent to sexually exploit, to obtain forced labour or services, to enslave other persons or similar practices, or to remove organs. JR Spencer cites real-life examples of trafficking for exploitation as including the importation of 'foreign women and forcing them to work

⁷³ National Crime Agency, *NCA Strategic Assessment: The Nature and Scale of Human Trafficking in 2013* (UKHTC 2014). These figures are based on those collected by the National Referral Mechanism.

⁷⁴ For example, there is particular hesitancy among migrant workers to report human trafficking. The ILO notes that this is especially true where migrant workers 'lack proper documentation' and therefore risk detention and deportation back to their home country. See ILO, *Caught at Sea: Forced Labour and Trafficking in Fisheries* (2013) 16.

⁷⁵ See Salvation Army, 'Anti-Human Trafficking Victim Care Coordination and Contracting Service Report' (September 2014).

⁷⁶ IOM, 'Counter Trafficking and Assistance to Vulnerable Migrants: Annual Report' (Geneva 2012) 18.

⁷⁷ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 3. This definition is also used in the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (CETS No 197), and EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ [2011] L101, 1). cf the position of children under Article 3(c), where trafficking is regarded as having occurred where there has been 'recruitment, transportation, transfer, harbouring or receipt of a child'.

in brothels, bringing in foreign juveniles to work as pick-pockets or as slave labourers in cannabis factories, and buying up surplus members of impoverished families to provide a source of organ transplants'.⁷⁸

Again, a key conceptual issue is the relevance of apparent consent. It is probable that trafficking conduct may engender an exploitee's consent. After all, on some occasions the work of an exploiter in engaging in such conduct is to get an exploitee 'on side'. An important question, therefore, is whether this consent should ever be held valid. Lord Wilson argued in *Hounga* that there is an important distinction between human trafficking and smuggling. He argued that the latter classification is appropriate where there has been a demand 'for money made by agents of persons who are only too keen to be transported to a western country', but noted that this distinction will be 'difficult to discern in a particular case'.⁷⁹

Human trafficking presents considerable difficulties for those considering the criminal law response to this serious wrong, and we will return to this point in section 1.5 below. We can briefly note here that one problem relates to the need for a coherent common law response to human trafficking for exploitation. There ought not to be contradictory legal measures which purport to criminalize human trafficking for exploitation on the one hand, but which are undermined by the operation of the civil law on the other. The anomaly caused by the Overseas Domestic Worker visa regime has been strongly criticized by Virginia Mantouvalou. Mantouvalou takes the view that a system of tying a worker's visa to the employer whom they entered into the UK to

⁷⁸ JR Spencer, 'International Law, People Trafficking and the Power to Stay Criminal Proceedings for Abuse of Process' (2014) 73 CLJ 11, 12.

⁷⁹ *Hounga* (n 1) [60].

work for undermines protection against labour exploitation offered by the Modern Slavery Bill.⁸⁰ Regrettably, this approach has now been crystallized in the Modern Slavery Act 2015. Moreover, the significance of criminal activity of trafficked persons demands further attention. Difficulty arises if an individual trafficked for exploitation commits a criminal offence. It was noted in *Hounga* that, ‘None of the international instruments, nor any rule of English criminal law, provides any automatic defence to a trafficked person who commits a criminal offence.’⁸¹ Of particular concern may be a trafficked person who is compelled to commit an offence as a *direct consequence* of their being trafficked.⁸² The Supreme Court in *Hounga* argued *obiter* that in such circumstances ‘careful consideration ought to be given to whether it is in the public interest to prosecute’.⁸³ Arguably there is an important question to be asked about whether a defence to a criminal liability should be offered in such circumstances.⁸⁴

1.3.5 Financial exploitation

Financial abuse includes ‘theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits’.⁸⁵ Thus, financial exploitation is one means of

⁸⁰ Written Evidence: Virginia Mantouvalou (15 October 2014) <www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/ms28.htm> accessed 29 March 2015.

⁸¹ *Hounga* (n 1) [63]-[64]. See also *R v L* [2014] 1 All ER 113 [13] and [17], and *R v M (L)* [2011] 1 Cr App R 135, [13]-[14].

⁸² *Hounga* (n 1) [63]-[64].

⁸³ *ibid* [63]-[64].

⁸⁴ We return to this discussion in s 1.6.1 below.

⁸⁵ Department of Health, *No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse* (Home Office 2000) s 2.7. For statistics on financial crime generally, see Karen Harrison and Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate 2013).

perpetrating financial abuse. A major conceptual hurdle lies in identifying what is distinctive about wrongful financial exploitation as opposed to financial abuse more generally. For example, financial abuse may involve a perpetrator who is ‘a family member, friend, care worker/professional or a stranger who has chosen to target a vulnerable adult’.⁸⁶ But since abuse of a position of trust and/or a position of dominance is likely to be key to an exploitation argument, we might conjecture that this is financial exploitation. Moreover, financial abuse can be perpetrated using a wide range of techniques, from ‘not acting in the person’s best interests, to persuasion or coercion in respect of gifts or loans, misappropriation of property or allowances, theft, rogue trading, or mass-marketing fraud’.⁸⁷ To indicate financial exploitation, a fault element of intention to cause gain or loss may be necessary. These are fairly standard ‘exploitation’ factors, and we will discuss them in relation to acquisitive exploitation in chapter 3 of this thesis.

Elder financial exploitation has been identified as a serious problem in the United States, defined as ‘the illegal or improper use of an elder’s funds, property, or assets’.⁸⁸ A 2006 report recorded 191,908 incidents of elder and vulnerable adult abuse in the United States in 2004: 15 percent of these cases were identified as involving financial exploitation.⁸⁹ The rise of financial exploitation comes at a significant cost. In 2009 it

⁸⁶ Adults’ Services SCIE Report, *Assessment: Financial Crime Against Vulnerable Adults* (National Fraud Intelligence Bureau, November 2011) 5. For example, s 15610.30 of the California State Welfare and Institutions Code, defines financial abuse as ‘a situation in which a person, including but not limited to, one who has care or custody of or who stands in a position of trust, of an elder or dependent adult, takes, secretes, or appropriates their money or property, to any wrongful use, or with the intent to defraud’.

⁸⁷ Adults’ Services SCIE Report (n 86) 5.

⁸⁸ National Center on Elder Abuse, ‘National Elder Abuse Incidence Study: Final Report’ (1998) 12.

⁸⁹ National Center on Elder Abuse, ‘The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older’ (2006) 6.

was estimated that the U.S. economy stood to lose 2.6 billion dollars annually through financial exploitation.⁹⁰ Certainly this form of wrongful interpersonal exploitation has attracted less conceptual attention from Anglo-American criminal law theorists than other forms examined above. There must be further work done to understand how much financial abuse amounts to financial exploitation in England and Wales, and how much of it is targeted towards elderly or vulnerable persons. A question raised by this thesis is how the wrong of acquisitive exploitation (which is introduced in chapter 2) is different or distinct from financial exploitation. Does financial exploitation require harm caused to property interests, for example? Can we conceptualize a wrong of acquisitive exploitation based on seriously wrongful exploitative conduct, as opposed to financial harm? Certainly the margins of financial exploitation have not yet been fully explored.

1.3.6 Summary

Much more could be written about these forms of wrongful interpersonal exploitation individually notwithstanding the fact that they may overlap in practice. If we were to attempt to categorize this thesis' work on exploitation using the categories identified, we can say that 'acquisitive exploitation' is most like financial exploitation. But even our clipped survey of financial exploitation above has shown that it is a very amorphous category.

Nothing so far establishes a case for studying acquisitive exploitation. Why not analyze better known types of interpersonal exploitation, such as sexual exploitation?

⁹⁰ See Jonathan Golding and others, 'When a Son Steals Money From His Mother: Courtroom Perceptions of Elder Financial Exploitation' (2013) 25 *Journal of Elder Abuse and Neglect* 126-27.

Sexual exploitation has generated an enormous amount of political and legislative interest in recent years. It is crucial to emphasize that any case for analysis of wrongful interpersonal exploitation cannot be made on the basis of statistics. As we have noted several times in this section, it is challenging to get an accurate picture of the incidence of interpersonal exploitation. For example, a 2009 government report argued that ‘Estimating the extent of child sexual exploitation nationally is difficult given the low awareness of the indicators of this abuse among service providers and the varying responses from local areas in terms of assessing their local situation.’⁹¹

However, careful study of sexual exploitation of children, particularly by gangs and groups, is now at an all-time high.⁹² What has prompted such study despite the lack of empirical data? Arguably it is when the real-life grit of interpersonal exploitation catches the attention of charities, NGOs, local authorities, the police, and is then fed into mainstream politics, that a particular type of exploitation is given real attention. This demonstrates the need for vigilance by criminal law theorists where vulnerable persons are seriously exploited, but where that abuse remains largely hidden. There has not yet been much political or social pressure surrounding acquisitive exploitation. But I argue in chapter 2 that it is increasingly common for property offences to be said to penalize an undefined type of interpersonal exploitation. It is as pressing for criminal law theorists to investigate *assumptions* that interpersonal exploitation is being dealt with adequately, as it is to follow politically hot topics such as child sexual exploitation. We will develop this argument fully in chapter 2 of this thesis.

⁹¹ Department for Children, Schools and Families, ‘Safeguarding Children and Young People from Sexual Exploitation’ (HM Government 2009) 19.

⁹² See Children’s Commissioner, ‘If Only Someone Had Listened: Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups’ (2013).

1.4 Background: the state's obligations

Evidence of new commitment to studying wrongful interpersonal exploitation is welcome, though there is still much work to be done. Hard on its heels comes strong rhetoric urging that criminal law measures be used to penalize exploitation.⁹³ Clearly, however, any criminal measures interpreted or created to target exploitation require strong justification. Great care is needed in crafting criminalization arguments relating to specific types of wrongful interpersonal exploitation, and with reference to the appropriate level of criminalization (for example, ought there to be a regulatory offence, or a strict liability offence attracting a high maximum sentence?). A positive criminalization argument must be presented and robustly defended if the criminal law is to be justifiably used. But before specific criminalization arguments are scrutinized, one broader normative question presents itself. Does the state have a foundational duty to penalize exploitation using criminal law measures? On the face of it, without such a duty any argument for criminalization of exploitation is undercut from the outset. In attempting to see the wood from the trees, I argue that human rights law and political theory both provide important foundational arguments for this thesis' study of acquisitive exploitation and criminal law.

⁹³ For example, see Yvette Cooper MP, 'Speech to Labour Party Annual Conference 2014' (Manchester, 24 September 2014) <<http://press.labour.org.uk/post/98301589749/speech-by-yvette-cooper-mp-to-labours-annual>> accessed 29 March 2015, 'We'll outlaw agencies who only recruit abroad, we'll close the loopholes in the minimum wage, we'll increase fines for employing people here illegally. And we should do more. Take the Eastern European workers brought here by a gang to work. Their wages were stolen, they slept on bug ridden mattresses six to a room, they had dogs set on them if they complained, and they were held in the back of a transit van for five days at a time. The police tried to stop it but said they couldn't prosecute because the men were here legally and they'd consented to work, so there was no crime. People treated like animals, used to undercut local wages and jobs. Responsible businesses losing out. No crime? Conference, this is not the economy we want or the Britain we believe in. So the next Labour government will make this exploitation a crime.'

1.4.1 Important human rights developments

An emerging body of European human rights jurisprudence has been used to improve protection of vulnerable persons in England and Wales from forced labour, slavery, and servitude. The link with wrongful interpersonal exploitation is clear: the absolute right found in Article 4 of the ECHR protects against wrongful *labour exploitation* as we defined it in section 1.3.2 of this chapter.⁹⁴ The meaning of slavery, servitude and forced labour were explained in the case of *Siliadin* in 2006.⁹⁵ The European Court of Human Rights argued that these concepts are best explained in terms of seriousness, with slavery the most acute form of labour exploitation. One bold development has been the court's willingness in *Rantsev v Cyprus and Russia* to extend the scope of Article 4 ECHR, reading into it a right not to be subjected to human trafficking.⁹⁶ The court stated that:

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligations to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes slavery, servitude or forced and compulsory labour. Instead, the Court concludes that trafficking itself, within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention, falls within the scope of art.4 of the Convention.⁹⁷

It is a matter of surprise that Article 4 ECHR—a right protected in England and Wales by means of the Human Rights Act 1998—can be read in such a way. The decision in *Rantsev* lacks stability because it puts forward no supporting justifications for this

⁹⁴ Articles 4(1) and (2) state that no one shall 'be held in slavery or servitude', or 'be required to perform forced or compulsory labour'.

⁹⁵ *Siliadin* (n 57). For discussion, see s 1.3.2 above.

⁹⁶ *Rantsev* (n 4).

⁹⁷ *ibid* [282].

conclusion, relying on abstract ideas of human dignity and fundamental freedoms as the drivers for this interpretation. Our best conjecture is that *Rantsev* extends protection against another form of wrongful interpersonal exploitation, beyond labour exploitation. It appears to use the Article 4 right to protect against systemic exploitation: labour exploitation *and* trafficking for exploitation. Difficulties with identifying the exact point at which an individual who has been trafficked is ‘exploited’ may be the reason for adopting this analysis. But if this is the case, then this ought to be explicitly acknowledged.

Since Article 4 ECHR has been read so dynamically in relation to exploitation, this raises the question as to which other ECHR rights will likewise be engaged in cases of serious exploitation. For example, Article 5 ECHR provides that ‘everyone has the right to liberty and security of person’. The rampant spread of sexual exploitation in towns and cities is plainly a threat to the security of persons. In fact, several types of wrongful interpersonal exploitation may come within the scope of Article 5 ECHR, since one can assume that serious exploitation has significant implications for the liberty of persons. And other rights may be given a similarly broad interpretation in cases of interpersonal exploitation. For example, what of the scope of Article 1 of Protocol 1, which sets out a qualified right to peaceful enjoyment of property? Does the type of exploitation studied in this thesis—what we call acquisitive exploitation—come within its scope? There is room for development here; the use of ECHR rights to protect against wrongful interpersonal exploitation is far from settled. Surely it is only a matter of time before counsel pleads these types of arguments before the Strasbourg court.

If an ECHR right is engaged, a state must ensure effective protection of that

right. The court in *Siliadin* imposed positive duties upon states ‘to adopt criminal law provisions which penalize the practices referred to in Article 4 and to apply them in practice’ in order to keep pace with international developments.⁹⁸ It seems clear then that states are required to have in place (i) ‘thorough and effective’ investigations of breaches of ECHR rights;⁹⁹ and (ii) ‘preventive operational measures’ to prevent risks to an individual’s ECHR rights ‘from the criminal acts of a third party’.¹⁰⁰ In order to discharge these obligations a state may need to take positive measures to ensure ECHR protection in certain circumstances. For example, the state may need to improve upon current statutory provision by enacting new criminal law measures where current measures are considered insufficient.¹⁰¹ In *CN v UK*, the European Court of Human Rights found that Article 4 ECHR was violated because ‘investigation into the applicant’s complaints of domestic servitude was ineffective due to the absence of specific legislation criminalising such treatment’.¹⁰² And ECHR protection of a right must not be short-circuited by contradictory civil law measures. In *Rantsev*, the court added that national legislation ‘must be adequate to ensure practical and effective protection of the rights of victims or potential victims of trafficking’, and this may require review of immigration rules and the common law’s regulation of business practices.¹⁰³ It is well known that international obligations and EU law are other bases for positive duties upon states to enact criminal law measures and/or effective

⁹⁸ *Siliadin* (n 57) [89].

⁹⁹ *Aydin v Turkey* (n 6) [103].

¹⁰⁰ *Van Colle v United Kingdom* (2013) 56 EHRR 839 [88].

¹⁰¹ See Keir Starmer, ‘Human Rights, Victims and the Prosecution of Crime in the 21st Century’ [2014] Crim LR 777, 778 ff.

¹⁰² [2012] ECHR 4239/08 (13 November 2012) [81].

¹⁰³ *Rantsev* (n 4) [284].

investigation and procedures. For example, the United Nations Convention of the Rights of the Child requires states to protect children from sexual exploitation, and effective procedures and criminal law measures are required in order to ensure this.¹⁰⁴ Moreover, Directive 2011/36/EU has been enacted by the European Union, establishing minimum rules for EU member states concerning criminal offences and sanctions in relation to human trafficking.¹⁰⁵

1.4.2 Arguments in political theory

It may be tempting to overlook arguments in political theory since they do not provide a means of justifying a particular criminalization decision in relation to exploitation. This is true, but these arguments are important because they fulfill the need for what Andrew Simester and Andreas von Hirsch call the ‘deeper embedding of criminalisation theory in general political theory’.¹⁰⁶ This is valuable because concerns about criminalization are not removed from questions about political power, and how that power should be exercised. Two arguments in political theory lend weight to the state having a foundational duty to penalize wrongful interpersonal exploitation. One perspective runs on the liberal concern to protect the security of citizens—this is a requirement because citizens have in turn obeyed laws laid down by the state. The other is the civic republican mandate that the state addresses arbitrary domination.

¹⁰⁴ (1989) Article 34 (protection from sexual abuse and exploitation); Article 39 (right to rehabilitation from abuse, exploitation and torture). See also Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* 2007 (CETS No 201).

¹⁰⁵ Replacing Council Framework Decision 2002/629/JHA.

¹⁰⁶ AP Simester and Andreas von Hirsch, ‘On the Legitimate Objectives of Criminalisation’ (2014) 8(3) *Crim L and Philosophy* 1, 4 (official page number not yet assigned). And further, 4, ‘Criminalisation theory, like so many large intellectual projects, is a communal enterprise.’

First, a duty upon the state to provide a right to security for its citizens is regarded as a cornerstone of liberal political theory. A right to security incorporates two aspects: a right held by citizens to have their interests protected *by* the state, and provision for protection of citizens *from* the state. At first glance both aspects of the right seem admirable moves to protect citizens. Arguably the idea of using the criminal law to protect citizens from non-state interference is the more powerful rhetorical tool, used by politicians, non-governmental organizations, and courts. Liora Lazarus' 2011 study of 400 political speeches showed that the right of citizens to protection from the state was referred to in only one case.¹⁰⁷

The basis of a right to security has been best explored by Liora Lazarus, who argues that its foundations are found in work by Thomas Hobbes and John Locke.¹⁰⁸ Hobbes argued in favour of a social contract between citizens and the state in order to appropriate security, and in order to steer away from the alternative, which he described as 'war'.¹⁰⁹ This offered best prospects for personal flourishing, but citizens' support of this aim required total abrogation of their rights. Thus, Lazarus notes that 'Hobbes' social contract was a bargain between individuals to cede their liberty—or "right to do every thing"—to the extent necessary to avoid war.'¹¹⁰ Lazarus observes that the gist of

¹⁰⁷ See Liora Lazarus, 'The Right to Security: Securing Rights or Securitizing Rights?' in Rob Dickinson (ed), *Examining Critical Perspectives on Human Rights* (CUP 2012) 95-98. HC Deb 25 July 2007, vol 463, col 851.

¹⁰⁸ Thomas Hobbes, *Leviathan* (1651) Ch XIII §9; John Locke, *Two Treatises of Government* (1689) §222. For discussion, see Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP 2014) (forthcoming). Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365798> accessed 29 March 2015.

¹⁰⁹ Hobbes (n 108) §4.

¹¹⁰ Lazarus, 'The Right to Security' (n 108) 2 (SSRN copy).

the problem with Hobbes' account is that it leads to a 'security state'.¹¹¹ In this model deliberative contestation is not encouraged as a means of placing limits on the exercise of political power. By contrast, Locke supported state power to the extent that it protected 'the Members of that Society in their Lives, Liberties, and Possessions'.¹¹² In other words, the basic state of nature was not one of war which citizens must enter into a social contract to be protected from. Because state power could provide an anchoring for protecting rights to liberty, life and property, Locke also recognized that there ought to be limits to this power. This is referred to by Locke as 'security within the limits of the law'.¹¹³ There is therefore a key difference in the early development of a broad right to security. Lazarus' observation is that:

Either we believe, as Hobbes did, that peace (or bare security) was a value so important as to supersede other goods in a political community, or we believe, like Locke, that a rich conception of security is inseparable from the enjoyment of the liberties and property that is naturally ours to enjoy.¹¹⁴

These ideas have been developed further since Hobbes and Locke to explicitly identify a right to security. Blackstone's approach allowed for the right to be 'a personal and legal right vested in individuals'.¹¹⁵ This stems from individual and absolute rights of man to personal security, personal liberty, and private property.¹¹⁶ According to Blackstone '[T]he first and primary end of human laws is to maintain and regulate these absolute rights of individuals.'¹¹⁷ The question arises how these absolute rights ought

¹¹¹ *ibid* 3.

¹¹² Locke (n 108) §171.

¹¹³ *ibid* §137.

¹¹⁴ Lazarus, 'The Right to Security' (n 108) 5 (SSRN copy).

¹¹⁵ *ibid* 7. See William Blackstone, *Commentaries on the Laws of England* (first published 1765, Clarendon Press 1769) 133.

¹¹⁶ Blackstone (n 115) 129.

¹¹⁷ *ibid* 124.

to be balanced—especially rights to security and to liberty. However, this question is not answered by Blackstone.¹¹⁸ There was an important shift in defining a right to security in Henry Shue’s work in 1996. Shue defined a right to security as a basic right which ‘is essential to the enjoyment of all other rights’.¹¹⁹ According to Shue, this is a right to physical security, since ‘[N]o one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right’.¹²⁰ It follows that ‘If any right is to be exercised except at great risk, physical security must be protected.’¹²¹ In a similar vein, Sandra Fredman argues that a right to security encompasses a right to be physically secure. But Fredman *adds* to this that ‘[P]rotection against hunger, want and other material deprivations that threaten a person’s existence are...as much part of the right to security as protection against assaults by the state or others.’¹²² This is because individuals are only able to live personally autonomous lives in circumstances where they have access to economic prospects, education, protection of their health, the ability to engage in political contestation, and so on.¹²³

Of course much more could be written about how a right to security has been

¹¹⁸ Lazarus critiques Blackstone’s account in Lazarus, ‘The Right to Security’ (n 108) 7 (SSRN copy).

¹¹⁹ Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996) 19.

¹²⁰ *ibid* 21.

¹²¹ *ibid* 21.

¹²² Sandra Fredman, ‘The Positive Right to Security’ in Benjamin Goold and Liora Lazarus, *Security and Human Rights* (Hart 2007) 307, 308.

¹²³ *ibid* 308.

conceptualized.¹²⁴ For the purposes of this chapter our clipped survey of the literature will suffice. We turn now to examine what is required by a right to security. I argue that even a narrow interpretation of the right is likely to require the state to protect vulnerable persons from serious interpersonal exploitation.

As was noted above, Shue's perspective on a right to security is that it is essential to secure all other rights. In other words, a right to security does not carry substantive value in and of itself. Rather it facilitates the protection of other valuable rights. This means that a right to security can be used to justify state action 'to anticipate and mitigate the risks that militate against the enjoyment of all other rights'.¹²⁵ However, Shue's approach raises serious concerns. Shue's interpretation of a right to security means that the right can be invoked whenever there is any apparent or perceived threat to security. Presumably the state can interfere in order to deal with a wide range of risks to security. A broad and amorphous 'right to security' does not further the rule of law as an ideal by advancing clarity or legal certainty since it bears no substantive content in and of itself. This provides little opportunity for citizens to know what is required by law and to what conduct legal sanctions will apply.¹²⁶ There is also a deeper conceptual problem. Lazarus has argued that because a right to security is not given a tightly defined meaning, when it is invoked there is no clear sense as to which rights are being balanced.¹²⁷ There is a respectable argument that this in fact

¹²⁴ See also Amartya Sen, *Development as Freedom* (OUP 1999); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) ch 1.

¹²⁵ Lazarus, 'The Right to Security' (n 108) 17 (SSRN copy).

¹²⁶ See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardner ed, 2nd ed, OUP 2008) 152-53.

¹²⁷ Lazarus, 'The Right to Security' (n 108) 18 (SSRN copy).

endangers the rights ‘which security is meant to be serving’.¹²⁸ The greater the onus on the state to provide a vague concept of security, the deeper the incursion into the personal liberty of citizens as the state works to provide for this.¹²⁹ There is intellectual coherence in Lazarus’ argument that a right to security must not ‘become the overarching legitimating principle and rhetorical tool upon which we ground arguments for all other desirable human goods’.¹³⁰ This amounts to ‘securitization’: the promotion of security ‘to an unhealthy hegemonic category [which] comes to mean the unreflexive, parochial and anxious cleaving to a security-driven conception of a risk free society’.¹³¹

Most plausibly a duty to provide security to citizens should be read narrowly. This is a duty upon the state ‘to develop structures and institutions that are capable of responding to and minimizing “critical and pervasive threats” to human security’, which means ‘an absence of harm in the most core physical sense of harm to a person’.¹³² How might this interpretation of liberal political theory ground a state duty to penalize interpersonal exploitation? Using Lazarus’ formulation, such an obligation should apply where there is a ‘critical and pervasive’ threat to security caused by wrongful interpersonal exploitation. Certainly serious forms of wrongful interpersonal exploitation lend themselves to this type of analysis. For example, there is evidence

¹²⁸ *ibid* 18.

¹²⁹ In Liora Lazarus, ‘Mapping the Right to Security’ in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) 326, Lazarus notes that there is a fundamental tension in relation to a right to security, ‘[H]ow are we to protect freedom (through security) without denying its essence (by violating human rights)?’

¹³⁰ *ibid* 326.

¹³¹ Ian Loader and Neil Walker, *Civilizing Security* (CUP 2007) 168. Lazarus, ‘Mapping the Right to Security’ (n 129) 329, ‘In short, the right to security cannot equate to a right to be secure.’

¹³² Lazarus, ‘Mapping the Right to Security’ (n 129) 329.

that sexual exploitation of individuals by groups and gangs poses a significant and pervasive risk to young adults in social care.¹³³ And this risk of harm is directed to their bodily interests—a ‘core physical sense of harm to a person’.¹³⁴ It is thus reasonable to assume that this passes the ‘critical and pervasive threat’ hurdle, thus triggering a state duty to act. What we have established is that even using a restrictive interpretation of a ‘right to security’, there seems to be significant pressure upon the state to protect vulnerable persons at risk of serious exploitation.

Some commentators argue that the need for *positive* measures is inherent in a right to security. Sandra Fredman argues that the right to security is more than a right not to have one’s interests interfered with. Rather she argues that it is ‘a right to positive state action—state action that aims to protect the individual from risks to the person, whether they are caused by fellow citizens, poverty or the state itself’.¹³⁵ Positive measures are therefore required in order to realize what Fredman calls ‘duties of fulfillment’.¹³⁶ However, care must be taken to avoid using Fredman’s formulation of a right to security as a *prima facie* basis to ground arguments for positive measures.¹³⁷ This is because Fredman gives a very expansive meaning to ‘security’ to include economic deprivation and other types of social problems. Arguably these rights

¹³³ Sue Berelowitz and others, “‘I thought I was the only one. The Only one in the world’”: Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups, Interim Report’ (November 2012) 84.

¹³⁴ Lazarus (n 129) 329.

¹³⁵ Fredman (n 122) 307.

¹³⁶ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

¹³⁷ Lazarus, ‘Mapping the Right to Security’ (n 129) 327, ‘What better way, in the face of popular anxiety about security, to turn the supposed dichotomy between security and human rights in on itself and, by arguing from an overarching right to security, to protect against the loss of our traditional rights or even to develop new ones. This temptation is also strong for those seeking to develop and promote previously neglected social and economic rights as positive obligations on the state.’

ought not to form part of a well-delineated right to security. There may be other considerations to weigh up against a right to security in cases where fundamental human rights are involved. Thus, Andrew Ashworth and Lucia Zedner argued that a duty of justice is also key, and supporting a duty to provide security will require the state to respect the personal autonomy of all its citizens.¹³⁸

However, adopting a narrower interpretation of a right to security does not support the state using criminal law measures to penalize serious exploitation. Institutional measures may need to be put in place to combat serious exploitation which is a threat to security, for example. Criminalization must still be a last resort.¹³⁹ If criminalization is justifiable, existing criminal law measures may sufficiently protect against this risk to citizens' security. In some circumstances positive measures may be required, such as the enactment of new criminal offences and/or procedures.

Moving away from a right to security, republican political theory also points in the direction of a foundational duty upon the state to address serious interpersonal exploitation. Republicanism takes as its animating idea 'freedom as non-domination'—a term coined by Philip Pettit.¹⁴⁰ On this view liberty is the absence of domination or independence from arbitrary power.¹⁴¹ A person is not free if they have 'to live at the mercy of another' or if they have to 'live in a manner that leaves [them] vulnerable to

¹³⁸ Ashworth and Zedner (n 124) ch 1.

¹³⁹ Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 OJLS 207.

¹⁴⁰ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999). See also John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press 1990); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 49–53; Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012).

¹⁴¹ For an introduction to republican perspectives, see Samantha Besson and José Luis Martí, 'Law and Republicanism: Mapping the Issues' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (OUP 2009).

some ill that the other is in a position arbitrarily to impose'.¹⁴² While there are a number of streams of republican thought, the clear concern in all is with structural conditions being present for arbitrary or uncontrolled domination, even if that capacity is not exercised. This idea is encompassed in Pettit's statement that:

Being unfree does not consist in being restrained; on the contrary, the restraint of a fair system of law—a non-arbitrary regime—does not make you unfree. Being unfree consists rather in being subject to arbitrary sway: being subject to the potentially capricious will or the potentially idiosyncratic judgement of another. Freedom involves emancipation from any such subordination, liberation from any such dependency. It requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another.¹⁴³

Either the state or fellow citizens may hold such a capacity to interfere arbitrarily. Clearly the state holds capacity to interfere in its citizens' lives because it has the power to make and enact law. Jeremy Bentham highlighted the fact that 'All coercive laws...and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.'¹⁴⁴ Thus Bentham is right to say that when coercive power is exercised 'no liberty can be given to one man but in proportion as it is taken from another'.¹⁴⁵ But this capacity of the state does not mean that the state holds capacity to interfere arbitrarily. If a state is to ensure citizens' freedom from *arbitrary* domination, Pettit argues that citizens' 'common recognizable interests' must be respected.¹⁴⁶ This means that coercive power must be exercised within a system of effective procedures and

¹⁴² Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 5-6.

¹⁴³ *ibid* 5.

¹⁴⁴ Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham*, vol 2 (Edinburgh 1843) 503.

¹⁴⁵ *ibid* 503.

¹⁴⁶ Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 292.

enforcement, with an emphasis on the rule of law as an ideal,¹⁴⁷ and a focus upon deliberative democracy.¹⁴⁸ Where such values are not prioritized, there will be clearer grounds for arguing that the state infringes republican ideals.

Another potential source of arbitrary interference comes from citizens themselves. Pettit argues that citizens should not have the capacity to arbitrarily dominate their fellow citizens even if that power is unexercised. This concern is with securing structural freedom from *dominium*. Pettit argues that this focus differentiates civic republicanism from the traditional focus of liberalism on ensuring negative liberty. According to Pettit, liberals' 'relative indifference to power or domination has made liberalism tolerant of relationships in the home, in the workplace, in the electorate, and elsewhere, that the republican must denounce as paradigms of domination and unfreedom'.¹⁴⁹ However, we ought not to jump to the conclusion that liberalism overlooks these concerns. Accounts of liberalism which focus on the state taking positive measures to ensure freedom are in principle more closely aligned with Pettit's republican argument.

This brief survey of republicanism seems in principle to support a foundational duty upon the state to deal with serious interpersonal exploitation. Surely a structural condition whereby one citizen can arbitrarily dominate another is of real significance in cases of interpersonal exploitation? Indeed this is an argument that we will explore and

¹⁴⁷ For discussion, see Richard Dagger, 'Republicanism and the Foundations of Criminal Law' in Anthony Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 48 ff.

¹⁴⁸ Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 244-48. Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 142, argue that deliberative democracy 'requires the ability to contest the decisions of others, both public and private actors, who wield power over one's life and livelihood'.

¹⁴⁹ Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 10.

defend in detail in this thesis when building a normative account of acquisitive exploitation. The important point to note at this preliminary stage is that there is a clear association between interpersonal exploitation and arbitrary or uncontrolled domination. Exploiters seek to set themselves in positions of domination over vulnerable members of society. In other cases, exploiters take advantage of ready-made opportunities for control. While uncontrolled domination is one step removed from exploitation, it creates real opportunity for exploitation. Of course not every instance of uncontrolled domination will lead to exploitation. The argument is simply that where this structural condition does exist, there is greater opportunity for exploitation. In many cases it is part of the process of exploitation.

There are obvious difficulties in identifying arbitrary or uncontrolled domination.¹⁵⁰ When does this domination cross over into being arbitrary? Can we be clear on whether serious interpersonal exploitation triggers arbitrary domination? Plausibly exploitation should be regarded as involving arbitrary or uncontrolled domination where a vulnerable person is deliberately targeted, and where an exploiter has knowledge that they are setting themselves in a position of domination over a vulnerable person. This avoids republicanism being used as a tool to promote a culture of respect for persons. Concerns about systemic arbitrary domination ought to come into play in highly problematic circumstances, where exploiters act deliberately and with knowledge of vulnerability.

To acknowledge republican ideals is not to contend that citizens must be protected against all arbitrary domination by the law. There is a strong presumption

¹⁵⁰ 'Uncontrolled' domination is Pettit's more recent term. See George Fletcher, 'Domination in Wrongdoing' (1996) 76 Boston UL Rev 347; cf FM Lawrence, 'Comment: The Limits of Domination' (1996) 76 Boston UL Rev 361.

within republicanism that non-domination is supported through civic virtue and deliberative democracy. Pettit argues that because republicanism requires that rights ‘will be richer than any that the law alone could support’, they therefore ‘depend on the sort of informal implementation that is possible only in vibrant civil society’.¹⁵¹ If the state must intervene to secure non-domination in certain circumstances, this will not in the first instance be via criminal law measures, but via regulatory or civil law measures. As we discussed in relation to liberalism, the criminal law ought to be a last resort. As Braithwaite and Pettit note, ‘The fact that a certain kind of act diminishes or invades someone’s dominion does not mean that it ought to be criminalized, for its criminalization may do more harm to dominion than good.’¹⁵²

I have argued that liberalism and republican political theories supply two independent normative bases for state action using criminal law in targeting wrongful interpersonal exploitation. Taking human rights and political theory arguments together, there is a strong basis for reconsidering the role of the state in penalizing serious exploitation.

1.5 Criminal law responses to wrongful interpersonal exploitation

Despite the high interest level in interpersonal exploitation, criminal law theorists are still to rationalize a principled criminal law response explaining when and how the

¹⁵¹ Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 305.

¹⁵² Braithwaite and Pettit (n 140) 72. Pettit, *Republicanism: A Theory of Freedom and Government* (n 140) 304, ‘[T]here is a general recognition in the republican tradition that the rights whereby people can come to enjoy non-domination, both in relation to government and to other parties, far outrun anything that the law could provide on its own. The rights required will be richer than any that the law alone could support and they will depend on the sort of informal implementation that is possible only in vibrant civil society: only in society where social movements prosper, for example, and where people show a willingness to come to one another’s assistance. That is why the republican tradition has always insisted on the importance of a supply of civic virtue for the stability of a free state.’

criminal law ought to be used to penalize exploitation. Perhaps this is unsurprising given that the legal position is in flux in England and Wales. There is an emerging jurisprudence on interpersonal exploitation in the criminal law which still needs to be rationalized. In the following section, we consider several ways in which the criminal law is currently used to penalize exploitation. This discussion supplies the groundwork for chapter 2 in which we critique the inadequacies of the current criminal law response to acquisitive exploitation.

1.5.1 Interpreting existing criminal offences to penalize or to prevent exploitation

One approach has been to use existing criminal law offences to target various forms of interpersonal exploitation. These offences need not have been explicitly designed to penalize wrongful interpersonal exploitation, but may penalize *certain aspects* of exploitative conduct. In *CN v UK*, the European Court of Human Rights noted that in the absence of a specific exploitation offence there were several existing criminal offences which could be used to penalize slavery, servitude and forced or compulsory labour.¹⁵³ These included ‘offences of trafficking, false imprisonment, kidnapping, grievous bodily harm, assault, battery, blackmail and harassment’.¹⁵⁴ It is therefore an open question in cases involving exploitation as to which offences will be read in this way. In England and Wales, there are a number of offences which can be read as tackling exploitation, but which are not advertised as exploitation statutes. These could plausibly include criminal offences drafted in inchoate form, such as section 1 of the Fraud Act 2006.

¹⁵³ *CN v UK* (n 102).

¹⁵⁴ *ibid* [74].

One effect of this interpretative approach is that it avoids cluttering the criminal law with overly specialized exploitation offences. Douglas Husak has argued that overlapping new criminal offences with existing offences is deleterious for defendants.¹⁵⁵ Defendants may be faced with higher sentences if charged with several criminal offences, so in some cases the practice of overlapping offences acts as a driver to plea-bargaining and guilty pleas.¹⁵⁶ There is also an argument that it is more important to penalize the end-point of exploitation than the exploitation itself. Naturally enough, those who exploit will engage in exploitation in order to achieve a certain aim or purpose: the acquisition of property, labour or sexual interests. In this way an exploiter will often commit certain other offences as the ‘end point’ of his exploitative enterprise. Evidentially exploitation may be relevant to the extent that it casts light on the fault and conduct elements of an existing criminal offence.

However, there is a lot that is problematic about this line of argument if there is something distinctive about exploitation’s blameworthiness which ought to be marked out in a criminal offence. Ought the element of censuring exploitation be marked out explicitly? To evaluate whether this is the case, the precise form of wrongful interpersonal exploitation in question must be elaborated. We will investigate this line of argument in this thesis in relation to acquisitive exploitation. It is also imperative that criminal law in England and Wales complies with international and European human rights law. We saw in section 1.4 above that there has been an important shift in Strasbourg jurisprudence towards using the ECHR to protect against serious interpersonal exploitation. This emerging body of jurisprudence will in some

¹⁵⁵ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008) 37-38.

¹⁵⁶ *ibid* 38.

circumstances require positive action by a state to implement criminal law measures.¹⁵⁷

A further concern is that it is very unclear which offences can be read in this way. Broad offences are the most likely candidates. But interpreting already broad offences to penalize exploitation provides great scope for introducing ‘exploitation’ reasoning with little attention to the contours of the wrong. This concern is key to the argument in chapter 2 of this thesis: we detect and critique thinly reasoned arguments that certain property offences can be used to target exploitation, before the nature of the wrong is even made clear. As we argued in sections 1.2 and 1.3 of this chapter, wrongful interpersonal exploitation is neither a unitary idea, nor a perspicuous idea. It requires work to assign to a particular form of exploitation a clear meaning. It is illogical to use existing offences to penalize serious exploitation without first critically analyzing the nature of the wrong in question. If the interpretative approach to penalizing exploitation is ever warranted, we should expect this analysis to first be performed.

A clearer alternative is to use an exploitative wrong as a means of aggravating an existing criminal law offence. For example, we argue in chapter 5, section 5.6 that one response to this thesis’ strong normative account of acquisitive exploitation is to consider whether acquisitive exploitation might be used to more fairly label property offences. In particular, section 5.6.1 argues that it is convincing to analyze acquisitive exploitation as aggravating the basic theft offence in England and Wales. This is a means of more clearly labelling the theft offence, which currently fails to distinguish

¹⁵⁷ For example, in *CN v UK* (n 102) [70], the ECtHR criticized the United Kingdom for failing to ‘effectively criminalise treatment falling within the scope of Article 4 of the Convention’. Section 71 of the Coroners and Justice Act 2009 created the offence of holding someone in slavery, servitude, or requiring a person to perform forced or compulsory labour, and came into force on 6 April 2010. It could not be applied retrospectively in *CN v UK* (n 102) [30].

between small thefts and substantial violations of another person's property rights via a strong interpersonal attack.¹⁵⁸

1.5.2 Exploitation offences, drafted in a variety of forms

By exploitation offences we mean offences enacted with the purpose of penalizing or preventing interpersonal exploitation. In other words, these offences penalize exploitation as a freestanding wrong. There is no straightforward way of evaluating whether an offence is an exploitation offence. Arguably section 59A of the Sexual Offences Act 2003, section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and section 71 of the Coroners and Justice Act 2009 can be identified as 'core' exploitation offences. Parliamentary intention will be the clearest means of establishing an offence's status. Sentencing guidelines and judicial statements may be required to determine whether an offence fits into this broad category. For example, there is reasonable consensus that sections 47-50, 52, 53 and 59A of the Sexual Offences Act 2003 are exploitation offences, given that they are referred to in this way in the *Sexual Offences Definitive Guideline*.¹⁵⁹ We might also include section 32 of the Human Tissue Act 2004, which criminalizes commercial dealings in human material for transplantation, in this category.¹⁶⁰ This is because section 32 is identified as a form of exploitation under section 3 of the Modern Slavery Act 2015.

Exploitation offences may be drafted in various forms. For example, they may

¹⁵⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 415.

¹⁵⁹ Sentencing Council, *Sexual Offences: Definitive Guideline* (2013) 2.

¹⁶⁰ It is lawful to commercially deal in human organs for purposes other than human transplantation, but this requires 'appropriate consent', as defined by the Act, and licensing conditions to be satisfied. The offence carries a maximum sentence of three years and/or a fine.

take the form of a substantive offence; a substantive offence drafted in inchoate form; a preventive measure (such as trafficking for exploitation); or a duty to report offence. The seriousness of the offence ought to be reflected in the level of criminalization attached to it. For example, a substantive offence might permit a high maximum sentence of imprisonment, whereas a duty to report offence may attract a monetary fine.

The use of exploitation offences is a rapidly developing area of criminal law in England and Wales. The Modern Slavery Act was enacted on 25 March 2015. Section 1 of the Act presents a new offence penalizing labour exploitation, and section 2 an offence of human trafficking for exploitation. Both offences attract a maximum sentence of life imprisonment. Committing any other offence with intent to commit the section 2 offence is also criminalized, with a maximum sentence of 10 years' imprisonment.¹⁶¹ The intended effect of this Act is to penalize labour exploitation and trafficking for exploitation more severely than at present. The Act increases maximum sentences beyond those laid down in section 59A of the Sexual Offences Act 2003, section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and section 71 of the Coroners and Justice Act 2009.¹⁶²

Arguably there is now increased pressure to reevaluate existing criminal law measures to penalize various types of exploitation in England and Wales. There are a large and increasing number of statutes in U.S. states targeting the financial exploitation of vulnerable or elderly persons. For example, section 17-56 of the Illinois Criminal Code 1961 states that:

A person commits financial exploitation of an elderly person or a person with a

¹⁶¹ Modern Slavery Act 2015, s 4.

¹⁶² *ibid*, s 5.

disability when he or she stands in a position of trust or confidence with the elderly person or a person with a disability and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person or a person with a disability or illegally uses the assets or resources of an elderly person or a person with a disability.¹⁶³

In 2012, 26 states had criminal legislation penalizing financially exploitative crime, and this figure increased to 29 states and the District of Columbia in 2013.¹⁶⁴ Financial exploitation is assuming growing significance as a type of financial abuse. We should expect these U.S. developments to be scrutinized by criminal law theorists in England and Wales. Is this type of legislation defensible? These are questions we explore in relation to acquisitive exploitation in this thesis. In chapter 5, section 5.6.2 of this thesis we consider whether penalizing acquisitive exploitation as a freestanding wrong is defensible.

Also significant is the development of exploitation offences to include duty to report offences. In Northern Ireland it is an offence to fail to report information about an arrestable offence.¹⁶⁵ HMIC's 2013 review of intelligence gathered in the much-publicized case against Jimmy Savile, noted that '[E]very state in the United States of America, all bar one Australian state and all bar one state in Canada have adopted some form of mandatory reporting requirements where there are allegations of child abuse or neglect.'¹⁶⁶ For example, in the state of Florida a person who knows or suspects child

¹⁶³ Enacted by Public Act 097-0865.

¹⁶⁴ National Conference of State Legislatures, 'Financial Crimes Against the Elderly 2012 Legislation' (15 January 2013) <www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2012-legis.aspx> accessed 29 March 2015; National Conference of State Legislatures, 'Financial Crimes Against the Elderly 2013 Legislation' (15 January 2014) <www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx> accessed 29 March 2015.

¹⁶⁵ Criminal Justice Act (Northern Ireland) 1967, s 5.

¹⁶⁶ HMIC, "'Mistakes Were Made'": HMIC's Review Into Allegations and Intelligence Material Concerning Jimmy Savile Between 1964 and 2012' (2013) 50-51.

abuse, abandonment or neglect has a duty to report such abuse to the Florida Abuse Hotline.¹⁶⁷ It is a felony of the third degree to fail to do so.¹⁶⁸ There is a pressing need for criminal law theorists to critically analyze duties placed upon citizens to report serious exploitation. It is not the aim of this thesis to scrutinize this normative question, but it is another way in which acquisitive exploitation may be relevant to criminalization.

Where the basis for an offence is one of preventing or penalizing exploitation, the blameworthiness of exploitation is clearly marked out. As is well-known, Article 7 of the European Convention of Human Rights requires that criminal law offences are defined to be sufficiently certain. The meaning of the type of exploitation in question must be located and expressed in statutory form. This is hardly straightforward. In *Hounga*, an ill-defined concept of human trafficking for exploitation was recognized as grounds enough to bypass the illegality doctrine in civil law.¹⁶⁹ The Supreme Court held that if ‘Miss Hounga’s case was not one of trafficking on the part of Mrs Allen and her family, it was so close to it that the distinction will not matter for the purpose of what follows’.¹⁷⁰ This lack of certainty would not be justifiable in the criminal law, but it is challenging to define a particular type of wrongful interpersonal exploitation clearly. If this is not prioritized it could lead to over-expansive offences. We have argued in this chapter that wrongful interpersonal exploitation must be disaggregated into a number of wrongs, and that this is the rationale for building specific accounts of wrongful interpersonal exploitation. Even if legal certainty is achievable in an

¹⁶⁷ The 2014 Florida Statutes, 39.201, s (1)(a).

¹⁶⁸ *ibid*, 39.205, s (1).

¹⁶⁹ *Hounga* (n 1).

¹⁷⁰ *ibid* [49].

exploitation offence, it is impossible to evaluate whether such offences are justifiable in the abstract. The type of offence and level of criminalization must be taken into account.

There is a concern that the rise of exploitation offences can be motivated by political pressures to legislate. It has long been understood in England and Wales that a ‘decision to create a crime is often a political reaction to a few much-publicized cases—creating a criminal offence is taken to be unambiguous proof that the government is committed to “doing something about” a certain form of (mis)conduct’.¹⁷¹ Moreover, the emotive aspect of targeting exploitation can be used to justify coercive measures with significant censure attached.¹⁷² The need for principled criminal law-making is as pressing as ever. Moreover, the criminalization of exploitation raises issues regarding gaps in protection for exploitees. Arguably the Modern Slavery Act 2015 will not produce a coherent regime to target labour exploitation, since it stands in conflict with a tied visa system.¹⁷³ Exploitation offences cannot be advertised as strong means of tackling exploitation, while systemic common law deficiencies remain unaddressed.

1.6 Moving against interpersonal exploitation? The criminal justice system

Reference should also be made to the relevance of interpersonal exploitation in the criminal justice system. What is the significance of exploitation in relation to: investigation of crime and decisions to prosecute; the trial process; and sentencing? In

¹⁷¹ Andrew Ashworth, ‘Criminal Justice, Not Criminology?’ in Mary Bosworth and Carolyn Hoyle, *What Is Criminology?* (OUP 2011) 357.

¹⁷² See Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill* (1013-14, HL 166, HC 1019).

¹⁷³ See (n 3) above.

fact, much recent commentary has focused on the failings of the criminal justice system to deal appropriately with cases of serious interpersonal exploitation.¹⁷⁴ It is important in this introductory chapter that we take stock of the current criminal justice response to exploitation. These complex criminal justice issues are not the focus of this thesis. However, questions about criminalizing acquisitive exploitation should not be reviewed without reference to the criminal justice system as a whole.

1.6.1 Investigation of crime and decisions to prosecute

Effective investigations are key if there are to be prosecutions of cases of serious interpersonal exploitation. However, it is well-known that there are significant practical difficulties in identifying interpersonal exploitation. Labour exploitation, sexual exploitation, trafficking for exploitation—in fact all of the types of exploitation referred to in section 1.3 above—operate as hidden wrongs. Exploitative conduct is often subtle, avoiding detection. An exploiter’s coercive control may intimidate a victim into silence. Alternatively an exploitee may be manipulated into acquiescence or they may harbour the belief that they are in a loving relationship and cannot therefore be being exploited. One major hurdle for the criminal justice system therefore lies in identifying exploitation.

This has elicited a shift to identifying individuals who are ‘at risk’. In the context of sexual exploitation of children and young persons, the identification of ‘at

¹⁷⁴ For example, Keir Starmer, *The Criminal Justice Response to Child Sexual Abuse: Time for a National Consensus* (CPS 2013)

<www.cps.gov.uk/news/articles/the_criminal_justice_response_to_child_sexual_abuse_-_time_for_a_national_consensus/> accessed 29 March 2015.

risk' groups of young persons underpins the current approach.¹⁷⁵ It may be the case that youth workers, social workers and health professionals are better placed than the police to identify exploitation. For example, the Jay Inquiry into sexual exploitation in Rotherham estimated that '1,400 children were sexually exploited over the 16-year inquiry period, and that in just over a third of cases, children affected by sexual exploitation were previously known to services because of other child protection issues'.¹⁷⁶ But identifying an individual at risk of exploitation is only that, and any individuals who are identified will have to have their specific circumstances scrutinized. It is difficult to know how acute a risk is without adequate information. To this end, professional bodies must pool their information regarding alleged instances of exploitation. The Home Affairs Select Committee strongly criticized Rotherham council's failure to investigate claims of child sexual exploitation. The council, which had had a key oversight position, had 'been inexcusably slow to realize that the widespread, organised sexual abuse of children, many of them in the care of the local authority, was taking place on their doorstep'.¹⁷⁷ There have been several well-publicized examples in recent years of local councils failing to see the 'bigger picture' of child sexual exploitation, despite a steady flow of evidence.¹⁷⁸ As the Home Affairs Select Committee remarked, ineffective investigations have been the product of 'a woeful lack of professional curiosity, or even indifference' in relation to widespread

¹⁷⁵ Child Exploitation and Online Protection Centre (CEOP), 'Out of Sight, Out of Mind: Breaking Down the Barriers to Understanding Child Sexual Exploitation' (June 2011). The CEOP is now known as the National Crime Agency's CEOP Command.

¹⁷⁶ Home Affairs Select Committee, 'Child Sexual Exploitation and the Response to Localised Grooming: Follow-Up' (15 October 2014) para 5.

¹⁷⁷ *ibid* para 2.

¹⁷⁸ *ibid* para 16.

sexual exploitation.¹⁷⁹ Thus, several recent government reports on child sexual exploitation have emphasised the need for a multi-agency approach in identifying individuals at risk of serious exploitation.

If a case of exploitation is reported, police will be required to interview victims of the alleged exploitation and to consider whether sufficient evidence has been raised to move forward towards prosecution. One underlying reason why allegations of abuse have not been pursued is because an individual's views and experiences have not been taken seriously. For example, the Jay Inquiry, which investigated sexual exploitation in South Yorkshire in the period from 1997 to 2013, found that 'South Yorkshire Police gave no priority to child sexual exploitation, regarding many child victims with contempt and failing to act on their abuse as a crime.'¹⁸⁰ In Rotherham and Rochdale, police 'dismissed the victims—children as young as 12—as “prostitutes” at the investigation stage'.¹⁸¹ A recent Home Affairs Select Committee report noted that practitioners' labelling of children in this way is 'a chilling confirmation of the abusers' blackmails and threats'.¹⁸² This is demonstrative of limited understanding of consent in cases of child sexual exploitation and in respect of the exploitation of young persons over-16 years of age. A recent follow-up inquiry has argued for greater accountability of public officials, including the ability to remove the Police and Crime Commissioner from their post.¹⁸³ Certainly there must be a culture of taking victims of any type of

¹⁷⁹ *ibid* para 2.

¹⁸⁰ *ibid* para 5, referring to Alexis Jay, 'Independent Inquiry into Child Sexual Exploitation in Rotherham 1997-2013' (Rotherham 2014).

¹⁸¹ Home Affairs Select Committee (n 176) para 13.

¹⁸² Home Affairs Select Committee, 'Child Sexual Exploitation and the Response to Localised Grooming' (n 44), Conclusion and Recommendations, para 13.

¹⁸³ Home Affairs Select Committee, 'Follow-Up' (n 176) paras 17-24.

exploitation seriously within the criminal justice system.

One might expect various forms of interpersonal exploitation to act as drivers for decisions to prosecute. For example, the government's command paper accompanying the Sexual Offences Act 2003 provides scope for prosecutors to use interpersonal exploitation to inform their decision to prosecute. According to section 13 of the Sexual Offences Act 2003, it is an offence for a person under-18 to commit an offence found in sections 9 to 12 of the 2003 Act if he were aged 18. Section 9 of the Act sets out the offence of sexual activity with a child under-16. Given the existence of section 13, it is therefore possible that two under-16 year olds can together commit the offence of sexual activity with a child. The government command paper does not assume that prosecution of under-16s in these circumstances is always required. However, it is the case that prosecutors are to consider whether 'the sexual activity was consensual but was also clearly manipulative'.¹⁸⁴ Certainly one can detect here the sense that prosecutors are given a wide margin of appreciation in assessing whether a particular case has the hallmarks of a type of serious interpersonal exploitation.

However, the extent to which exploitation acts as a driver to prosecution is not entirely clear. One matter of concern is that negative impressions about victim credibility have informed decisions not to prosecute cases of serious exploitation. Again, this issue has been most explored to-date in relation to sexual exploitation.¹⁸⁵ The logic is that the evidential stage of the Code for Crown Prosecutors has not been

¹⁸⁴ Secretary of State for the Home Department, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (CM 5668, 2002) [52].

¹⁸⁵ Sue Jago and others, 'What's Going On to Safeguard Children and Young People from Sexual Exploitation?' (University of Bedfordshire 2011), note that a key concern is that 'the prosecution of abusers is rare, and where criminal proceedings take place, young people's experience of court is intolerable'.

met, namely because victim testimony is not considered credible or reliable. Keir Starmer, former Director of Public Prosecutions, notes that:

If the credibility and reliability of the victims in Rochdale were tested solely by asking questions such as whether they reported their abuse swiftly, whether they returned to the perpetrators, whether they had ever told untruths in the past, and whether their accounts were unaffected by drink or drugs, the answers would almost always result in a decision not to prosecute.¹⁸⁶

Thus, it has been strongly argued that traditional tests of credibility must be interpreted sensitively—even reinterpreted—in cases of serious exploitation. Starmer has argued that this requires ‘a more sophisticated approach that starts with the assumption that the victim is telling the truth and seeks to build a case and make links between different allegations’.¹⁸⁷ This reasoning has justified the implementation of new approaches for the police and the CPS, to be applied when they are considering a case of child sexual exploitation.¹⁸⁸

There is also lively discussion as to whether exploitation should be used as a reason *not* to prosecute those who have been exploited, but who have been compelled to commit a criminal offence because of their exploitation.¹⁸⁹ Several international instruments require states not to prosecute persons who have committed offences as a result of their being trafficked.¹⁹⁰ Four conjoined appeals were heard in *R v L*.¹⁹¹ Three

¹⁸⁶ Starmer (n 174).

¹⁸⁷ Starmer (n 101) 782.

¹⁸⁸ Home Affairs Select Committee (n 44) 10.

¹⁸⁹ See Anti-Slavery International, ‘Trafficking for Forced Criminal Activities and Begging in Europe’ (30 September 2014) <www.antislavery.org/includes/documents/cm_docs/2014/r/race_europe_report.pdf> accessed 29 March 2015.

¹⁹⁰ Council of Europe Convention on Action Against Trafficking in Human Beings (2005); Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA.

¹⁹¹ *R v L* (n 81).

defendants from Vietnam had been prosecuted and sentenced for cultivating cannabis; and a fourth defendant from Uganda had been prosecuted and sentenced for possessing a false passport. The Court of Appeal quashed all four convictions on the grounds that each of the defendants had been trafficked for the purposes of exploitation. Lord Judge advocated that:

[W]here there is evidence that victims of trafficking have been involved in criminal activities, the investigation and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity.¹⁹²

Judicial recognition of the fact that an exploitee may have acted because ‘no realistic alternative was available...but to comply with the dominant force of another individual’ is welcome.¹⁹³ The Court of Appeal held that prosecutions in the circumstances of the present case amounted to abuse of process. Indeed, Lord Judge argued that the abuse of process jurisdiction provided a level of protection from prosecution or criminal sanction for those who were compelled to commit a criminal offence as a result of human trafficking for exploitation.¹⁹⁴ Section 45 of the Modern Slavery Act offers a full defence to victims of slavery or trafficking who have been compelled by their exploitation to commit an offence. They must show that a reasonable person in the same circumstances and with the same characteristics of the accused would have ‘had no realistic alternative to doing that act’.¹⁹⁵ The Act excludes this defence being used in cases of false imprisonment, kidnapping, manslaughter, murder, perverting the course

¹⁹² *ibid* [13].

¹⁹³ *ibid* [13].

¹⁹⁴ *ibid* [14]. For discussion, see Spencer (n 78).

¹⁹⁵ Modern Slavery Act 2015, s 45(1)(d).

of justice and piracy.¹⁹⁶ There may therefore be less need for the court to stay proceedings as an abuse of process in these types of cases given the availability of this defence.

1.6.2 The trial process

There are signs that modification of trial processes is necessary if a case involves interpersonal exploitation. Again, this has been a live issue in relation to child sexual exploitation. The Home Affairs Select Committee noted that, '[W]hen they do make it to the court room, child sexual exploitation cases involve highly sensitive evidence and deeply vulnerable witnesses.'¹⁹⁷ There are particular concerns regarding multiple cross-examination of vulnerable victims by defence counsel, and as to whether judges need to be trained to preside over cases involving sexual exploitation of children and young persons. Lord Judge declined to support specialist courts for cases of child sexual exploitation and other forms of sexual exploitation in his final term of office as Lord Chief Justice in 2013. He did, however, recommend that certain sensitive cases will 'be tried by a judge selected, on a case-by-case basis, by the Resident Judge and approved by a presiding Judge'.¹⁹⁸ These include cases:

[I]rrespective of the nature of the charges and the length of the trials, in which a significantly vulnerable witness is to be called in circumstances that call for especially sensitive handling (e.g. by virtue of age, situation, or the circumstances of the case).¹⁹⁹

This is accompanied by a list 'of the limited number of judges who are likely to be

¹⁹⁶ *ibid* schedule 4.

¹⁹⁷ Home Affairs Select Committee (n 44) para 84.

¹⁹⁸ Letter from Lord Judge to Keith Vaz MP, in Response to the Home Affairs Select Committee Inquiry into Child Sexual Exploitation and the Response to Localised Grooming (26 July 2013).

¹⁹⁹ *ibid*.

selected to try these cases’.²⁰⁰ While specific adjustments to the trial process may be considered laudable in theory, they are of no value if they remain unimplemented. Only recently has the government announced that section 28 of the Youth Justice and Criminal Evidence Act 1999 will be implemented. Section 28 allows for the recording of the entirety of young witnesses’ evidence, thus avoiding further victimization. It appears that the validity of court processes must be assessed in cases of serious exploitation, and this is not limited to cases of sexual exploitation.

1.6.3 Sentencing

Regardless as to whether exploitation is criminalized, it seems that exploitative conduct can be relevant at the sentencing stage. The Sentencing Guidelines Council’s definitive guideline *Theft and Burglary in a Building Other Than a Dwelling* contains several references to exploitative conduct as a reason for increasing the seriousness of an offence.²⁰¹ For example, aggravating factors indicating higher culpability include the deliberate targeting of vulnerable victims, and abuse of a position of trust.²⁰² The *Sexual Offences Definitive Guideline*, effective from 1 April 2014, refers to exploitation at numerous points in sentencing decisions of ‘exploitation offences’, which were referred to in section 1.5.2 above. For example, the offence of controlling prostitution for gain, found in section 53 of the Sexual Offences Act 2003, explicitly identifies ‘exploitation of those known to be trafficked’ as a factor increasing culpability in

²⁰⁰ *ibid.*

²⁰¹ Sentencing Guidelines Council, *Theft and Burglary in a Building Other Than a Dwelling: Definitive Guideline* (2008).

²⁰² *ibid* 20.

determining the offence category.²⁰³ Exploitative conduct is also an implicit factor in determining culpability given exploitation's close association with expectation of financial or other gain, abuse of trust, and grooming of individuals.²⁰⁴ We saw in section 1.3.1 above that these factors are key to sexual exploitation. Other guidelines could be cited, but the key point is that various forms of exploitation affect levels of harm to victims and culpability of offenders in various sentencing guidelines.

1.6.4 Summary

It is not the aim of this thesis to scrutinize these criminal justice issues in depth. However, these issues are of relevance when we come to scrutinize criminalization arguments in chapter 5. When considering the validity of claims to criminalize acquisitive exploitation, it is important to assess the wider criminal justice approach to this complex wrong.

1.7 Conclusion

A large number of questions surround the criminalization of exploitation in England and Wales. However, I choose to investigate the remarkably stealthy introduction of an undefined concept of exploitation in the sphere of property offences. The purpose of this chapter has been to lay foundational arguments which are important for this thesis' study. First, there must be concern to elucidate individual wrongs of interpersonal exploitation. This point carries through to chapter 2. In this thesis we look at the boundaries of what is known about wrongful interpersonal exploitation, via one

²⁰³ *Sexual Offences Definitive Guideline* (n 159) 82.

²⁰⁴ *ibid* 82.

fundamental but little explored type of exploitation. Light must be shone on the wrong of acquisitive exploitation. Secondly, we have established that the idea of a state duty to penalize exploitation garners support in human rights law, and has a basis in political theory. Thirdly, a decision to criminalize exploitation must be clearly defended, with reference to the type of offence and the level of criminalization imposed. Criminalizing exploitation by stealth undermines these principles. Fourthly, if we do not think through how criminalization of exploitation interacts with the criminal justice system more broadly, the coherence of the law will be undermined. Exploitation has been referred to with easy familiarity in academic commentary and case law where an individual's property interests have been attacked. It is high time that the nature of this wrong is scrutinized, and to see whether it has any bearing on, or throws any light on, criminalization.

1.8 Road map

Chapter 2 offers a critique of the criminal law response to acquisitive exploitation in England and Wales. As we will see, assumptions have been made about exploitation in the context of several key property offences which do not withstand critical analysis. I argue that a robust account of acquisitive account is needed, and this is supplied in chapters 3 and 4. Chapter 3 elucidates what is key to a strong analytical account of wrongful acquisitive exploitation, providing practical detail. The limits of the account are drawn in chapter 4 where it is argued, perhaps controversially, that consent is irrelevant to this core account. The opportunity is taken to highlight that acquisitive exploitation may be just as likely to eclipse valid consent as it is to eclipse an exploitee's lack of consent. The state's duty to penalize acquisitive exploitation is scrutinized in chapter 5. Ought the criminal law be used to penalize acquisitive

exploitation, and, if so, how? Having established an in principle case, we begin to consider alternative criminal law responses to acquisitive exploitation, focusing on the need for fair labelling and proportionate sentencing.

Chapter 2

Unravelling Wrongful Interpersonal Exploitation and Property Offences

2.1 Introduction

It follows from chapter 1 that the time is ripe to debate the place of wrongful interpersonal exploitation in English criminal law. What is the state's duty to penalize serious interpersonal exploitation using the criminal law? Does the state discharge this duty appropriately? I want to turn the focus of this thesis onto an unexplored exploitative wrong, used by individuals who target property interests. The idea that certain property offences are justified on the basis that they penalize exploitation is repeated frequently by criminal law commentators, but is supported with little careful analysis. In fact, analysis of the relationship between wrongful interpersonal exploitation and property offences has been woefully superficial in English law. Commentators and practitioners have tended to *assume* that section 1 of the Fraud Act 2006, together with accompanying sentencing guidelines, adequately penalizes exploitation. The basis for this apparent consensus can be swiftly unravelled. In fact, as we will see, several property offences can penalize exploitation. One aim of this chapter is to identify hitherto neglected connections between exploitation and property offences. The other aim is to expose the precarious foundations of relying on current property offences and sentencing guidelines to censure exploitation. Part of the problem is the little work put into identifying the contours of *this wrong* of exploitation. It is nigh on impossible to know whether offences *can* effectively penalize exploitation if a specific wrong of exploitation is not elucidated. Instead, Joel Feinberg's general

descriptive account of key elements of exploitation is frequently cited as authoritative.¹ Even if a robust working definition is identified, serious doubt may be cast on the appropriateness of the current legal position. Some property offences are unable to penalize what we suggest is the gist of acquisitive exploitation. Others are hopelessly broad, begging questions as to whether the criminal law should respond to this type of serious wrongdoing more transparently and with greater adherence to rule of law ideals.

What I describe in this thesis as acquisitive exploitation has not yet received sufficient attention by criminal law theorists, and the reason for this study is clear. The nature and relevance of acquisitive exploitation to English criminal law needs to be thoroughly debated because there are widely held assumptions about exploitation in the context of property offences which do not withstand critical analysis.

Section 2.2 highlights that a broad idea of exploitation has been assumed to ‘fit’ within the scope of several key property offences, and this backward reasoning is strongly criticized. The false start is one of circularity: it is unprincipled to say that current property offences target exploitation without defining the nature of the relevant wrong. Building on the argument made in chapter 1 that ‘wrongful interpersonal exploitation’ is an umbrella term, it is argued that the type of exploitation relevant to this area of the criminal law is acquisitive exploitation. It is high time that criminal law theorists identify the contours and limits of *this* wrong in order to bring coherence to this area of criminal law. Section 2.3 develops a working definition of acquisitive exploitation. This working definition is used in this chapter in order to critically analyze whether current criminal law measures can be said to penalize this form of exploitation. A full normative account of the wrong of acquisitive exploitation follows

¹ Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP 1988) 176-79.

in chapters 3 and 4 of this thesis. In section 2.4 we draw connections between five property offences (conspiracy to defraud, fraud, bribery, blackmail and theft) and our working definition of acquisitive exploitation, considering the scope and appropriateness of each offence to penalize this acquisitive exploitation. I argue that even a working definition of acquisitive exploitation can be used to unravel consensus about the sufficiency of current criminal law measures in England and Wales. Section 2.5 discusses the relevance of sentencing guidelines in penalizing acquisitive exploitation, raising doubts as to whether exploitative wrongdoing can appropriately be dealt with at the point of sentencing. Using what we have learned in this chapter, section 2.6 argues that reappraisal of acquisitive exploitation and property offences is overdue.

2.2 Wrongful interpersonal exploitation and property offences: a case of cart before the horse

In English law there is apparent consensus that section 1 of the Fraud Act 2006, and several sentencing guidelines, can adequately penalize exploitation.² We will explore the details of these arguments in section 2.3 below, and we will also identify other less publicized examples. But the first issue is to raise questions about how a consensus around the fraud offence has developed. How have commentators assessed that this property offence can penalize exploitation? Is their reasoning conceptually sound?

Plainly those who argue that a fraud offence targets exploitation have some idea of exploitation in mind, since the scope of the wrong of exploitation is key to this

² AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart 2010) 618-19.

assessment. For example, if false representation or abuse of a position of trust are key to wrongful exploitation it follows that sections 1(2)(a) and 1(2)(c) of the Fraud Act 2006 are credible candidates for penalizing exploitation, so long as other requirements of the offence are not incompatible with the nature of the wrong. Likewise, in assessing whether there is provision for penalizing exploitation at the sentencing stage, factors which guide culpability and harm decisions must be found to relate closely to exploitation. The principled approach is to begin by elucidating the contours and limits of the wrong of exploitation.

What is astonishing about the current consensus in English law is the little attention given to this task. The common approach has been to refer to Feinberg's work on exploitation in volume 4 of *The Moral Limits of the Criminal Law* as if it is conclusive.³ Feinberg argues that '[T]here are three elements in all incidents of exploitation about which we can raise further questions: how A uses B; what it is about B that A uses; how the process redistributes gains and losses.'⁴ This is immediately followed up by the argument that, 'In addition, exploitation (in the pejorative sense with which we are here concerned) is assumed to be unfair ("taking unfair advantage") or otherwise subject to adverse criticism.'⁵ In a chapter devoted to elucidating moral ideas of coercion and exploitation, Stuart Green relies exclusively on Feinberg's three elements of exploitation, without debating why they are persuasive, nor considering if further factors should be taken into account.⁶ While Green is to be commended for engaging with the concept of exploitation at all when others so mysteriously pass it by,

³ Feinberg (n 1) 176-210.

⁴ *ibid* 179.

⁵ *ibid* 179.

⁶ Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 97.

an analysis which crystallizes Feinberg's approach to exploitation as fixed is disappointing. Those who have made arguments about exploitation to good effect in the context of property offences scholarship make little further progress. According to Alan Bogg and John Stanton-Ife, exploitation depends upon 'the manner in which the victim is used, the characteristics that are utilized and the way in which exploitation allocates gains and losses'—a further restatement of Feinberg's observations in *Harmless Wrongdoing*.⁷ Bogg and Stanton-Ife do speculate about exploitation's seriousness, arguing that there will be a stronger case of exploitation if strong predatory techniques are used, if moral virtues or vulnerabilities are utilized, and if there are 'extensive gains at the expense of the victim's losses', but even these assertions are vague.⁸ While Bogg and Stanton-Ife's analysis of the case of *Hinks* reinvigorated debate about exploitation and property offences in the context of the English theft offence, it is now commonplace to assert exploitation's relevance to the English fraud offence.⁹ But this shift has not been accompanied by enquiries into the wrong under discussion. This hardly makes sense: if Feinberg, Green, and Bogg and Stanton-Ife's conceptual approaches to exploitation all require actual gain and loss, why is the English offence of fraud a compelling candidate for censuring exploitation? As we will see in section 2.3 below, the fraud offence found in section 1 of the Fraud Act 2006 does not require actual gain or loss. Does this imply that the fraud offence does not penalize the gist of the wrong of exploitation? Taking Feinberg's work on exploitation as authoritative is hardly perspicuous in this context. Even a cursory look at the English fraud offence leads one to wonder whether it has any relationship at all with

⁷ Alan Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 Legal Studies 402, 416.

⁸ *ibid* 416.

⁹ [2000] UKHL 53.

exploitation.

In any case, a careful reading of Feinberg's work reveals his intention to provoke debate. Feinberg states that the three elements he identifies as key to exploitation each raise further questions, and argues that a full account of exploitation as unfair advantage-taking would require 'a complete normative theory'.¹⁰ Rather than seeking to offer such a theory, Feinberg instead raises a number of questions which will inform decisions about exploitation's unfairness.¹¹ Debate could be pursued in at least two directions, since there is some ambiguity present in this account. On the one hand, it is possible to focus on identifying what Feinberg has left out of his own account. We have noted that Feinberg focuses on three elements core to interpersonal exploitation: how A uses B; what characteristics of B A uses; and how the process redistributes gains and losses.¹² But the issue of a complete normative account of wrongful interpersonal exploitation is bypassed. In this sense, the account of exploitation offered by Feinberg is 'light' and must be supplemented with explanation as to what is unfair or wrongful about interpersonal exploitation. By contrast, we could read Feinberg's account of wrongful interpersonal exploitation as itself a description of exploitation's wrongfulness or unfairness (thus producing the 'heavy' sense of the term). In other words, the three elements identified are themselves tools for evaluating exploitation's unfairness. Feinberg argues that insofar as certain elements are present 'in a relationship between A and B, that relationship tends to be unfairly exploitative, and, insofar as they are absent, that relationship tends not to be unfairly exploitative'.¹³ Yet

¹⁰ Feinberg (n 1) 201.

¹¹ *ibid* 201.

¹² *ibid* 179.

¹³ *ibid* 201.

even on this reading, the case for selecting these elements must be scrutinized. Is it defensible that exploitation will tend to be unfair if it leads to gain for an exploiter? Even if a ‘heavy’ reading of Feinberg’s account is adopted, these ‘building blocks’ of exploitation should not be treated as authoritative. A willingness to scrutinize these elements seems to be what Feinberg intended, given that he argues that:

A fuller account of the characteristics that distinguish exploitation from mere profitable utilization would follow the outline of exploitation’s main structural elements....and their main combinations and variations.¹⁴

On either a ‘light’ or ‘heavy’ reading there is still plenty of important work to do.

This over-reliance by criminal lawyers on Feinberg is unsatisfactory, but the nagging question remains as to *why* commentators have settled on using it rather than seeking to advance his conceptual work. It is hardly intellectual laziness. Nor is it because the topic is considered unimportant. There has been significant conceptual work into the moral content of the criminal law in recent years, and key moral concepts such as coercion have been elucidated.¹⁵ It is most plausible that commentators recognize the complexity of wrongful interpersonal exploitation and are put off by it. We see this reasoning surface in Stuart Green’s comparison of exploitation and coercion in the context of white-collar crimes. Green’s first point is that ‘[T]he harms typically associated with coercive behavior are greater than the harms typically associated with exploitation.’¹⁶ His second is that wrongful coercion is ‘inherently a more serious wrong than exploitation’.¹⁷ Thirdly, Green argues that exploitation may

¹⁴ *ibid* 201.

¹⁵ For example, see John Deigh and David Dolinko, *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011); Green *LCS* (n 6).

¹⁶ Green *LCS* (n 6) 97.

¹⁷ *ibid* 97.

be ‘harder to distinguish from merely aggressive but lawful business behavior than is coercion’.¹⁸

Three points can be made briefly in response. The first is that we cannot reason from the fact that exploitation’s relationship with harm is uncertain or difficult, to the conclusion that the harm(s) caused by exploitation are necessarily less serious. This proposition is nothing more than speculation and must be supported with rigorous argument. One problem is that ‘harm’ is not a delineated idea. It is therefore not the case that the idea of ‘exploitation’ is necessarily unstable, while the concept of ‘harm’ is settled. It follows that it is necessary to both determine the meaning of harm *and* how exploitation relates to this meaning. Secondly, Green is not alone in arguing that exploitation is outranked in seriousness by coercion. Mitchell Berman also argues that ‘[E]xploitation is usually a less serious moral wrong than coercion and almost certainly a less secure basis for criminalization.’¹⁹ Robert Mayer candidly argues that ‘For most wrongs—like murder, theft, or lying—it is easy to understand why the conduct is bad. But exploitation is different. We know it is wrong to be an exploiter but it is not clear why it is wrong.’²⁰ What is interesting about these analyses is that they rely upon establishing wrongfulness, presumably because *serious* wrongfulness is a necessary requirement for criminalization.²¹ But exploitation’s wrongfulness ought to be reviewed independently of thresholds to criminalization, at least in the first instance. It is a separate question whether the wrongfulness of exploitation is sufficiently serious to

¹⁸ *ibid* 97.

¹⁹ Mitchell Berman, ‘Blackmail’ in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 74.

²⁰ Robert Mayer, ‘What’s Wrong With Exploitation?’ (2007) 24 *Journal of Applied Philosophy* 137.

²¹ See Andrew Simester and Andrew von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011), and ch 5 of this thesis.

cross a threshold to criminalization. At this initial stage of identifying the wrong, comparing the seriousness of coercion with exploitation is neither here nor there.

Green's third argument seems to do little more than state the obvious. It would be unrealistic to expect exploitative conduct to be readily apparent. For example, even a strong attack on another individual's business interests—such as an intentional plan to drive a competitor out of business—might not constitute wrongful exploitation, and this may be because of the context in which these competitive activities are performed and the relevant prevailing norms. It follows that drawing a robust distinction between lawful conduct and exploitative conduct will be complex, and there will be borderline cases. But surely some firm lines can be drawn in identifying exploitation, while recognizing that the boundaries of the wrong will be contestable. The harsh reality of exploitation, and the need for criminal law theorists to respond to it, demand that this work is undertaken. Criminal law commentators increasingly refer to exploitation—a much-publicized contemporary problem. It would be odd if commentators were unprepared to offer a view on the nature of the wrong. Moreover, it is implausible to maintain on the one hand that exploitation is too difficult a wrong to identify, but on the other hand to argue that existing property offences adequately penalize this wrong. Conceptual clarity is not aided by arguing that the nature of exploitation's wrongfulness is evasive. In short, while Green identifies credible difficulties in elucidating exploitation, it is vital that these reasons are not used to divert attention away from careful study.

There is a further difficulty in reappraising exploitation, apart from the complexity of the wrong. We adopted the term 'wrongful interpersonal exploitation' in chapter 1 to explain this thesis' focus on non-Marxist accounts of interpersonal

exploitation, and explained that this is a broad umbrella term. Attempting to review ‘wrongful interpersonal exploitation’ as a whole is impossible. ‘Wrongful interpersonal exploitation’ is not a unitary idea—it can and should be disaggregated into a number of different exploitative wrongs. This point flows quite naturally from the normal meaning of what it means to exploit another person. We saw in chapter 1 that there are different ways in which a person can wrongfully exploit another person, and sought to provide a rough taxonomy.²² To cite just two examples, there will be distinctively sexual exploitation which is different in nature from labour exploitation. It is suggested that the nature of these wrongs are different as opposed to there being one type of wrongful interpersonal exploitation which can be used in different contexts.²³ For example, the gist of wrongful sexual exploitation is quite different from that of wrongful labour exploitation. In the former there will be a dynamic mix of techniques used to infringe sexual interests, whereas in the latter measures used to limit employment options are at the fore. Moreover, fault elements are likely to be different. On this approach, the state’s duty to prevent or penalize exploitation must be reviewed in the light of a specific type of exploitation. The state may have a duty to prevent labour exploitation using the criminal law, but not financial exploitation, for example. The specific type of exploitation in focus must be made clear before criminalization questions can be raised and debated.

In turn, this characterization requires us to look beyond general features of exploitation identified by Feinberg to evaluate the nature of a particular wrong. It makes little sense that commentators begin with a general and undeveloped idea of

²² s 1.3.

²³ And this holds true if they overlap in practice, i.e. an exploiter engages in more than one form of exploitation.

wrongful interpersonal exploitation, arguing that the current regime of property offences and sentencing guidelines adequately penalizes this wrong.

2.3 Acquisitive exploitation: A working definition

How, then, can we evaluate exploitation and property offences? Since we have already established that there are analytically distinct types of ‘wrongful interpersonal exploitation’, our analysis must begin by making clear which concept is in view.²⁴ We require a working definition of exploitation used by an exploiter who intends to violate another person’s property interests—a type of wrongful interpersonal exploitation which has received little critical attention. We will give this form of wrongdoing the label ‘acquisitive exploitation’, but this is to be read loosely. In the result an exploiter may not actually violate an exploitee’s property interests. A more accurate version is ‘acquisitive intent exploitation’, but we drop this somewhat clumsy full title in this thesis. Moreover, as we see below, this title does not capture the fact that the exploitative wrong extends beyond an attack on property interests to an attack upon vulnerable persons.

Identifying the contours and limits of this wrong is overdue, and a full account is presented in chapters 3 and 4 of this thesis. For the purposes of this chapter’s reappraisal of existing assumptions about exploitation and property offences in England and Wales, we can identify the following elements as key to a working definition of the exploitative wrong:

- (i) First, acquisitive exploitation involves *already* vulnerable persons as victims.

²⁴ See ss 1.2 and 1.3.

In other words, these are persons who can objectively be identified as vulnerable. There may be no need for an objectively vulnerable victim when delineating sexual or labour exploitation, for example, because the interests at stake (sexual autonomy and personal freedom) are so grave. Arguably the concept of an objectively vulnerable person expresses a necessary element of seriousness where an exploiter has intent to violate property interests. It is argued in section 3.5 of thesis that dishonestly targeting an objectively vulnerable person, with accompanying predatory conduct, is a form of cheating. An exploiter violates a norm against unfair contest, since he dishonestly secures and uses a forum where parties are significantly unevenly matched. The gist of the wrong is tied to the fact that, by dishonestly targeting an already vulnerable person, an exploiter hopes to gain easy advantage over this person. There is increased culpability in these cases because an exploiter is hoping that an objectively vulnerable person will be an ‘easy target’. Moreover, those who prey upon the vulnerable are likely to have a secondary reason for doing so, beyond the greater likelihood of the exploiter succeeding in his goals. An objectively vulnerable person may be less likely to report their ill-treatment and/or it may be difficult to build a case based upon their testimony and evidence. A full defence of this element of the working definition will be presented in section 3.5 of this thesis. We will also parse the meaning of an objectively vulnerable person in chapter 3 (specifically sections 3.4) of this thesis.

(ii) Secondly, there is an important connection with an exploiter *seeking out or targeting* an already vulnerable person as key to the wrong. An exploiter may be proactive about this: for example, by seeking to establish opportunistic friendships or identifying so-called ‘suckers’. Alternatively, he may be passive about this because he has a pre-existing relationship with a vulnerable person (such as that held by a carer). In either case, the targeting of an already vulnerable person increases the level of

seriousness.

(iii) A third feature is that dishonesty or lack of probity must be present on the part of an exploiter, though this may not be straightforward to prove. This marks out exploitation from reasonable business dealings, but as we will see in chapter 3 this remains a very vague and murky borderland.

(iv) Fourthly, an exploiter must intend to violate a vulnerable person's property interests. However, an exploiter's goals need not be limited to this. To put forward an extreme example, it is conceivable that an exploiter could also have sadistic motivations for targeting vulnerable persons. At this early stage we will not confine ourselves to saying that actual harm to property interests is part of our working definition (though harm to property interests may be present in cases of acquisitive exploitation).

(v) Fifthly, there must be grounds to say that an exploiter has attacked an objectively vulnerable person. This is what the concept of 'predation' adds to an analysis of acquisitive exploitation, and we will return in detail to this idea in sections 3.2 and 3.6 of this thesis. In reality, this attack looks quite subtle to the extent that it is the opening up of opportunities once an exploiter has gained access to a vulnerable person. It may even appear that an exploitee is 'on board' with these arrangements. We can conjecture that deception, abuse of position, false representations, and manipulation may all be amongst the means of preying upon a vulnerable person.

This nascent working account will suffice for the purposes of this chapter. We have not yet ventured to consider the relevance (if any) of an exploitee's consent, and the full nature of exploitation's harmfulness. Rather, we are arguing that acquisitive exploitation is a deliberate effort to target an objectively vulnerable person, undertaken

dishonestly, which constitutes a clear attack upon a vulnerable person. The context is one in which an exploiter intends to violate an exploitee's property interests, but an exploiter's goals are not necessarily limited to an intention to gain of property interests, or to cause loss in relation to property interests. These goals will be pursued using a range of predatory conduct.

More generally we can conjecture that, like other forms of interpersonal exploitation, acquisitive exploitation will be difficult to identify. There may be reluctance from vulnerable persons to report acquisitive exploitation. Moreover, exploitation may be performed on a large scale, involving the targeting of many victims, or it could involve just one victim. However, what is key to this nascent account is the focus on acquisitive exploitation as an *interpersonal* concept, and this feature is further developed in our normative account of the wrong in chapter 3 of this thesis. Crucially this explains our focus in this thesis upon i. unravelling the current criminal law response to exploitation via interpersonal property offences in section 2.4 below; and ii. our focus in chapter 5 on the relevance of a strong normative account of acquisitive exploitation to the English theft offence and fraud offence. Offences of cartel or antitrust wrongdoing and price gouging do not have this feature of targeting another vulnerable person. Rather, the focus in such offences is upon targeting the marketplace generally and reducing competition therein. Peter Whelan notes that:

The concept of 'cartel activity' refers to the making or implementing of an anticompetitive agreement, concerted practice or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or divide markets by allocating customers, suppliers, territories or lines of commerce. Cartel activity is generally perceived to be harmful to society in that it reduces competition in the marketplace to the detriment of consumers.²⁵

²⁵ Peter Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) MLR 493. A cartel offence for England and Wales is found in s 47 of the ERRRA 2013.

Moreover price gouging – ‘which consists of failing to comply with a requirement that the price of necessities in the aftermath of a major storm or other emergency remain at the average price that existed for some specified period prior to the emergency’ – lacks the feature of specifically targeting vulnerable persons.²⁶ We must also emphasize that although ‘wrongful interpersonal exploitation’ is not a unitary idea, it is plausible that various types of exploitation can overlap. For example, a single case may involve sexual exploitation as well as acquisitive exploitation.

We will return to the matter of identifying the nature and contours of this wrong in chapters 3 and 4 of this thesis. In the meantime, using this working definition, can we identify ways in which the criminal law could be said to penalize acquisitive exploitation?

2.4 Acquisitive exploitation penalized using property offences?

In this section we provide a more thorough study of links between exploitation and property offences in English law in order to demonstrate how the current legal position can be put under strain. For this task we will rely on our working definition of acquisitive exploitation identified in section 2.3 above, with a more extensive account of the wrong to follow in chapters 3 and 4 of this thesis. A number of offences are explored, though this analysis is not intended to be exhaustive. While references to exploitation in the context of property offences are quite common, the following subsections lay bare just how much has been taken for granted by criminal law theorists.

²⁶ Green *LCS* (n 6) 96.

2.4.1 An inchoate offence: conspiracy to defraud

We ought to begin with the offence of conspiracy to defraud on the grounds that it is a breathtakingly broad offence which has scope to penalize wrongful acquisitive exploitation undertaken by two or more persons. This common law offence is committed if an individual (i) dishonestly agrees with one or more persons to prejudice another's economic interests;²⁷ or (ii) agrees with one or more persons to mislead a person with intent to cause him to act contrary to his duty.²⁸ The offence carries a maximum sentence of 10 years' imprisonment. The Office for National Statistics records conspiracy to defraud figures within a general category of fraud offences.²⁹ It is therefore difficult to assess how frequently the offence is currently charged and how often individuals are convicted.³⁰ Anecdotal evidence from a reading of the Serious Fraud Office's website would suggest that the offence still forms a key means of their targeting fraudulent conduct.³¹ Certainly it would be useful if conspiracy to defraud figures were released independently, rather than presented within a large category of fraud offences. The first configuration of the offence can be applied in cases of acquisitive exploitation, and so on it we focus.

The offence requires that an agreement is made to prejudice another person's

²⁷ *Scott v MPC* [1974] 3 All ER 1032.

²⁸ *Welham v DPP* [1960] 1 All ER 805; *Terry* [1984] 1 All ER 65. For discussion, see David Ormerod and David Williams, *Smith's Law of Theft* (9th edn, OUP 2007) 212-13.

²⁹ For example, see Office for National Statistics, *Crime in England and Wales, Year Ending December 2013* <www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2013/stb-crime-stats-dec-2013.html#tab-Fraud> accessed 29 March 2015.

³⁰ In 2003, 6.8% of all fraud charges involved conspiracy to defraud, see Attorney General's Guidelines, 'Use of the Common Law Offence of Conspiracy to Defraud' (London 2012) para 5. For fraud statistics by victim and by type, see National Fraud Authority, *Annual Fraud Indicator* (June 2013).

³¹ Serious Fraud Office, 'Press Releases 2014' (SFO) <<http://sfo.gov.uk/press-room/latest-press-releases/press-releases-2014.aspx>> accessed 29 March 2015.

economic interests, but no further steps need to have been taken to realize this ambition. The conduct requirements of the offence can best be described as extremely minimal. All kinds of otherwise lawful agreements can be said to fall within the offence, with the only limit provided by a requirement of dishonesty.³² The *Ghosh* direction has been influential here, as in the English fraud and theft offences.³³ This requires an assessment as to whether the defendant's conduct was dishonest according to the ordinary standards of reasonable people, and whether the defendant knew he was acting dishonestly according to these standards.³⁴

Arguably the conspiracy to defraud offence is capable of penalizing acquisitive exploitation where there is agreement between two or more exploiters to prejudice another person's economic interests. In the paradigm case of acquisitive exploitation, it is probable that exploiters intend to prejudice another person's economic interests. There is overlap, albeit with some key exceptions, between the two notions of economic interests and property interests.³⁵ There will also be cases where neither economic interests nor property interests are in question. For example, Stephen Wilkinson notes that some exploiters may have self-destructive motivations.³⁶ It is likely that these marginal cases will fall outside of the conspiracy to defraud offence. However, we also argued in section 2.3 that there is a clear intuitive case for treating acquisitive

³² A point made in Law Commission, *Fraud* (Law Com No 276, 2002) para 5.12. cf the recent Crown Court decision in *Evans* [2014] 1 WLR 2817 at [138] and [160], which additionally required that the object of the agreement was unlawful or, if the object was lawful, that the means of achieving that object was unlawful.

³³ *Ghosh* [1982] 1 QB 1053.

³⁴ *ibid* 1064.

³⁵ For example, if an exploiter 'goes after' a family heirloom which has no financial economic worth, he attacks property interests, but not economic interests.

³⁶ Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 20-21.

exploitation as tied up with an exploiter's *dishonest* dealings with vulnerable persons. In other words, we can expect dishonesty to feature as a culpability element. If two or more exploiters agree to violate another person's economic interests, and do so dishonestly, this would seem to come within the ambit of the offence.

The anomaly at the heart of the offence of conspiracy to defraud—that 'what is legal if performed by one person should be criminal if performed by many'—also applies when links are drawn with acquisitive exploitation.³⁷ Why penalize an agreement to prejudice another persons' economic interests if there are two or more exploiters, but decline to do so if there is one? This distinction seems entirely arbitrary in cases of serious acquisitive exploitation. If the rationale for the requirement is that an agreement between exploiters provides evidence of deliberation, which in turn is more wrongful than spontaneous acts of exploitation, then this is hardly robust. If deliberation is important, it is quite plausible that sufficient evidence of it could be collected independently of an agreement between two persons. Vulnerable persons are just as much at risk from those who exploit on a whim, and from those who operate independently.

As is well known, the usefulness of the offence to prosecutors has been one of the reasons why it has not been abolished. While the Attorney General's Office has argued that the offence will be 'used to a significantly lesser extent' post-Fraud Act 2006, a 2012 review of the Fraud Act highlighted the practical advantages of retaining the offence.³⁸ The report accepted the arguments of the Attorney General's Office, the

³⁷ Attorney General's Guidelines, 'Use of the Common Law Offence of Conspiracy to Defraud' (London 2007) para 3.

³⁸ Ministry of Justice, *Post-legislative Assessment of the Fraud Act 2006: Memorandum to the Justice Select Committee* (London 2012).

Crown Prosecution Service, and the Serious Fraud Office that the offence can be used when:

[It] more clearly and accurately reflects the gravity of the offending, for example where multiple defendants are engaged in a fraudulent course of conduct; where the statutory offences (or statutory conspiracies) would otherwise lead to difficulties in presenting an overall picture of the offending; where it may avoid an overloaded indictment or procedural and evidential difficulties arising from issues of jurisdiction; and where there are different kinds and levels of criminality.³⁹

This argument has been repeated many times.⁴⁰ It is an attempt to balance a ‘usefulness’ and ‘overall picture’ argument against the obvious rule of law defects of the offence, which gives rise to ‘interests of justice’ reasoning. In other words, the interests of justice ‘can only be served by presenting to a court an overall picture’ of a complex case, and the conspiracy to defraud offence allows for this.⁴¹ Prosecutors are likely to use the offence where there is the semblance of exploitation, and the conspiracy to defraud offence’s loose fault and conduct requirements are met.⁴² No doubt this function is especially useful in cases of acquisitive exploitation because they invariably involve complexity. We noted in chapter 1 that there are difficulties with exploitation being a largely hidden phenomenon. But pragmatic arguments about the usefulness of criminal offences do not make them principled. The starting point must be that the conspiracy to defraud offence clearly runs counter to the rule of law as an

³⁹ *ibid* para 35.

⁴⁰ For example, see Criminal Law Revision Committee, *Eighteenth Report: Conspiracy to Defraud* (1986) Cmnd 9873, part 3.

⁴¹ Ministry of Justice, *Post-legislative Assessment* (n 38) para 35; Attorney General’s Guidelines (n 37) para 12. A 2006 inquiry, Stephen Wooler, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (CPS 2006) para 11.88, argued that the conspiracy to defraud offence can ‘be resorted to in an attempt to sidestep significant difficulties in the proof of any substantive offence and bridge the gaps in an investigation which has failed to prove more specific offences of dishonesty’.

⁴² For example, the facts of *R v Croke* [2014] EWCA Crim 1247 align with acquisitive exploitation. The Crokes encouraged elderly and vulnerable victims to part with substantial sums of money for repairs and fake business investments. Some victims were persuaded to give over their life savings.

ideal, and arguments that it can be used to penalize serious acquisitive exploitation do not make the offence any more principled. Strong criticisms of the offence made by criminal law commentators and the Law Commission still hold true if the offence is used to penalize acquisitive exploitation.⁴³ These criticisms have focused on the fact that the offence does not provide sufficient legal certainty, and thus fair warning for citizens.⁴⁴ The latitude inherent in the offence raises concerns as to whether it infringes Article 7(1) of the European Convention on Human Rights, though such a declaration of incompatibility has not yet been made.⁴⁵

A further concern is that such a broad offence, if used as a flexible tool to criminalize acquisitive exploitation, severely limits the ability of courts to adjudicate on the true nature of acquisitive exploitation. As James Edwards has explained, broadly drafted offences oust courts from adjudicating on the nature of the wrong which the offence is designed to target, '[T]he offence-creator creates an output wrong which merely captures some act A because it is thought that prohibiting A, rather than the input wrong, will make it easier to arrest and convict the aforementioned suspects.'⁴⁶ While protecting vulnerable persons may be the reason for using the conspiracy to defraud offence, use of such an ill-drafted offence undermines the 'judicial function' which is equal to an ouster clause.⁴⁷ While it is unknown whether treatment of

⁴³ See ATH Smith, 'Conspiracy to Defraud' [1988] Crim LR 508; JC Smith, 'Conspiracy to Defraud: Some Comments on the Law Commission's Report' [1995] Crim LR 209; Law Commission, *Fraud* (n 32).

⁴⁴ For example, Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (London 2004).

⁴⁵ *Norris v United States of America* [2008] UKHL 16.

⁴⁶ James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 OJLS 725, 728.

⁴⁷ *ibid* 747.

exploitation was on the mind of the court in *Scott v MPC*, it is quite possible for courts to ‘graft on’ to an already broad offence an input wrong of exploitation.⁴⁸ But this protective purpose ought not to be pursued using a catch-all offence. Not only is the offence incapable of censuring exploitation in a principled way, it ought also to be jettisoned from criminal law theory and practice.

2.4.2 Substantive offences drafted in inchoate form

(A) Fraud offence found in Fraud Act 2006

As is well-known, commentators tether the state response to exploitation to section 1 of the Fraud Act 2006, but the argument has been put forward with hardly any justification.⁴⁹ In English law, an offence of fraud is based upon dishonest conduct. Section 1 of the Fraud Act 2006 states that fraud can be committed in three ways: by making a false representation, by failing to disclose information, or by abusing a position of trust. It must be shown that the defendant dishonestly engaged in one of these forms of fraudulent conduct, and that he intended, by means of it, to either make a gain for himself or another, or to cause loss or the risk of loss to another. This substantive offence is drafted in inchoate form. David Ormerod notes that each form of the offence is ‘complete on the accused’s acts irrespective of any result caused, which represents a significant shift from the deception offences they replace’.⁵⁰ Ironically the idea of exploitation has never been clarified, even in the context of the offence of fraud

⁴⁸ (n 46).

⁴⁹ For example, Simester and others (n 2) 618-19.

⁵⁰ David Ormerod, ‘The Fraud Act 2006—Criminalising Lying?’ [2007] Crim LR 193. For background, see Law Commission Consultation Paper No 155, *Legislating the Criminal Code: Fraud and Deception* (1999); Law Commission No 276, *Fraud* (2002); Home Office Consultation Paper, *Fraud Law Reform* (2004).

where it appears to be most warmly endorsed. Thus, it is impossible for commentators to say that the offence justifiably penalizes wrongful interpersonal exploitation. This accepted approach to exploitation ought to be challenged. Assuming our working definition in section 2.3 is an improvement, we will use it to critically analyze the following questions: in what ways, and how effectively, is the section 1 offence capable of penalizing acquisitive exploitation?

First, the section 1 offence requires dishonesty and not deception. In conceptual terms, this seems to align the offence with the wrong of acquisitive exploitation we are interested in, which surely need not *require* deception or deceptive practices. This is consistent with deceptive practices being present in the facts of a particular case of exploitation. While it is logical that dishonesty must be taken into account in cases of exploitation and fraud, there are difficulties with ‘dishonesty’ in the section 1 offence. In non-straightforward fraud cases, judges will assess ‘dishonesty’ on the basis of whether a defendant (i) acted dishonestly according to the ordinary standards of reasonable and honest people, and (ii) whether the defendant realized that reasonable and honest people would regard his conduct as dishonest.⁵¹ There is no further guidance available, so there is much scope for arbiters of ‘dishonesty’ to decide whether or not dishonesty should be read into a defendant’s conduct.⁵² According to the Joint Parliamentary Committee on Human Rights, the section 1 offence is compliant with Article 7 of the European Convention on Human Rights. This is because dishonesty is embedded ‘as an element in the definition of the offence’, and there is ‘some

⁵¹ *Ghosh* (n 33) 1053, 1064. Parliamentary debates endorsed the use of the *Ghosh* test in the context of the section 1 offence. See HL Deb 19 July 2005, col 1424 Attorney General; SC Deb (B) 20 June 2006, col 8 Solicitor-General.

⁵² See Stuart P Green, ‘A Normative Approach to White-Collar Crime’ in Henry Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer 2007) 230.

identifiable morally dubious conduct to which the test of dishonesty may be applied'.⁵³ This argument has attracted criticism, since we will see below that the conduct requirements of the offence are not so demanding. Ormerod and Williams starkly note that 'something as innocuous as failing to work for an employer as hard as one might' might suffice to come within section 1(2)(c) of the 2006 Act.⁵⁴

A further difficulty with using the section 1 fraud offence to target exploitation is that it does not specifically penalize *serious* forms of dishonesty, which we would expect to be key to acquisitive exploitation (we conjectured in section 2.3 that serious dishonesty may be represented where *vulnerable* persons have been dishonestly targeted). Stuart Green has noted that fraud as dishonest conduct can be interpreted as:

[A] wrongful act of almost any sort—a violation of 'moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society', an act that is 'discreditable as being at variance with straightforward or honorable dealings'.⁵⁵

A broad interpretation of 'dishonesty' can bring within the scope of section 1 behaviour which is not best described as serious. It would be too easy to focus on the breadth of 'dishonest' fraud, arguing that it can be clearly linked with acquisitive exploitation.⁵⁶ But surely we need to also ask whether the seriousness or blameworthiness of (dishonest) acquisitive exploitation can be penalized more clearly?

Secondly, section 1 requires that fraudulent conduct is undertaken *with intent* to

⁵³ Joint Parliamentary Committee on Human Rights, *Legislative Scrutiny: Sixth Progress Report, Fourteenth Report of Session 2005-06* (The Stationery Office 2006) para 2.14.

⁵⁴ Ormerod and Williams (n 28) 133.

⁵⁵ Green, 'A Normative Approach to White-Collar Crime' (n 52) 230, quoting *Blachly v US* (380 F.2d 665, 671 (5th Cir. 1967)).

⁵⁶ Notably the breadth of the offence was praised in the 2012 review of the Fraud Act, see Ministry of Justice, *Post-legislative Assessment of the Fraud Act 2006* (n 38) para 13. See Serious Fraud Office, 'Taxonomy of Fraud' <www.sfo.gov.uk/taxonomy.swf> accessed 29 March 2015.

make a gain for oneself or another, or with intent to cause loss to another or to expose another to a risk of loss. A broad meaning is given to ‘gain’ and ‘loss’ in section 5 of the 2006 Act. For the purposes of our discussion of acquisitive exploitation, it is relevant that the focus of the offence is not upon actual gain or loss. We might expect most cases of acquisitive exploitation to involve intent to gain or to cause loss or the risk of loss, though even this factor is open to debate. What is most striking, however, is the dissonance between conceptual accounts of exploitation relied upon by criminal law commentators, and the offence that they argue is justified in penalizing exploitation. We have already established the basis for this argument in section 2.2. Joel Feinberg is emphatic that an exploiter exploits in order to gain (thus, consistent with the fraud offence), and that he does in fact gain (clearly inconsistent with the fraud offence).⁵⁷ Other commentators have extended exploitation to include situations where exploiters ‘inflict losses of a relative sort on disadvantaged parties’.⁵⁸ Now, if actual gain or loss is key to wrongful acquisitive exploitation and exploitation is a result-word, then it seems like the fraud offence is a clumsy ‘fit’ for penalizing the wrong. The issue as to whether this type of wrongful interpersonal exploitation requires actual gain and loss (i.e. is a result-word) is a fiendishly difficult question, and we will return to it in chapter 3 of this thesis. For example, is there a distinction between exploitative conduct and successful acquisitive exploitation which necessarily involves gain and/or loss? Which formulation best expresses the paradigm of this wrong? In the meantime, we can highlight the inadequacy of discussion by criminal law theorists as to the contours and limits of acquisitive exploitation. Here is another demonstration of the kind of backward reasoning taken in relation to exploitation and property offences. The section

⁵⁷ Feinberg (n 1) 192. Ironically *Simester and Sullivan’s* example of exploitation involves loss to a victim of exploitation, see *Simester and others* (n 2) 619.

⁵⁸ Mayer (n 20) 138.

1 fraud offence cannot be assumed to clearly penalize acquisitive exploitation with fair warning for citizens without further critical analysis.

Thirdly, review of conduct elements of the fraud offence may lead one to say that the offence is capable of penalizing acquisitive exploitation. Arguably fraud committed by false representation and by abuse of position are the most plausible candidates. Turning first to fraud by false representation, Ormerod notes that it is the ‘broadest form of the fraud offence and hence likely to be the most frequently charged’.⁵⁹ This has proven to be the case, with a 2012 assessment of the Fraud Act noting that fraud by false representation accounts for the ‘overwhelming majority of charges’.⁶⁰ An individual must make a false representation which he knows is, or might be, untrue or misleading, and with the relevant intent. The scope of the offence is strikingly broad, and has led David Ormerod to say that it serves to ‘criminalise lying’.⁶¹ According to Smith’s *Law of Theft*, ‘[T]here is no need to prove a result of any kind; that the alleged victim or indeed any person believed any representation; that any person acted on it; that the accused succeeded in making a gain or causing a loss by the representation.’⁶²

The scope of the fraud offence’s conduct element means that it may be used to target exploitative conduct. To be more precise about the conduct requirement of fraud committed by false representation, a ‘false representation’ may be express or implied,

⁵⁹ Ormerod, ‘Criminalising Lying?’ (n 50) 197.

⁶⁰ Ministry of Justice, *Post-legislative Assessment* (n 38) para 13.

⁶¹ Ormerod, ‘Criminalising Lying’ (n 50) 197.

⁶² Ormerod and Williams (n 28) 140.

and may be made by words or conduct.⁶³ For example, there is an implied representation by a person who orders a taxi and journeys in it: he ‘represents that he intends to pay, and has the means of paying, at the end of the ride’.⁶⁴ Section 2(2)(a) of the 2006 Act makes clear that a representation is false if it is untrue or misleading. An ordinary meaning is to be given to ‘untrue’, and it will not matter that a ‘representation contains one falsity, even if it relates to a peripheral matter in his dealing with V’.⁶⁵ A ‘misleading’ representation need not be technically untrue, but generally speaking a representation which bears two or more meanings may be interpreted as misleading.⁶⁶ Notably the breadth of a relevant ‘false representation’ focuses on knowledge of the accused—it is key that he knows his representation is or might be misleading. Therefore, an individual who makes a representation carries a heavy burden as to whether or not it is characterized as misleading.⁶⁷ One effect of this interpretation is that it brings the savvy exploiter within the scope of this conduct requirement. An exploiter may seek to sidestep the literal truth in order to take advantage of an exploitee. For example, defendants in a recent land banking fraud trial set out to sell individual plots of land as good investments—not only were the plots grossly overpriced, they were also useless as a development opportunity. As the Crown Prosecution Service tersely put it, ‘Far from being ripe for development, one site in Halifax was on a 40

⁶³ Fraud Act 2006, s 2(4).

⁶⁴ Ormerod and Williams (n 28) 152.

⁶⁵ *ibid* 158.

⁶⁶ *Smith v Chadwick* (1884) 9 App Cas 187, 201.

⁶⁷ Simester and others (n 2) 611-12, argue that if ‘misleading’ is read broadly, one problem ‘is that it takes the criminal law beyond what constitutes a misrepresentation for the purposes of the law of contract, where the boundaries of the concept are mediated by the principle of *caveat emptor*...Extending the notion of falsity to representations that are misleading yet true could lead to further incoherence at the interface of criminal and civil law’.

degree slope with Tree Preservation Orders and a Japanese Knotweed problem.’⁶⁸ Techniques used in the case of presenting ‘general historic truths’ (such as ‘the price of land like house prices always goes up’), would be interpreted as misleading for the purposes of section 2.⁶⁹ Also in relation to exploitation, an accused’s knowledge that his representation is directed at an especially vulnerable person could be sufficient grounds to conclude that the representation is misleading. We can therefore countenance false representations as techniques used by exploiters in some cases of acquisitive exploitation.

Turning to fraud committed by abuse of position, a person must occupy a position in which he is expected to safeguard, or not to act against, the financial interests of another person. He must dishonestly abuse that position by act or omission, and intend, by abuse of that position, to make a gain or cause a loss.⁷⁰ Clearly, occupation of a relevant position is key to this form of the fraud offence, but the Law Commission drew no limits to its meaning in their Explanatory Notes, stating that:

The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm’s length.⁷¹

Several examples of an individual occupying a position are given. First, where a software company employee clones products with the relevant intent; and secondly

⁶⁸ Crown Prosecution Service, ‘Two Sentenced in First Ever “Land Banking” Fraud Trial’ (6 December 2012) <www.cps.gov.uk/news/latest_news/two_sentenced_in_first_ever_land_banking_fraud_trial/index.html> accessed 29 March 2015.

⁶⁹ *ibid*, ‘They were fed tales of local housing shortages and were even told there had been development interest from supermarket and hotel chains.’

⁷⁰ Fraud Act s 1(2)(c), defined in s 4.

⁷¹ Law Commission, *Fraud* (n 32) para 7.38.

where a carer for an elderly or disabled person has ‘access’ to that person’s bank account.⁷² Ormerod notes that the ‘only other advice was that the offence applies wherever V has “voluntarily” put D in such a position’.⁷³

Commentators have noted that a relevant position is not limited to positions recognized in the civil law (such as fiduciary positions).⁷⁴ Deciding whether there is a relevant position in circumstances where there is no civil law duty will rest upon identifying an expectation that a person must safeguard financial interests, or not act against them.⁷⁵ The animating idea of there being an ‘expectation’ is invariably vague. Who should decide whether there is such an expectation to safeguard, or not to act against another person’s financial interests? It is likely that an interpretation that asks ‘would a reasonable man consider this individual to have such an expectation?’ will be used. But the key concern here must be with legal certainty and it is not convincing that a reasonable man test advances legal clarity. Of clear concern is the lack of limits to the idea that a person is expected *not* to act against another person’s financial interests. As Ashworth and Horder note, a duty not to act against an employer’s financial interests will be implicit in many jobs.⁷⁶ Neither is the idea of ‘abuse’ meaningful, with section 4(2) only stating that it may occur by act or omission.

Is a wrong of acquisitive exploitation consistent with this broad conduct element? Are exploiters likely to hold positions where they are expected to safeguard,

⁷² Home Office, ‘Fraud Act 2006: Explanatory Notes’ paras 22-23.

⁷³ Ormerod, ‘Criminalising Lying?’ (n 50) 208-09. See also Law Commission, *Fraud* (n 32) para 7.37.

⁷⁴ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 408.

⁷⁵ Simester and others (n 2) 617.

⁷⁶ Ashworth and Horder (n 74) 409.

or not to act against, an exploitee's financial interests? A general answer cannot be given to this question; it will depend upon the facts of a particular case of acquisitive exploitation. It is striking, therefore, that criminal law commentators tend to write about fraud by abuse of position and exploitation as if there is always a clearly established connection between the two. The common example given in criminal law textbooks is of a 'tradesman who regularly supplies V with goods or services building up over the course of time a relationship in which V comes to trust him but then abuses V's trust by charging him prices that are far above the going rate'.⁷⁷ It would seem that this scenario is being identified as exploitative, though as noted in section 2.2 above, the idea of exploitation is not probed. But it ought also to be emphasized that other core cases of acquisitive exploitation *cannot* be aligned with an expectation to safeguard, or not to act against, another person's financial interests. There will be exploitees who will be 'worked on' over a period of time (as in *Hinks*) where a position of trust has been established, but for others the interaction will be much more transitory. Quite naturally an exploiter may only have a fleeting encounter with an exploitee in temporal terms. It would be difficult to argue that a door-to-door salesman who employs exploitative tactics is expected to safeguard a homeowner's financial interests.⁷⁸ That would be to interpret even an admittedly vague idea of 'position' to the point of absurdity. Similarly, it would be illogical to argue that a door-to-door salesman has a duty not to act against a homeowner's financial interests given that they are strangers.

We cannot expect a criminal law offence to have an exact fit with the contours of the wrong of acquisitive exploitation, but it is reasonable to ask whether these current

⁷⁷ *Simester and others* (n 2) 619; see *Silverman* (1988) 86 Cr App R 213.

⁷⁸ cf *Tomney* [2012] EWCA Crim 2545 [84], who was convicted of fraud by abuse of position on an elderly and vulnerable woman whom he had just met.

measures sufficiently penalize wrongful conduct of exploiters. Acknowledging the diversity of exploitative techniques may require a more specific criminal law response than that provided by the Fraud Act, one which marks out the particular blameworthiness of exploitative wrongdoing.

Our discussion of fraud committed by false representation and by abuse of position has shown that *some* cases of acquisitive exploitation will come within the scope of these broad conduct requirements. But in other core cases the likelihood that exploitative conduct will come within the scope of the fraud offence will be slim. Another subtle aspect of our working definition of acquisitive exploitation must also be taken into consideration. We suggested in section 2.3 above that exploiters typically target already vulnerable persons therein gaining access to opportunities. It may only be subsequently that exploiters act fraudulently (within the meaning of section 1 of the Fraud Act 2006). It follows that part of the gist of serious acquisitive exploitation is not just that an exploiter has acted fraudulently in relation to an otherwise robust person. The earlier ‘targeting’ behaviour also bears on the seriousness of the exploitative wrong, and thus should be taken into account in the criminal law response. By penalizing the making of a false representation, the criminal law glosses over this earlier ‘targeting’ aspect of exploitation. However, occupation of a position of trust within the meaning of section 1(2)(c) may present a ‘ready-made’ opportunity for unfair advantage-taking of vulnerable persons. This might indicate a reason why criminal law commentators are drawn to fraud by abuse of position as a means of penalizing acquisitive exploitation.

Nevertheless, the concern still remains that even a very broad fraud offence does not fairly penalize the nature of the wrong of acquisitive exploitation, thereby infringing

rule of law ideals. It is high time that a targeted fraud offence, tailored to targeting acquisitive exploitation, is interrogated.

(B) Bribery

Several bribery offences found in the Bribery Act 2010 may be linked with ‘unfair advantage-taking’, which we saw in chapter 1 is key to a general idea of ‘wrongful interpersonal exploitation’.⁷⁹ However, this does not mean that bribery offences can in principle penalize the type of exploitation explored in this thesis, and this section explains why they do not. Arguably the bribery offences found in the 2010 Act are best suited to penalizing corruption in relation to public office or commercial activities, and this is most likely to occur in the context of *other* serious forms of wrongful interpersonal exploitation, such as trafficking persons for exploitation.⁸⁰

We can begin by examining two inchoate offences found in sections 1 and 2 of the Bribery Act 2010: section 1 is an offence targeting conduct of a briber (who presents the offer), and section 2 penalizes conduct of a bribee (who accepts the offer). An individual is guilty of bribery under the section 1 offence if he ‘offers, promises or gives a financial or other advantage to another person’.⁸¹ He must intend to ‘induce a person to perform improperly a relevant function or activity’, or reward him for doing so.⁸² Alternatively he may offer, promise or give ‘financial or other advantage to another person’, knowing or believing that this ‘would itself constitute the improper

⁷⁹ See s 1.2.

⁸⁰ If a case involves bribery of a foreign public official, s 6 will apply in certain circumstances.

⁸¹ Bribery Act 2010, s 1(2)(a).

⁸² Bribery Act 2010, s 1(2)(b)(i)-(ii).

performance of a relevant function or activity’.⁸³ Section 2 makes clear that a person is guilty of receiving a bribe if he comes within one of four scenarios. We will not recount the details of each scenario here, but broadly speaking, he must request, agree to receive, or accept, a financial or other advantage. In consequence, he must intend that ‘a relevant function or activity should be performed improperly’, or the request, agreement or acceptance ‘itself constitutes the improper performance’.⁸⁴ Paralleling the inchoate structure of the Fraud Act 2006, a bribe need not actually be given or accepted for the offence to have been committed.⁸⁵

In moral terms, the act of requesting or accepting a bribe can *prima facie* be linked with a broad idea of wrongful interpersonal exploitation. Accepting a bribe can be seen as taking advantage of one’s position, and the range of persons who can be convicted of an offence relating to being bribed has been extended under the 2010 Act.⁸⁶ This is significant, given Stuart Green’s observation that ‘[F]or most of the history of bribery, the only kind of person who could be a bribee was a public official.’⁸⁷ Green argues that it involves ‘the misuse of the bribee’s position for personal gain. It reflects a kind of disloyalty: rather than serving the interests of the principal to whom he owes a fiduciary duty, the bribe serves his own interests instead.’⁸⁸ However, improper performance turns on what is a ‘relevant function or

⁸³ Bribery Act 2010, s 1(3)(a)-(b).

⁸⁴ Bribery Act 2010, s 2.

⁸⁵ See Andrew Ashworth, ‘The Criminal Law’s Ambivalence About Outcomes’ in Rowan Cruft and others (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Anthony Duff* (OUP 2011) 165, on the fact that, unlike the Fraud Act 2006, the Bribery Act does not ‘mark a historical shift’.

⁸⁶ John Noonan, *Bribes* (University of California Press 1984).

⁸⁷ Green *LCS* (n 6) 195.

⁸⁸ Stuart P Green, ‘Official Bribery and Commercial Bribery: Should They be Distinguished?’ in Peter Alldridge and Jeremy Horder (eds), *Modern Bribery Law: Comparative Perspectives* (CUP 2013) 56.

activity’, and herein lies the sticking point in linking bribery with penalizing acquisitive exploitation. Section 3(2) of the Act identifies relevant functions and activities as: any function of a public nature; any activity connected with a business; any activity performed in the course of a person’s employment; or any activity performed on behalf of a corporate or unincorporated body. Section 3(3)-(5) notes that a person must be under an obligation to perform their function or activity in good faith, impartially, or in a position of trust. The point is that these bribery offences seem ‘invariably committed in the context of governmental or commercial activities’.⁸⁹ They concern the acceptance of bribes in public or commercial spheres. It is unlikely that exploiters exploit by bribing persons in particular positions—or at least this does not describe the paradigm wrong of acquisitive exploitation.

Green posits a further intriguing link to exploitation in the giving of a bribe. The starting point is that a ‘briber normally has no duty of loyalty to violate’.⁹⁰ However, Green emphasizes that bribing amounts to ‘unfair competition or cheating’, because the briber seeks ‘to obtain an unfair advantage over his non-bribe paying “competitors”’.⁹¹ He hopes to put himself in a better position than them and his wrongful conduct in turn causes harm to his competitors.⁹² This argument is plausible, but the essence of dishonestly targeting already vulnerable persons is rather different. In this context, exploiters are undoubtedly seeking to get ahead. But they are highly unlikely to do so by inducing exploitees to work outside of the remit of a public or

⁸⁹ Green *LCS* (n 6) 194.

⁹⁰ Green in Alldridge and Horder (n 88) 63.

⁹¹ *ibid* 63.

⁹² *ibid* 63. See Bob Sullivan, ‘The Bribery Act 2010: Part 1: An Overview’ [2011] *Crim LR* 87.

commercial role, which may carry obligations of good faith.⁹³

It is important to be clear that there *will* be links with other serious forms of exploitation, namely where a bribee does occupy a relevant position, and where a briber seeks to induce a bribee to act outside of that role. For example, Virginia Kendall and Markus Funk highlight a connection between public corruption and trafficking of persons.⁹⁴ While the working assumption must be that accepting bribes does not necessarily lead to ‘any actual bad decision’, the gravamen of the wrong is that it ‘makes the decision-maker unable or unwilling to determine what is in the best interest of his principal’.⁹⁵ However, it would be naïve to pretend that bribing a public official to step outside of the remit of their role to facilitate trafficking for exploitation will have anything less than disastrous consequences for vulnerable persons.⁹⁶

(C) Blackmail

Is the offence of blackmail better able to penalize acquisitive exploitation? Blackmail is a complex criminal law offence with characteristics of a property offence and of an offence against the person.⁹⁷ For classification purposes we will consider blackmail

⁹³ This ties in with Green’s point in *LCS* (n 6) 194, that perpetrators of bribery offences ‘are typically upper-income professionals (whether they are the bribees who accept the bribes, or the bribers who have enough capital to pay them)’.

⁹⁴ Virginia Kendall and Markus Funk, *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Response* (Rowman and Littlefield 2012) 58. See also Sheldon Zhang and Samuel Pineda, ‘Corruption as a Causal Factor in Human Trafficking’ in Dina Siegel and Hans Nelen (eds), *Organized Crime: Culture, Markets and Policies* (Springer 2008); United Nations Office on Drugs and Crime, *The Role of Corruption in Trafficking in Persons: Issue Paper* (Vienna 2011).

⁹⁵ Green in Alldridge and Horder (n 88) 56-57.

⁹⁶ *ibid* 56-57.

⁹⁷ AP Simester and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 188. For links with offences against the person, see Sexual Offences Act 1956, s 2 (procurement of woman by threats); United States Model Penal Code, s 212.5 (criminal coercion).

under the heading of a property offence drafted in inchoate mode. Section 21(1) of the Theft Act 1968 states that ‘A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces.’⁹⁸ A demand with menaces is unwarranted ‘unless an individual: (a) has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand’.⁹⁹ The offence has a maximum sentence of fourteen years’ imprisonment.¹⁰⁰

It is often observed that blackmail is rarely prosecuted in Anglo-American law. Mitchell Berman argues that blackmail ‘exerts a grasp on the popular imagination almost surely out of proportion to the actual incidence of its occurrence’.¹⁰¹ The police recorded 1,369 blackmail offences in England and Wales in 2011-2012, and 1,497 offences in 2012-2013.¹⁰² We cannot read statistics about the number of recorded cases of blackmail as if they reflect the incidence of this type of wrongdoing. The reporting rate will be affected by the fact that blackmail will often be hidden because it is undertaken in the context of relationships of dominance and subordination. A person who is blackmailed may be terrified to speak out because they do not wish to expose themselves to criminal liability or to damage their reputation.¹⁰³ We can immediately draw a link with acquisitive exploitation—like exploitation, blackmail has the tendency

⁹⁸ Theft Act 1968, s 21, which replaces offences found in ss 29-31 of the Larceny Act 1916.

⁹⁹ Theft Act 1968, s 21(1).

¹⁰⁰ Theft Act 1968, s 21(3).

¹⁰¹ Berman (n 19) 82.

¹⁰² Kevin Smith and others, *Crimes Detected in England and Wales 2012/13* (Home Office 2013) 22.

¹⁰³ Ormerod and Williams (n 28) 333 fn 38, note the example of ‘businessmen being charged extortionate prices for champagne ordered in Soho clubs and threatened with violence if they fail to pay. The perpetrators are rarely charged since the businessmen are unwilling to admit their presence in the clubs: *The Observer*, 29 Feb 2004’.

to be a hidden wrong which is unlikely to be widely reported by its vulnerable victims.

Turning to the details of the offence, the conduct element is broad. An ‘unwarranted demand’ need not relate to the property of the person blackmailed, and section 21(2) states that the ‘nature of the act or omission demanded is immaterial’, as is whether or not ‘the menaces relate to action to be taken by the person making the demand’.¹⁰⁴ However, an individual must make a demand ‘with a view to gain for himself or another or with intent to cause loss to another’, and this draws a limit on section 21(2). The demand can be express or implied and can take a variety of forms.¹⁰⁵ ‘Whether a demand is “warranted” or not appears to be exclusively a question of the accused’s belief’.¹⁰⁶ An unwarranted demand is accompanied ‘with menaces’, with ‘menace’ to be given its ordinary meaning.¹⁰⁷ Lord Wright emphasized the need for a liberal reading of ‘menace’ in *Thorne v Motor Trade Association* to include ‘any action detrimental to or unpleasant to the person addressed’.¹⁰⁸ Ormerod and Williams argue that a menace will be found if the threat either would: (i) ‘influence the mind of an ordinary person of normal stability and courage’, regardless of whether the targeted individual is intimidated or frightened; or (ii) ‘influence the mind of the person addressed, though it would not influence an ordinary person’.¹⁰⁹ In this way, the blackmail offence is sensitive to the fact that menaces may be interpreted differently by

¹⁰⁴ *ibid* 330.

¹⁰⁵ *ibid* 331.

¹⁰⁶ *ibid* 340.

¹⁰⁷ *Lawrence* (1971) 57 Cr App R 64.

¹⁰⁸ [1937] AC 797 at 817.

¹⁰⁹ Ormerod and Williams (n 28) 334. See *Garwood* [1987] 1 All ER 1032, for departure from the reasonable person test in order to take into account the effect of a menace upon an exceptionally timid victim.

persons who are not of ‘average firmness’.¹¹⁰

As noted above, an individual must make an unwarranted demand with a view to making gain for himself or another, or with intent to cause loss to another. ‘Gain’ and ‘loss’ are defined in section 34(2)(a) of the Theft Act 1968. This section makes clear that the offence is concerned with economic interests, but this requirement has been interpreted loosely in practice.¹¹¹ It was accepted in *R v Bevans* that a patient’s unwarranted demand that his doctor provide him with a morphine injection was made with a view to gain for himself.¹¹² This was because he demanded morphine, which the Court of Appeal considered property. It made no difference that he sought the pain relief the morphine would provide.

Nevertheless actual gain or loss is not key to the core wrong of blackmail. Andrew Simester and Bob Sullivan argue that ‘the *concept* of blackmail is free from property’—blackmail involves a wrong of coercion, and the offence expresses a ‘need to protect citizens from unjustified coercion by others’.¹¹³ Herein lies an interesting link with acquisitive exploitation. We might not expect an exploiter to make an unwarranted demand with menaces with intent to gain *money or property*. However, we might expect an exploiter to do so in order to first gain *control* of a victim. An exploiter may first wish to establish a relationship of dominance before moving on to intend to gain an exploitee’s resources. In other words, the threat made may not be in the first instance with intent to gain or to cause loss to economic interests. As Simester

¹¹⁰ *Tomlinson* [1895] 1 QB 706, per Wills J.

¹¹¹ Ormerod and Williams (n 28) 335.

¹¹² [1988] Crim LR 236.

¹¹³ Simester and Sullivan in Duff and Green (n 97) 189. See Grant Lamond, ‘Coercion, Threats, and the Puzzle of Blackmail’ in AP Simester and ATH Smith (eds), *Harm and Culpability* (OUP 1996).

and Sullivan note, the ‘pressures inducing a surrender to these threats may well be, according to the circumstances, enormous, and succumbing may well entail a form of life that comes close to servitude’.¹¹⁴

The significance of blackmail being used to establish a relationship of dominance and subordination connects to a deeply contentious issue in theorizing the offence of blackmail. The issue has been to explain why threatening to reveal something which is true unless money is given over is considered unlawful.¹¹⁵ This is puzzling if an individual is at liberty to reveal this fact and if there is no reason why he cannot ask for money. Is the concern to ‘deter conditions of “domination and subordination”’ caused by blackmail, using the criminal law?¹¹⁶ Stuart Green notes that this approach has few principled limits, since ‘most, or even all, hard bargaining involves relationships of domination and submission’.¹¹⁷ And Mitchell Berman notes that:

Innumerable relationships—parent and child, employer and employee, teacher and student, and so on—exhibit aspects of dominance and subordination, yet raise no suspicion in the eyes of the law. So the existence of such a dynamic cannot be a sufficient condition for criminalization.¹¹⁸

It is evident that something more is necessary to justify criminalization; a relationship of domination and subordination is insufficient grounds for criminalization. Grant Lamond suggests that the difficulty lies in the effect of blackmail upon consent. A

¹¹⁴ Simester and Sullivan in Duff and Green (n 97) 188-89.

¹¹⁵ See Glanville Williams, ‘Blackmail’ [1954] Crim LR 7.

¹¹⁶ Green *LCS* (n 6) 220.

¹¹⁷ *ibid* 220. See Peter Alldridge, ‘Dealing with Drug Dealing’ in Andrew Simester and ATH Smith (eds), *Harm and Culpability* (OUP 1996), for an argument that selling drugs involves the exploitation of addicts, which has ‘certain analytical similarities with blackmail’. According to Alldridge, a dealer threatens an addict (either physically or psychologically) with the symptoms of drug withdrawal.

¹¹⁸ Berman (n 19) 55.

person who has been blackmailed is unable to give valid consent, and a blackmailer's move to 'secure an advantage' is therefore impermissible against this context of non-consent.¹¹⁹

Certainly blackmail can be linked with forms of sexual exploitation.¹²⁰ In 2013, the Child Exploitation and Online Protection Centre (CEOP) identified 184 children as having been blackmailed between 2011-13 to exchange sexual images of themselves online. While exploiters attempt to secure the initial semblance of a 'consensual relationship', CEOP has noted that this can be followed by increasing demands once an individual has hold of initial indecent images. Often this involves a threat to share images with a young person's friends or family members.¹²¹ Blackmail is also an important technique used by exploiters in 'on the street' grooming for sexual exploitation. An exploiter can threaten to reveal an exploitee's hitherto unreported history of criminal offending. While it may be perfectly legal to report crimes to the police, an exploiter may threaten to do so in order to establish dominance over his victim and to ensure their subordination.¹²² Arguably the effect of blackmail upon the validity of consent is an important issue in cases where an exploitee is 16 or over.

While the use of blackmail in cases of sexual exploitation has been recognized, it is also arguable that blackmail may be a means used by exploiters in relation to acquisitive exploitation. Surely exploiters engaging in this form of wrongful

¹¹⁹ Lamond (n 113) 233-34.

¹²⁰ See s 1.3.1.

¹²¹ CEOP, 'Children Treated Like "Slaves" to Perform Sexual Acts' (20 September 2013) <<http://ceop.police.uk/Media-Centre/Press-releases/2013/Children-treated-like-slaves-to-perform-sexual-acts/>> accessed 29 March 2015.

¹²² CEOP, 'Out of Mind, Out of Sight: Breaking Down the Barriers to Understanding Child Sexual Exploitation' (June 2011) 11.

interpersonal exploitation are keen to create relationships of dominance and subordination over already vulnerable persons where this is not already present. Blackmail penalizes cases where an exploiter has used unwarranted demands with menaces to establish this dynamic. Arguably the effect upon an exploitee's consent needs to be more fully probed. On the other hand, where blackmail is not used, acquisitive exploitation again falls through the cracks of the criminal law. Certainly blackmail does not capture the whole story of acquisitive exploitation, so there are still questions about whether a targeted acquisitive exploitation offence need supplement blackmail.

2.4.3 A substantive property offence: theft

While there have been recent steers away from the offence of theft and towards the fraud offence when discussing exploitation, the connection between the English theft offence and exploitation remains strong in practice. But unprincipled the connection undoubtedly is, and we argue that herein lies another basis for reappraisal.

Section 1(1) of the Theft Act 1968 states that 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.' An individual commits theft if he (i) appropriates (ii) property, (iii) which belongs to another. The necessary fault requirements are that an individual does so (iv) dishonestly, and (v) with an intention to permanently deprive another person of their property. The theft offence penalizes a wide range of conduct: from minor cases of shoplifting to sophisticated white-collar thefts.¹²³ The offence carries a maximum sentence of seven years' imprisonment.¹²⁴

¹²³ Sentencing Council, *Theft Offences Guideline Consultation* (April 2014) 8.

The theft offence is drafted as a substantive property offence but, as we will see below, it has been interpreted as an inchoate offence. This is because of the liberal judicial interpretation given to ‘appropriation’, meaning that the scope of the offence is set by whether an individual has acted dishonestly with an intention to permanently deprive another person of their property.

The theft offence penalizes an individual’s appropriation of property belonging to another person. No doubt there are important questions about whether the Theft Act’s definition of ‘property’ is sufficiently tailored to include interests held in modern day society.¹²⁵ We will engage here with what has been the most contentious conduct element in the section 1 offence—the meaning of ‘appropriation’. It is sometimes said that the requirement of ‘appropriation’ does not clearly accord with normal intuitions as to what constitutes theft or stealing. Intuitively, the meaning of theft would seem to be associated with the unlawful taking of another person’s property.¹²⁶ For example, under the Larceny Act 1916 emphasis was on the taking of property or on trespass (*amotio* or *asportatio*).¹²⁷ The 1968 Act sets out a different approach. Section 3(1) states that ‘Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.’

A narrow approach to interpreting ‘appropriation’ would be to require that an

¹²⁴ Theft Act 1968, s 7.

¹²⁵ For discussion of property and theft law, see Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (HUP 2012) ch 4.

¹²⁶ Simester and others (n 2) 519.

¹²⁷ Lindsay Farmer, ‘The Metamorphosis of Theft: Property and Criminalisation’ (Criminalization Conference, Queen’s University, 7-8 September 2010) (circulating draft) 4.

individual assumes *all* of an owner's rights to their property.¹²⁸ Here the emphasis would be on whether a person has taken 'the rights of an owner', assuming that those rights exist as a bundle. A moderate approach would be to require 'substantial interference' with another person's property interests, with an associated element of permanent deprivation of property interests.¹²⁹ But judicial interpretation of 'appropriation' has been much broader still. In a series of important judgments the House of Lords endorsed a loose reading of 'appropriation'. It was held in *Lawrence* that the presence of consent by an owner of property was not logically inconsistent with 'appropriation'.¹³⁰ However, the House of Lords reached a different conclusion in the case of *Morris*.¹³¹ Lord Roskill stated the opinion of the House and held that appropriation 'involves not an act expressly or impliedly authorized by the owner but an act by way of adverse interference with or usurpation of those [ownership] rights'.¹³² In so doing, a conflict was created between interpretations of 'appropriation' in *Lawrence* and *Morris*, and this issue was reconsidered in the later case of *Gomez*.¹³³

In *Gomez*, an assistant shop manager took advantage of his position, authorizing the sale of goods to persons whom he knew were offering stolen cheques. He represented to the shop manager that the cheques were 'as good as cash'. He was charged with theft under section 1 of the Theft Act 1968, and the issue arose as to whether he had appropriated the rights of an owner within the meaning of section 3(1).

¹²⁸ Simester and others (n 2) 517.

¹²⁹ Stuart P Green, 'Property Offenses' in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) s II.

¹³⁰ [1972] AC 626.

¹³¹ [1984] AC 320.

¹³² *ibid* 332.

¹³³ [1993] AC 442.

The interpretation of ‘appropriation’ was therefore key. *Gomez* was decided on the basis of the reasoning put forward in *Lawrence*. The House of Lords was keen to emphasize that *Morris*’ divergence from *Lawrence* in interpreting ‘appropriation’ was simply *obiter dicta*.¹³⁴ Moreover, the reasoning in *Lawrence* was held to apply to cases of deception, even though theft by deception was not charged (as it could have been) on the facts of *Gomez*.¹³⁵ As Ashworth and Horder argue, post-*Gomez*, ‘[A]ny act in relation to property that can be said to assume a right of the owner of the property constitutes appropriation, and the consent of the owner is irrelevant.’¹³⁶ The decision in *Gomez* has attracted strong criticism, especially since an individual who has ownership of property recognized by the civil law can still be charged with a theft offence.¹³⁷

The well-known case of *Hinks* arguably extends the interpretation in *Gomez* to cover indefeasible gifts of property.¹³⁸ Ms Hinks had assumed the position of carer for Mr Dolphin, who was described to the court as a man of limited intelligence. In the course of their relationship, Mr Dolphin gave Ms Hinks £60,000 cash and a television set. The House of Lords was persuaded that Ms Hinks did not deal with Mr Dolphin in good faith—she ‘had acted dishonestly by systematically raiding the savings in a building society account of a vulnerable person who trusted her’.¹³⁹ Lord Steyn argued that ‘appropriation’ can occur where property has been given as a gift, and that ‘the

¹³⁴ *ibid* 464.

¹³⁵ *ibid* 464.

¹³⁶ Ashworth and Horder (n 74) 378.

¹³⁷ For example, Simester and others (n 2) 522.

¹³⁸ (n 9) 241. I say ‘arguably’ because it is not certain that the gift in *Hinks* was in fact indefeasible, since effect of undue influence was not considered by the House of Lords. *Hinks*, therefore, was a difficult case.

¹³⁹ *ibid* 253.

mental requirements of theft are an adequate protection against injustice'.¹⁴⁰

The result is an offence of theft turning almost entirely on the fault elements of the offence: dishonesty and intention to permanently deprive another person of their property interests. We can concur with Smith that this renders theft 'something akin to "thought crime"'.¹⁴¹ Section 2(1) of the 1968 Act specifies three circumstances when appropriation is *not* undertaken dishonestly, but there is no positive statement of what 'dishonesty' means. In difficult cases, the common law approach to dishonesty set out in *Ghosh* will be used.¹⁴² But we saw in our discussion of the fraud offence above that there have been robust criticisms of the *Ghosh* approach to 'dishonesty'.

If there is any merit in this interpretation of the theft offence it may lie in its potential for penalizing exploitation. It seems plausible that since 'appropriation' is easily satisfied in many cases of exploitation, dishonesty is being extended and interpreted to cover exploitation.¹⁴³ Simon Gardner has argued that the interpretation of 'appropriation' by the House of Lords in *Gomez* has the potential to protect 'persons in a state of low-level specific confusion', and especially elderly persons who are 'exploited by rogues who dishonestly overcharge them for work, or underpay them for their treasures'.¹⁴⁴ Indeed, the link between theft and acquisitive exploitation seems especially robust for two reasons. First, it is quite plausible that there will be apparent

¹⁴⁰ *ibid* 253.

¹⁴¹ ATH Smith, 'Theft or Sharp Practice: Who Cares Now?' (2001) 60 CLJ 21, 22. This in turn means that attempted theft is emptied of criminality.

¹⁴² (n 33).

¹⁴³ Alan Bogg and John Stanton-Ife (n 7) 405, argue that a 'broad reading of "appropriation" could move the offence of theft beyond a rigid focus on "non-voluntary transfers"'. They argue, 405, that 'Ideas of exploitation and its manifold forms, such as coercion, manipulation and, indeed, deception will enter into the picture as well.'

¹⁴⁴ Simon Gardner, 'Appropriation in Theft: The Last Word?' (1993) 109 LQR 194, 195.

consent in cases of acquisitive exploitation. This accords with how we would expect exploiters to ‘work upon’ vulnerable persons—successful exploiters will tend to elicit ‘consent’ as a response from exploitees.¹⁴⁵ Therefore, it is significant, post-*Hinks*, that apparent consent is not incompatible with a finding of ‘appropriation’.

Secondly, the link with exploitation is strong because of the theft offence’s requirement of ‘dishonesty’. Now we could seek to criticize penalizing acquisitive exploitation using a dishonesty offence—all the usual criticisms of a ‘dishonesty’ standard apply. But we conjectured in section 2.3 above that dishonesty *is* most likely to be key to the wrong of serious acquisitive exploitation. It would be disingenuous and unhelpful to argue that dishonesty is unimportant to the type of exploitation we are interested in in this thesis. Plainly it is an important feature.¹⁴⁶

However, using the theft offence in this way is not ultimately defensible. First, nothing in the concept of ‘appropriation’ requires the nature of wrongful acquisitive exploitation to be elucidated. An individual can be convicted of theft so long as an exploitee’s property right is minimally interfered with and the relevant fault elements of the offence are met. But it does not matter *how* an exploitee’s property right has been interfered with. For example, it is not necessary to identify the distinctively predatory conduct associated with strong acquisitive exploitation. Nor is the effect of this predatory conduct upon ‘consent’ probed. It is intellectually frustrating to bury a serious wrong within a broad conduct requirement. Such an approach also lacks certainty and therefore fair warning for citizens.

¹⁴⁵ This is an argument we explore in ch 4 of this thesis.

¹⁴⁶ It is also likely that our paradigm exploiter intends to violate another person’s property interests.

Perhaps a useful way forward is to differentiate the means by which theft is committed.¹⁴⁷ Indeed, a number of theft offences in other jurisdictions make clear that they are committed by exploitation. For example, section 243(1) of the German Criminal Code states that theft ‘by exploiting the helplessness of another person’ will result in an especially serious case of theft, with a maximum sentence of ten years’ imprisonment.¹⁴⁸ The French Penal Code contains a basic offence of theft and a number of aggravated theft offences.¹⁴⁹ An aggravated theft offence is committed where ‘it is facilitated by the state of a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator’, and attracts a five year maximum sentence and a monetary fine.¹⁵⁰ The penalty is further increased if at least one other factor identified in Article 311-4 is fulfilled.

Now it may be possible to differentiate the English theft offence in a similar way. But this still begs the question whether the theft offence is the right tool to penalize acquisitive exploitation. The idea of ‘appropriation’ still places significance on the fact that an exploitee’s property right has been interfered with, even though this requirement is routinely satisfied. Moreover, the offence requires an intent to deprive another person of their property interests. It seems that the offence of theft draws intellectual coherence from a violation of property interests and this is one reason why *Hinks* is so problematic. Simester and Sullivan argue that *Hinks* ‘turns the very

¹⁴⁷ Green *Thirteen Ways* (n 125) 115, ‘Theft’s secondary wrongs involve not the deprivation of property rights per se, but rather the wrongful means by which such deprivation is carried out.’

¹⁴⁸ Section 243(2) states that ‘an especially serious case shall be excluded if the property is of minor value’. See Michael Bohlander, *German Criminal Law* (Hart 2009) 215-16. But why overlook the exploitative element as itself defining an especially serious case of theft?

¹⁴⁹ French Penal Code, Articles 311-1 to 311-6.

¹⁵⁰ Article 311-4(5).

rationale of property offences on its head’, since the theft offence ‘is designed to protect and reinforce property rights’.¹⁵¹ But arguably the difficulty with acquisitive exploitation is *not just* that it infringes property rights and a property regime more generally. Rather, it constitutes a strong attack upon a vulnerable person and is troubling not simply because it may lead to an exploitee’s property rights being violated. In fact it may be natural to say that a person has exploited a vulnerable person where there is *no* violation of property interests at all, and we explore this argument in chapter 3 of this thesis.

The fault requirement of the theft offence is also problematic. The requirement of ‘dishonesty’ again can be criticized as not specific enough to penalize acquisitive exploitation. In our discussion of the fraud offence in section 2.4.2(A) we argued that serious dishonesty ought to form part of a criminal law offence which penalizes acquisitive exploitation. Since the theft offence looks to the violation of property interests rather than to exploitative conduct per se, and it fails to censure adequately exploiters’ serious dishonesty, it is well overdue that criminal law theorists reappraise the significance of acquisitive exploitation to the criminal law.

2.4.4 Summary

In this section we have examined which property offences can be used to penalize acquisitive exploitation, and have argued that while the offence of fraud has received a lot of attention, conspiracy to defraud and section 1 of the Theft Act 1968 can also be used to penalize this serious wrong. The offence of blackmail found in section 21 of the Theft Act 1968 can be used to penalize grooming conduct which may be a natural

¹⁵¹ Simester and others (n 2) 524.

part of acquisitive exploitation. However, several bribery offences found in the Bribery Act 2010 cannot sensibly be read in this light: it is improbable that exploitees will hold a ‘relevant function or activity’ which an exploiter induces them to breach.

The appropriateness of using these offences to penalize acquisitive exploitation can be unravelled. The conspiracy to defraud offence is the easiest case in point: an unprincipled offence cannot be salvaged by stating that it can be put to use to target acquisitive exploitation. Doubt can be cast on whether the section 1 theft offence is able to penalize acquisitive exploitation clearly, since it draws intellectual coherence from the violation of property interests.

The most promising candidates are the section 1 fraud offence and the section 21 blackmail offence. With regard to the fraud offence, however, a proper understanding of exploitative conduct is long overdue. It can be doubted whether a false representation or abuse of a position to safeguard financial interests are necessarily present in core cases of acquisitive exploitation. It may be sheer coincidence whether there is a relevant position of trust held by an exploiter. Furthermore, an exploiter may be crafty enough to know that they should not make a false or misleading representation. We raised the question whether a specific fraud offence could better be used to penalize acquisitive exploitation, which also focuses on the serious nature of an exploiter’s dishonesty. There is no immediate reason to sideline blackmail since exploiters may have committed blackmail in the circumstances of acquisitive exploitation. But it is also perfectly possible to consider this conduct in relation to a specific acquisitive exploitation offence. It is clear that current provision for penalizing exploitation using property offences is hardly settled, and the relevance of acquisitive exploitation to the criminal law must be independently studied.

2.5 Acquisitive exploitation and sentencing guidelines

Can sentencing guidelines be said to rationally penalize acquisitive exploitation? One way of answering this question is to look at maximum penalties. We have seen that acquisitive exploitation can be censured using conspiracy to defraud, a fraud offence and a theft offence, for example. But the application of these offences to exploitative scenarios is inappropriate when one considers that they carry different maximum sentences. The disparity between maximum sentences is clear: seven years' imprisonment for the English theft offence, but ten years for fraud or conspiracy to defraud. In cases of overlap between theft and fraud, the Crown Prosecution Service directs prosecutors to ensure that the charge reflects 'the true criminality' of what actually occurred.¹⁵² But since both offences will bring a large amount of conduct within their remit, with modest fault requirements, there is significant uncertainty about whether acquisitive exploitation will be prosecuted as theft or as fraud. Equally there is doubt as to whether complex acquisitive exploitation cases will be charged as a conspiracy to defraud offence, for which a ten-year maximum sentence applies. It would be much more principled to ask whether a maximum sentence should be set in relation to an exploitation offence, thus reflecting the seriousness of an exploitative wrong. If such an approach is compelling, it would leave much less discretion in the hands of prosecutors to adjudicate acquisitive exploitation cases within property offences carrying high maximum sentences.

A second approach is to consider whether current sentencing guidelines take account of acquisitive exploitation. Section 125(1) of the Coroners and Justice Act

¹⁵² CPS, 'The Fraud Act 2006: Prosecution Policy and Guidance' <www.cps.gov.uk/legal/d_to_g/fraud_act/#content> accessed 29 March 2015.

2009 requires a court to ‘follow any sentencing guideline which is relevant to the offender’s case’. A court must first identify the relevant offence category for the case in hand, assessing a sentence using the appropriate starting point and by taking account of aggravating and mitigating factors. There are further steps in the decision-making process which require consideration as to whether a sentence should be reduced and how multiple offences should be sentenced. For illustrative purposes, we will discuss two guideline documents. The Sentencing Council has recently published a definitive guideline on *Fraud, Bribery and Money Laundering Offences*, which applies to adults or organizations sentenced on or after 1 October 2014.¹⁵³ Notably, conspiracy to defraud is now covered by this guideline. The second is the *Theft Offences Guideline Consultation*, and we will refer to the draft guideline here.¹⁵⁴

It is instructive to consider whether assessment of the appropriate offence category—the first step—is influenced by factors connected to acquisitive exploitation. In relation to fraud and conspiracy to defraud there are now three levels for assessing culpability at step one: high, medium or lesser culpability. Some of the factors identifying high culpability seem relevant based on our working definition of acquisitive exploitation. For example, factors indicating high culpability are: abuse of a position of power, trust or responsibility; significant planning; fraudulent activity conducted over a sustained period of time; and the deliberate targeting of a victim based on vulnerability.¹⁵⁵ An individual is considered to have lesser culpability if he did not

¹⁵³ Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (2014).

¹⁵⁴ (n 123), for which the consultation period closed on 26 June 2014. For blackmail, see ‘Blackmail—Sexual’ (2012) <www.cps.gov.uk/legal/s_to_u/sentencing_manual/blackmail_sexual/> accessed 29 March 2015. We argued in s 2.4 above that bribery is not a plausible means of penalizing acquisitive exploitation, so we will not discuss guidelines for bribery further here.

¹⁵⁵ Sentencing Council, *Fraud etc.* (n 153) 6.

in fact consent to take part in the activity, and was ‘involved through coercion, intimidation or exploitation’; or if he was not motivated for personal gain. The structure of higher, medium and lesser culpability is mirrored in the guidelines for general theft, though there are some additional factors in determining culpability.¹⁵⁶ These include scenarios where third parties engage in theft through coercion, intimidation or exploitation; the use of deception; and significant steps taken to avoid detection and/or to conceal identity. In some respects, it is an easy decision to say that these factors can be linked with penalizing serious acquisitive exploitation.

An assessment of harm is also part of the initial offence category decision. In relation to fraud and conspiracy to defraud, the assessment is based on ‘actual, intended or risked loss’.¹⁵⁷ Five category ranges are set out in relation to loss caused or intended but we will not list them here.¹⁵⁸ Cases involving the risk of loss are automatically considered ‘less serious than actual or intended loss’, and a lower category is usually appropriate. This point raises questions in relation to acquisitive exploitation. Even if the result of serious exploitation is risk of loss the conduct of an exploiter may still be serious. Moreover, it is fundamental that acquisitive exploitation will often involve harming interests beyond financial interests and this ought surely to be taken into account in its sentencing. It is not clear that this conundrum can be resolved by simply considering the impact upon a victim, as the guidelines require. We make little progress in penalizing acquisitive exploitation if we censure solely on the basis of victim impact, which is a subjective issue. Following an initial assessment of harm to a

¹⁵⁶ A category of ‘general theft’ includes: theft from a person; theft in a dwelling; theft in breach of trust; theft from a motor vehicle; theft of a motor vehicle; theft of a bike etc., see *Theft Offences Guideline Consultation* (n 123) 38.

¹⁵⁷ Sentencing Council, *Fraud etc.* (n 153) 7.

¹⁵⁸ *ibid* 7.

victim, it must be considered whether the sentence should move into the next category, or whether it should remain within the parameters of the initial category.¹⁵⁹

Again, there is a similar harm assessment proposed in the theft consultation in deciding the relevant offence category. A distinctive feature is that harm is assessed not only in relation to ‘detrimental effect on the victim’, but also in relation to others, and to infrastructure.¹⁶⁰ Also interesting is the proposal that ‘greater impact on the victim due to their circumstances’ should be taken into account.¹⁶¹ There is a credible argument that persons in circumstances of great hardship (say, because they are marginalized, suffering from a life-limiting illness, and so on) may suffer greater impact from exploitation, and so this makes provision for serious acquisitive exploitation.

Having determined the appropriate offence category, step two involves identifying relevant starting points and category ranges, for which aggravating and mitigating factors are relevant. Even if several of these factors can penalize acquisitive exploitation in theory, a key issue is how these factors are applied in practice. For example, ‘established evidence of community/wider impact’ is an aggravating factor under step two in relation to fraud and conspiracy to defraud offences. But it would be all too easy to sentence more harshly in cases of acquisitive exploitation because the community/wider impact is assumed to be more serious, without clear empirical evidence. Certainly we can see from this brief study that it is complex to coherently penalize acquisitive exploitation using sentencing guidelines. More fundamentally, it is

¹⁵⁹ Sentencing Council, *Fraud etc.* (n 153) 7.

¹⁶⁰ *Theft Offences Guideline Consultation* (n 123) 32.

¹⁶¹ Consider recent calls for heightened sentences for those who prey on the elderly, see Attorney General’s Office, ‘Solicitor General Welcomes Sentence Increase for Fraudsters who Preyed on Elderly’ (16 May 2014) <www.gov.uk/government/news/solicitor-general-welcomes-sentence-increase-for-fraudsters-who-preyed-on-elderly> accessed 29 March 2015.

right to question whether acquisitive exploitation is an issue to be dealt with at the point of sentencing. A targeted exploitation offence ought to be explored.

2.6 Conclusion: A strong case for reappraisal

It is an unexplored assumption in English law that a type of exploitation—itsself unclear—can be penalized using property offences and sentencing guidelines. The false start is one of circularity: saying that current offences in principle target exploitation without defining the nature of the relevant wrong. Instead, there are specific wrongs of ‘wrongful interpersonal exploitation’, and the type relevant to this area of the criminal law is clearly acquisitive exploitation. The coherence of this area of the law depends upon this wrong being elucidated and tested against thresholds for criminalization. Our concern in this chapter has been to provide a stronger foundation for this study. We have demonstrated that even a working definition of acquisitive exploitation can be used to unravel consensus about the sufficiency of current criminal law measures. Having carefully considered relevant criminal law offences and sentencing guidelines, it is doubtful whether there are means in place to accurately penalize acquisitive exploitation while adhering to values of legal certainty and fair warning for citizens. A powerful case emerges for independent review of acquisitive exploitation and its relevance to this area of the criminal law. Given the prominence of exploitation in modern discourse, and the suspicion that acquisitive exploitation will occupy greater attention in the future, it is time to bring coherence to property offences on this issue.

To be clear, we are not proposing that an ‘acquisitive exploitation’ offence is justifiable in England and Wales—that argument would need to be thoroughly debated, and other options would first need to be considered. But before criminal law

commentators consider whether acquisitive exploitation *should* be censured, and *how* this should be done, they must grapple with the nature of the wrong. For our purposes of unravelling consensus about acquisitive exploitation and property offences in this chapter we have argued that a loose draft of acquisitive exploitation involves the following elements. First, acquisitive intent exploitation involves *already* vulnerable persons as victims. In other words, these are persons who can objectively be identified as vulnerable. There may be no need for an objectively vulnerable victim when delineating sexual or labour exploitation, for example, because the interests at stake (sexual autonomy and personal freedom) are so grave. Arguably the concept of an objectively vulnerable person expresses a necessary element of seriousness where an exploiter has intent to violate property interests. Second, there is an important connection with an exploiter *seeking out* or *targeting* an already vulnerable person as key to the wrong. It is convincing that the targeting of an already vulnerable person increases the level of seriousness of the exploitative wrong.

A third feature is that dishonesty or lack of probity must be present on the part of an exploiter, though this may not be straightforward to prove. This marks out acquisitive intent exploitation from reasonable business dealings, but this remains a very vague and murky borderland. Fourth, an exploiter must intend to violate a vulnerable person's property interests, but an exploiter's goals need not be limited to this. At this initial stage we have not confined ourselves to saying that actual harm to property interests is part of our working definition (though harm to property interests may be present in cases of acquisitive intent exploitation). Fifth, there must be grounds to say that an exploiter has attacked an objectively vulnerable person. In reality, this may look quite subtle to the extent that it is the opening up of opportunities once an exploiter has gained access to a vulnerable person. It may even appear than an

exploitee is 'on board' with these arrangements. We have conjectured that deception, abuse of position, false representations, and manipulation may all be amongst the means of attack. All of these features merit further attention. We turn our attention to identifying more precisely the nature and contours of wrongful acquisitive exploitation in the next chapter.

Chapter 3

Building an Account of Wrongful Acquisitive Exploitation

3.1 Introduction

I have argued in strong terms for reappraisal of exploitative wrongdoing, so that its implications for criminal law theory can be carefully assessed. Chapter 2 exposed the many unexplored connections between exploitation and property offences. For example, the means by which the offence of theft was committed in *Hinks* can be strongly associated with exploitative wrongdoing.¹ A common view given in criminal law textbooks is that a similar case to *Hinks* would now fall within the fraud offence in section 1 of the Fraud Act 2006, as defined in sections 2 and 4 of the Act.² But apparent consensus that exploitation can be penalized using the fraud offence has been supported with little close analysis. This was but one example explored in chapter 2, where the argument was that the current position is woefully inadequate. Meanwhile interest in exploitation in other areas of the criminal law continues apace. In chapter 1 of this thesis we saw that a large number of criminal offences have been created to tackle interpersonal exploitation in a variety of contexts. There are criminal offences to deal with sexual exploitation, labour exploitation, and the exploitation of human bodies.³ Moreover, conduct undertaken with a view to exploit has been penalized, such

¹ *Hinks* [2001] 2 AC 241. For one such view, see Alan Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 LS 402.

² For example, see David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 785.

³ Sexual Offences Act 2003, ss 47-50, 52, 53 and 59A; Coroners and Justice Act 2009, s 71; Human Tissue Act 2004, s 32.

as trafficking of persons for exploitation.⁴ The rate of new offences is not slowing down, as evidenced by the Modern Slavery Act receiving Royal Assent in March 2015. Against this backdrop, there are real world concerns about the use of exploitative conduct by those who attack another person's property interests. Successful exploitation may 'open up' access to another person's property interests. Is it justifiable that wrongful exploitation is penalized by a broad property offence, such as a fraud offence? Should exploitation aggravate existing property offences? Should a person ever be penalized for engaging in exploitative conduct regardless as to whether he committed a property offence? Is it sufficient for exploitation to be taken into account at the sentencing stage? If we hope to correct our course away from superficial references to exploitation, we ought to closely analyze these questions.

This chapter presents a strong normative account of acquisitive exploitation. The hope is that this account will be used to invigorate debate about acquisitive exploitation's relevance to property offences in England and Wales. Two preliminary points must be borne in mind. First, this is an account which comes under the umbrella of 'wrongful interpersonal exploitation'. I defended the need for specific accounts of *wrongful* interpersonal exploitation in chapter 1. Whether the account presented is an 'all-things-considered account' of wrongful exploitation is a moot point. For now I follow Stephen Wilkinson's approach to studying exploitation when he says that exploitation is wrong 'in the absence of other (sufficiently strong) countervailing moral considerations'.⁵

⁴ Sexual Offences Act 2003, s 59A; Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s 4(1).

⁵ Stephen Wilkinson, *Bodies for Sale, Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 12 [italics removed].

Secondly, it is a strong account of acquisitive exploitation which is tailored to the concerns of criminal law theorists. On the one hand, it is coherent to take due account of core elements of interpersonal exploitation highlighted by commentators such as Joel Feinberg. Thus, we need to think broadly about elements of one individual using another; which aspects of an individual's characteristics or circumstances are used; and the balance of gains and losses.⁶ On the other hand, we need not be limited by these ideas since ours is a normative account of a specific type of wrongful exploitation and Feinberg's was not. From this direction comes the strong element. Since issues of fault and harm are paradigmatic requirements for criminal liability, it would be difficult to build a normative account which would pass even initial thresholds to criminalization which excludes their relevance. Of course there are exceptions to these requirements in the criminal law, but the point is that some choices will need to be made to provide a strong normative account of acquisitive exploitation which is of real interest to criminal law theorists.

We can illustrate this point by thinking about the requirement of fault. One might say that a normative account of acquisitive exploitation need not require that an exploiter knows he is exploiting another person. Alan Wertheimer, for example, argues that there can be 'non-culpable exploitation'.⁷ Now this position may be plausible in theory, but it may fall at the first hurdle when we come to think about thresholds for criminalization. As is well known, the requirement of fault is arguably a minimum threshold requirement to criminalization. It is manifestly unfair to impose state censure on an individual if they have not had fair opportunity to avoid engaging in criminal

⁶ Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP 1988) 179.

⁷ Alan Wertheimer, *Exploitation* (Princeton University Press 1999) 209.

conduct.⁸ Moreover, proof of fault ought to be necessary since criminal conviction involves public censure for serious wrongdoing. An individual ought not to be publically censured in this way if they have not been proven to be culpable.⁹ Since strict liability offences, or offences which have a strict liability element, infringe this reasoning, they must be independently justified.¹⁰ It follows that there is a decision to be made about whether fault is a necessary element of a strong normative account of acquisitive exploitation. We will return to these arguments at various points in this chapter, but for now I argue that the need to make this type of decision in favour of requirements for criminal liability does not undermine the usefulness of my account. Any effort to present a plausible normative account of acquisitive exploitation for criminal law theorists will require some important decisions to be made about how best to construct the strongest account of the wrong.¹¹ The best course is to be candid about these choices, and to explore their contours and implications. At various points in this chapter I will make reference to intuitions which we have about exploitation as a means of lending weight to this account.¹² Needless to say, we will need to have separate debates about acquisitive exploitation's relationship to thresholds for criminalization, and we will turn to this issue in chapter 5 of this thesis.

⁸ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardner ed, 2nd edn, OUP 2008) 152. Hart argues that this approach has positive effects on individual freedom.

⁹ See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 231-35.

¹⁰ See Andrew Ashworth, 'Should Strict Liability be Removed from all Imprisonable Offences?' in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 109.

¹¹ For example, Rick Bigwood, *Exploitative Contracts* (OUP 2003) 4, recognizes that this difficulty influences how a credible theory of exploitation is developed in the legal contractual domain. He notes that a scholar must accept 'the principles, practices, and discriminations already immanent in that domain'.

¹² See also Allen Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136, 137, '[M]y aim will be to clarify the concept [of interpersonal exploitation] not by providing a technical analysis but by exploring what I think people mean when they object to behavior or social arrangements as exploitative, and identifying the moral convictions which give such objections their force.'

Exposing this ambiguity provides support for my methodology of first building an account of acquisitive exploitation. An account of exploitation may be constructed to ‘fit within’ specific property offences, but it need not do so. For example, one well-known way of analyzing wrongful exploitation is to review it as a wrong which one or more property offences are capable of penalizing. We argued in chapter 2 that this is the approach adopted by commentators in relation to the English fraud offence. We can see this type of analysis in theoretical writings on property offences more generally. Stuart Green has argued that deception and coercion can be tied to Anglo-American theft law offences.¹³ Green argues that while theft can be examined in terms of a primary wrong which is ‘the basic deprivation of property rights itself’, reference can also be made to its secondary wrong ‘which derives from the means by which such stealing is effected’.¹⁴ Having developed this distinction, Green highlights how it ought to work in relation to theft by deception, force or coercion. First, there is the primary wrong, the taking of the property, which is followed by ‘the secondary wrongs of using deception, force, or coercion’.¹⁵ This analytical distinction is irrelevant to punishment, Green argues, to the extent that it ‘does not mean that the primary and secondary wrongs should be *punished* separately’.¹⁶ Has wrongful exploitation been analyzed in this way? Even if the language of primary and secondary wrongdoing is not used in this context of the offence of fraud, the current approach is similar. This is because the assessment of wrongful exploitation seems to depend on the requirements of the fraud

¹³ Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press 2012) 91.

¹⁴ *ibid* 91.

¹⁵ *ibid* 91.

¹⁶ *ibid* 91.

offence being satisfied. And this is hardly perspicuous given that the primary wrong in the English offence of theft is drafted so broadly.

On the contrary, it is not indisputable or obvious that acquisitive exploitation is a secondary wrong which must be penalized only in the context of existing property offences. We might want to deal with acquisitive exploitation by way of an aggravated property offence, for which its recognition as a secondary wrong seems satisfactory. However, we might also want to examine whether it is justifiable to penalize acquisitive exploitation separately from current property offences, in which case it would hold primary status. These are important questions which must be thoroughly debated. The second problem is that analyzing acquisitive exploitation by way of a specific property offence requires the fault and harm requirements of the offence in question to be satisfied. This means that acquisitive exploitation only comes into focus when the necessary elements of the property offence in question have been satisfied. Surely wrongful acquisitive exploitation need not involve the dishonest appropriation of property with the intention to permanently deprive, as is required by the English theft offence?¹⁷ Or even an intention to cause gain *or* loss, as the fraud offence in section 1 of the Fraud Act 2006 requires? The problem is that using property offences to study this type of wrongdoing limits our analysis. We ought to first examine the independent wrongfulness of exploitation used by those who target property interests. The concern here is to fairly appraise wrongful acquisitive exploitation outside of the constraints of current criminal law offences. The neglected normative questions are (i) what is meant by exploitation discussed in the context of property offences i.e. acquisitive exploitation; and (ii) ought the criminal law be used to penalize acquisitive exploitation,

¹⁷ Theft Act 1968, s 1.

and, if so, how? For this reason our analysis of whether acquisitive exploitation should aggravate existing property offences in England and Wales is deferred until chapter 5, by which stage we will have articulated and defended a normative account of the wrong. In that context we consider whether a fairly labelled fraud offence or an aggravated theft offence are defensible.

Section 3.2 sets out an analytical account of wrongful acquisitive exploitation aimed at scholars and law reformers who are keen to reappraise the theoretical foundations of exploitation and the criminal law's property offences. Its scope and limits will be explored in this chapter and the next. Section 3.3 explores the relationship between use (of an exploitee) and benefit (to an exploiter) via profit or gain. In section 3.4 we assess who may be identified as an objectively vulnerable person. Section 3.5 defends the significance of an exploiter dishonestly targeting an already vulnerable person. We then proceed to clarify some practical issues; section 3.6 provides an illustrative range of predatory conduct used by exploiters. Finally, section 3.7 offers a conclusion to the chapter.

3.2 An analytical account of wrongful acquisitive exploitation, summarized

What follows from chapters 1 and 2 is that we need to disentangle the elements which ground an evaluative judgment that an individual has exploited another person. The argument here is that a strong account of acquisitive exploitation involves the following underlying wrong: an exploiter (D) (i) dishonestly targets a vulnerable person (V) (ii) intending, by the targeting, to open up opportunities provided by V in order (iii) to pursue his own goals. An exploiter (iv) accordingly opens up opportunities by (v) engaging in predatory conduct. This is one way in which a person can be wrongfully

used. There is a lot which needs to be explained about this argument. For example, the account makes reference to an exploiter's goals. But what are these goals? Ought not reference be made to actual gain or benefit to the exploiter, say in the form of property interests? Moreover, the issue of consent might be assumed to be important. Ought an exploitee's lack of consent be included in the account? On the contrary, the issue of consent is sidelined, and justification for this argument will be presented in the next chapter. The purpose of this section is to sketch the contours of this analytical account.

The starting premise is that a strong account of acquisitive exploitation involves the wrongful use of another person. The gist of acquisitive exploitation's wrongfulness takes as its starting point Kant's statement that persons must 'treat humanity, whether in your own person or in that of another, always as an end and never as a means only'.¹⁸ The Kantian argument about wrongful use ties this account of acquisitive exploitation to arguments about instrumentalism. For example, Allen Buchanan argues that exploiting a person 'involves the harmful, merely instrumental utilization of him or his capacities, for [the exploiter's] own advantage or for the sake of [the exploiter's] own ends'.¹⁹ The obvious point is that the Kantian argument does not prohibit all use of persons. It merely tells against using persons as *mere* means. Rick Bigwood, for examples, notes that some uses of persons will be 'unavoidable and desirable under conditions of social interdependence'.²⁰ If we are to utilize the Kantian 'mere means' principle, we must show how one is to distinguish using another (which is permissible), and using someone as a mere means (which is not). This account puts forward one way

¹⁸ Immanuel Kant, *Foundations of the Metaphysics of Morals*, Lewis Beck (translator) (2nd edn, Bobbs-Merrill 1959) 47.

¹⁹ Allen Buchanan, *Ethics, Efficiency, and the Market* (Rowman and Allanheld 1985) 87.

²⁰ Bigwood (n 11) 160.

in which someone can be used as a mere means: the gist of wrongful acquisitive exploitation lies in an exploiter dishonestly targeting a vulnerable person and opening up opportunities, thereby using him solely as a means to achieve his goals.²¹ Acquisitive exploitation represents a distinctive method of using vulnerable persons, under the cover of dishonesty.

The first element—(i)—is that an exploiter dishonestly targets an objectively or already vulnerable person.²² It is perfectly possible for an individual to seek to exploit a person simply because that person is vulnerable in relation to him (this being a subjective type of vulnerability).²³ And no doubt he could seek to target any person (objectively vulnerable or not) without accompanying dishonesty. *Dishonestly* targeting an *objectively* or *already* vulnerable person is more serious, however.²⁴ It is still the case that an individual seeks to use an exploitee's particular vulnerabilities as leverage, as they exist in relation to an exploiter. However, the significant elements in our account are that an individual has targeted or singled out a person to be used on the basis that they are objectively vulnerable, and that he does so dishonestly. I will argue in section 3.5 below that in doing so an individual breaches a moral duty not to press for advantage against objectively vulnerable persons. This is a particularly serious form of cheating, since an exploitee is targeted for the reason that they are objectively

²¹ Wilkinson (n 5) 33.

²² I will refer to the singular form in this chapter, but more than one vulnerable person may be targeted, and eventually exploited.

²³ What is key is that the particular vulnerability gives scope to an exploiter to use an exploitee's attributes. This may be because of a certain characteristic or character quirk, for example.

²⁴ There is nothing distinctive about opportunities provided by vulnerable persons, as opposed to opportunities provided by persons generally. It may be easier to gain advantage over an objectively vulnerable person, meaning that there may be less work for an exploiter to do to gain an 'upper hand'. But this may not always be the case. Nor will it bear any correlation to how 'valuable' or 'useful' that person is to an exploiter in helping to pursue the exploiter's goals.

vulnerable.

We can make a few preliminary points, with further development of these ideas to come in the sections below. The idea of ‘dishonesty’ is a notoriously difficult idea to explicate. Stuart Green has argued that it ‘connotes a lack of honesty, probity, or integrity; a thievishness. It exists as a free-standing concept of morality’.²⁵ We could use the limited guidance available in section 2(1) of the Theft Act 1968 to identify the concept’s limits. Sub-sections 2(1)(a)-(c) tell us what will not be considered dishonest in the context of the theft offence. For example, an individual will not be held to be dishonest where he believes he has a legal right to deprive an individual of their property; where he believes he would have a victim’s consent if the victim had known of the circumstances; or where he believes that the owner of the property cannot be traced by taking reasonable steps. Moreover, section 2(2) of the 1968 Act states that an appropriation may be dishonest ‘notwithstanding that he is willing to pay for the property’.²⁶ However, it is well known that the *Ghosh* test is used to determine ‘dishonesty’ in difficult cases.²⁷ This involves an assessment of whether a defendant (i) acted dishonestly according to the ordinary standards of reasonable and honest people, and (ii) whether the defendant realized that reasonable and honest people would regard his conduct as dishonest.²⁸ The question is whether an exploiter has acted dishonestly according to this standard.²⁹ It is open to an arbiter of dishonesty to say that an

²⁵ Green, *Thirteen Ways* (n 13) 112.

²⁶ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 390.

²⁷ [1982] 1 QB 1053.

²⁸ *ibid* 1064.

²⁹ We see a type of ‘an exploiter dishonestly targeted a vulnerable person’ judgment in the sentencing decision of *R v Cash (Patrick)* [2012] EWCA Crim 1583. The Court of Appeal affirmed the sentencing judge’s strong language, who had described the applicant’s plan to fraudulently trick two elderly persons with learning disabilities into selling him their home as ‘despicable’. The sentencing judge said, at [5],

exploiter has not acted dishonestly.

Dishonesty will be identified in two sorts of ways in cases of acquisitive exploitation. First, in cases where an already vulnerable person is exploited into parting with property (or conferring some other gain or suffering some loss), *this* amounts to dishonesty, whereas the same conduct in the case of a non-vulnerable person would not (it might just be regarded as sharp practice). This is because the objectively vulnerable are less able to protect their own interests. Secondly, dishonesty will be gleaned from an exploiter's *targeting* of a vulnerable person. The verb 'to target' means 'to direct or aim on a course'.³⁰ Targeting is linked to gaining access to a vulnerable person in the first place, rather than to exploitative conduct subsequently used to gain advantage in relation to that person (such as grooming techniques, predatory conduct, etc.). A person is singled out, i.e. targeted, so that an exploiter is able to act exploitatively in relation to him. What does targeting an objectively vulnerable person look like in practice? In some cases a vulnerable person may clearly present themselves, such as where a predatory individual has a vulnerable family member. In these cases, targeting may include fairly passive conduct.³¹ On other occasions, an individual may need to employ more active measures to gain access to a vulnerable person. A great number of methods can be employed to gain access. For example, an individual may go door-to-door 'cold-calling' as a salesman, send out literature to 'sucker lists', or make friends with elderly persons who live next door. Conventional online methods of e-mail mailing lists and chat rooms can be used. Moreover, the internet has opened up new opportunities in

that, 'It was a confidence trick of the worst kind. Either from information that you had obtained from others, or perhaps because of the dilapidated external appearance of the house, you must have known from the outset that you were visiting a vulnerable person.'

³⁰ Oxford English Dictionary <www.oed.com> accessed 29 March 2015.

³¹ The intention here is not to bury the issue of passive exploitation, which can still amount to 'targeting'.

recent years. For example, some internet chat rooms now enable individuals to access an unlimited number of random contacts, which allows predators to put out ‘feelers’ to find susceptible persons, some of whom will be objectively vulnerable.³² Moreover, the ‘dark’ internet refers to unreachable and unregulated network hosts, and so potential exploiters can use it as another medium to target already vulnerable persons.³³ What is dishonest about targeting objectively vulnerable persons? Those who target the objectively vulnerable normally have another reason for doing so which is also dishonest. This is that they are less likely to be held to account for their treatment of the vulnerable since the vulnerable are less likely to complain, and it is more difficult in practice to establish a case based on the testimony and evidence of the vulnerable. So the vulnerable are doubly vulnerable to being preyed upon, and this plays a significant role in explaining why such conduct is dishonest.

It must be emphasized that the account focuses on objectively vulnerable persons as opposed to persons who happen to be vulnerable in relation to the exploiter. No doubt the contours of a category of objectively vulnerable persons can be contested. One can envisage a case of a crafty business operator who deliberately targets his much weaker competitor in order to drive him out of business. His aim is to gain a larger market share. But is the weaker competitor objectively vulnerable in this case? There may be a case for saying that the notion of there being objectively vulnerable persons is less relevant in the commercial sphere.³⁴ And so we should restrict our sense of

³² For example, chatroulette.com and chatrandom.com.

³³ Indeed, sexual predators have used these new forms of online mediums as a means of targeting vulnerable young persons. See Barnardo’s, *The Tangled Web: How Child Sexual Exploitation is Becoming More Complex* (2012); Claire Lilley and Ruth Ball, ‘Younger Children and Social Networking Sites’ (NSPCC 2013).

³⁴ For example, because both parties entered into a business marketplace they should reasonably expect sharp business practice.

objectively vulnerable persons accordingly. We will return to this boundary-drawing exercise in section 3.4 below.

The second element—(ii)—is that an exploiter intends, by the targeting, to open up opportunities. No doubt it is the prospect of good opportunities which spurs on an exploiter to target an objectively vulnerable person in the first place. Individuals who exploit are typically opportunists and may test many avenues to find opportunities. It will not matter if the deliberative process is relatively fleeting, such as when an individual quickly recognizes that there is an opportunity and acts upon it on the spur of the moment.

What types of opportunities will be provided by vulnerable persons, generally speaking? First, there could be opportunities for immediate gain which are ripe for the taking. An example might be where a severely disabled person (for now presuming that they will fall within a category of objectively vulnerable persons) leaves down his shopping bags in the street. However, if this opportunity is tied to acquisitive exploitation at all, it is only in a tangential sense. Taking advantage of the opportunity to steal the shopping bags seems to be better represented as appropriation than it does wrongful use of a vulnerable person via acquisitive exploitation. Secondly, there could be opportunities to gain advantage over a vulnerable person. The focus here is on the fact that an individual can now work to gain advantage or leverage over the vulnerable person who was targeted.³⁵ Underpinning this interest in gaining advantage is the intention of an exploiter to use this advantage to fulfill his goals.³⁶ How can this be

³⁵ Wood (n 12) 142, refers to this as ‘advantage-exploitation’.

³⁶ The language of ‘goals’ is used by Wilkinson (n 5) 21.

achieved? Utilizing an opportunity to gain advantage of another person will be tied to using a vulnerable person's vulnerabilities, as they exist in relation to an exploiter. This, then, is the way in which an exploiter makes the targeted individual vulnerable in the context of *their* relationship. We will examine the range of conduct which could be used for this purpose in section 3.6 below. Thirdly, there could be ready-made opportunities to further an exploiter's goals. This might be because an individual is already in a position of advantage in relation to the objectively vulnerable person whom they targeted. Perhaps there is already a basis of trust, for example. This might exist because the vulnerable person targeted is an exploiter's family member. Or perhaps it exists because the vulnerable person targeted is acutely naïve and trusting. The second and third types of opportunities are closely tied to a strongly pejorative account of acquisitive exploitation, and to each other. In practice, the gaining of an advantage, and the use of that advantage, may be interlinked.

A third element—(iii)—is that an exploiter intends, by the targeting, to open up opportunities *to pursue his own goals*. The most obvious explanation for why a person is on the look-out for opportunities is because they intend to benefit by exploiting them. Arguably intent to gain is *a* reason—even the main reason—why a person engages in exploitative conduct. In other words, opportunism is linked to an exploiter's interest in gaining for himself. Therefore, should intent to gain be put at the fore? A little work demonstrates the language of gain to be too limited to describe an exploiter's motivations.

We see this demonstrated in the answer to the question: 'intent to gain *what*'? An individual could intend to gain one of a wide range of interests held by another person. These could include sexual interests, bodily interests, bodily property interests,

or property interests.³⁷ So the type of gain resulting from exploitation could be varied, but because this is an account of acquisitive exploitation, intent to gain property interests is most likely. In this connection, John Harris writes that there is a distinction between ‘wrongful use’ and ‘disparity of value’ exploitation.³⁸ Wrongful use ‘may occur when there are no financial or commercial dimensions to the transaction. A classic case here would be where it is claimed that lovers may exploit one another, that is, use one another in some wrongful way’.³⁹ On the other hand, wrongful exploitation can be conceptualized as involving disparity of value where there is imbalance in ‘the value of an exchange of goods and services’ as between an exploiter and exploitee.⁴⁰ Alan Wertheimer takes disparity of value exploitation to include situations where an exploiter intends to gain more than the party who is the target of exploitation.⁴¹ The point is that an individual may intend to gain in at least two different senses. Without clear elaboration as to the relevant sense of ‘gain’, the term is uninformative. We will return to the question of what type of account of acquisitive exploitation is defended in this thesis in section 3.4 below.

Another problem with the language of ‘gain’ is that it does not capture the potential complexity of an exploiter’s motivations for acting. For example, an exploiter

³⁷ Assuming that property interests in the body are recognized. For discussion, see *Jonathan Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37 and *Bazley v Wesley Monash IVF* [2010] QSC 11; Imogen Goold, *Flesh and Blood: Owning Our Bodies and Their Parts* (Hart 2014).

³⁸ John Harris, *The Value of Life: An Introduction to Medical Ethics* (Routledge 1985) 120.

³⁹ *ibid* 120.

⁴⁰ *ibid* 120.

⁴¹ Wertheimer (n 7) 167.

could act intending for a third party to gain or lose.⁴² Commentators such as Feinberg broaden their account of gain accordingly:

A may exploit B for great ‘gain’ all of which he then gives to charity. Clearly, to accommodate this example we must dilute the sense of ‘gain’ so that it includes gain either for oneself or for some person or cause that one chooses to benefit. In order to preserve the gain requirement, in short, we must employ an admittedly extended sense of ‘gain’ including both gain in the strict sense and fulfillment of one’s aims, purposes, or desires, including altruistic and conscientious ones.⁴³

However, Wilkinson criticizes Feinberg’s approach, in turn arguing that specifying an exploiter’s ‘aims, purposes, or desires’ does not capture the fact that an exploiter’s motivation could be self-destructive.⁴⁴ The example given by Wilkinson is of a slave owner wishing to be mutilated as a form of penance. According to Wilkinson, a clearer statement is to say that exploiters ‘necessarily use others to foster the achievement of their own goals: goals which may or may not be selfish and may or may not coincide with the furtherance of their real interests’.⁴⁵ This leaves open the precise goals in question but it is conceptually clearer than the language of ‘gain’. Pursuing their own personal goals is the reason why an individual exploits, but those goals cannot be specified in the abstract.⁴⁶

A fourth element—(iv)—is that an exploiter actually opens up opportunities to pursue his own goals. We identified several categories of opportunities above. It may

⁴² Wilkinson (n 5) 18.

⁴³ Feinberg (n 6) 193.

⁴⁴ Wilkinson (n 5) 20.

⁴⁵ *ibid* 21.

⁴⁶ For example, a recent report into child sexual exploitation noted motivations beyond commercial profit, see Sue Berelowitz and others, “‘If Only Someone Had Listened’: Office of the Children’s Commissioner’s Inquiry Into Child Sexual Exploitation in Gangs and Groups’ (November 2013). Motives identified were: exertion of power and control, a desire to humiliate, sexual gratification, and a belief in entitlement to sex.

be an opportunity to gain a position of advantage in relation to an exploitee, using an exploitee's vulnerabilities (as they exist in relation to the exploiter). Allen Wood refers to this as gaining 'control or manipulation of the object of exploitation'.⁴⁷ Or it could be to use a position of advantage to then 'exploit some attribute' of another person. An example of an attribute, Wood argues, is the 'official position or access to state secrets' which a governmental spy possesses.⁴⁸ 'Benefit-exploitation' involves using 'some attribute of the person from which we derive benefit or use to achieve our end'.⁴⁹ Any number of attributes can be used, which may include a person's 'fears, ignorance, superstitions, gullibility, or naiveté'.⁵⁰ Goodin's argument shows us how wide-ranging exploitable attributes are: we might exploit a person's bad luck or their good luck, their career or their joblessness, their hospitality or their homelessness.⁵¹ Moreover, Feinberg argues that a whole range of exploitable traits and circumstances may be used by an exploiter, '[V]irtually any traits or circumstances are in principle exploitable provided only that they are causally relevant to the exploiter's purposes.'⁵² In reality then, the requirement that an exploiter actually *opens up opportunities* to pursue his own goals is modest.

Fifthly, element (v) is that an exploiter usually engages in predatory conduct. What does the concept of 'predation' add to the analysis? An exploiter engages in conduct in order to open up the particular opportunity which they have identified via

⁴⁷ Wood (n 12) 142.

⁴⁸ *ibid* 142.

⁴⁹ *ibid* 142.

⁵⁰ Robert Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed), *Modern Theories of Exploitation* (Sage Publications 1987) 177.

⁵¹ *ibid* 177.

⁵² Feinberg (n 6) 205-06.

targeting a vulnerable person. Could there be predation without exploitation, or exploitation without predation? In principle there could be. However, the argument in this thesis is that predatory conduct is a necessary part of a strong normative account of acquisitive exploitation. In other words, something more is needed than the dishonest targeting of a vulnerable person by an exploiter. Rather, an exploiter opens up opportunities he has received via targeting by engaging in predatory conduct. This is the means by which an exploiter uses another individual in core cases of acquisitive exploitation. We must restate the point made in section 3.1 of this chapter that we are presenting a strong account of acquisitive exploitation which is tailored to the concerns of criminal law theorists. From this direction comes an emphasis on a serious conduct element to the exploitative wrong. What does it mean to engage in predatory conduct? The Oxford English Dictionary defines ‘to prey on’ as ‘to take advantage of; to exploit; to make (esp. a class of person) the victim of a particular crime, swindle, etc.’.⁵³ This is an abstract definition, so some real-life examples of predatory conduct are examined in section 3.6 below. As we will see, a wide range of conduct can be termed predatory. Predatory conduct can be performed over a period of time, and can range from the overt to the subtle.

Do we have any initial steers on predatory conduct? We could start by considering who can engage in predatory conduct, using recent sentencing case-law on sexual offences. In *R v Neil Wilson*, a 41 year-old man pleaded guilty to sexual activity with a child, offences relating to indecent photographs of children and making extreme pornographic images.⁵⁴ The offence of sexual activity with a child is of interest to us

⁵³ Oxford English Dictionary <www.oed.com> accessed 29 March 2015.

⁵⁴ *R v Neil Wilson*, Snaresbrook Crown Court (5 August 2013) <www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/neil-wilson-proceedings-re-sentence-05082013.pdf> accessed 29 March 2015.

here. The sentencing judge, using language offered to him by counsel for the prosecution, described the 13 year-old child as ‘predatory’ because she was ‘seriously egging’ the defendant on.⁵⁵ It was held appropriate to impose a suspended prison sentence for this offence given these circumstances. The use of the term ‘predatory’ was subsequently found to be unsatisfactory in a post-case review by the Director of Public Prosecutions.⁵⁶ The gist of the complaint is that while it is important that prosecutors accurately state the facts of the case in their summing up to the court, it is controversial whether the description of a 13 year-old girl as predatory is ever justifiable. No doubt there are questions about whether the language of ‘sexually provocative’ or something similar would have better described the complainant’s actions in this case. The important application for our purposes is that we may have a steer about what predatory conduct intuitively is *not*. The impression is that ‘predatory’ conduct is a loaded term to the extent that a vulnerable person cannot engage in it. In turn this places prime importance on who is said to be vulnerable in the first place, and how this assessment should take place (see element (i) above).⁵⁷

We should also draw attention to the statement that an individual *usually* engages in conduct in response to an opportunity. This leaves open whether it is possible to prey on someone by means of an omission. It is conceivable that an

⁵⁵ *ibid* [11], ‘[S]he is undoubtedly it is fair to say very sexually experienced, and one hesitates to use the word, but it is a word that has been used in other cases, I think the officer would agree that she may well be what is described as predatory in respect of her activities.’

⁵⁶ Keir Starmer, ‘Statement Regarding Comments Made by Counsel in *R. v Neil Wilson*’ (30 September 2013) <<http://blog.cps.gov.uk/2013/09/statement-regarding-comments-made-by-counsel-in-r-v-neil-wilson.html>> accessed 29 March 2015.

⁵⁷ Note the current unsatisfactory approach to children’s responsibility for sexual conduct, see *R v G* [2008] UKHL 37. According to the House of Lords, a 15-year-old boy could be held criminally responsible for rape of a child under-13 (a strict liability offence), despite the girl’s promise that she was also fifteen. This creates a questionable legal position: children under-16 are themselves unable to consent to sexual activity, but they can be held criminally liable for serious sexual offences.

individual preys upon another person when he fails to carry out a positive duty imposed upon him. For example, if an agent to a trust allows his naïve and generous principal to benefit him personally, he breaches fiduciary rules.⁵⁸ We will return to these issues in section 3.6 below.

If this analytical account of acquisitive exploitation is on first blush robust, the reasoning behind it must now be unearthed. Several matters require further explanation and justification. First, what is the relationship between use (of an exploitee) and benefit (to an exploiter) via profit or gain? Secondly, who is an objectively vulnerable person? Thirdly, why is it essential that an exploiter dishonestly targets a vulnerable person? Fourthly, what constitutes predatory conduct? We begin in the next section with discussion of benefit.

3.3 The (ir)relevance of benefit?

What is the relationship between use (of an exploitee) and benefit (to an exploiter) via profit or gain of property interests? Ought a strong normative account of acquisitive exploitation require benefit to an exploiter via profit or gain of property interests? On first blush we might expect an affirmative answer. I have argued in section 3.2 that an exploiter's intent to further his own goals is key to this wrong. Intuitively we might expect benefit to an exploiter via profit or gain of property interests to be part of an account of acquisitive exploitation.⁵⁹ It was noted in section 3.2 above that benefit to an exploiter via profit or gain of property interests is not the only reason for engaging in

⁵⁸ For discussion, see Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, Clarendon 2011) chs 1, 11, 13.

⁵⁹ For a useful working definition of 'gain', see Fraud Act 2006, ss 5(2)-(3). The Fraud Act's definition of 'gain' does not explicitly include profit, so 'profit' is also referred to in this section for clarity's sake.

exploitative conduct. However, benefit via profit or gain of property interests is likely to be a *main* goal, especially in cases of acquisitive exploitation where an individual engages in exploitative conduct in order to attack a vulnerable person's property interests. An exploiter may gain money, real property, tangible or intangible property in real life cases of acquisitive exploitation, thus fulfilling his goals. Joel Feinberg argues that profit or gain to an exploiter is key to a successful episode of interpersonal exploitation. On Feinberg's account, 'without gain for A, there is no exploitation'.⁶⁰ There is a decision to be made about how to construct a strong account of acquisitive exploitation which, unlike Feinberg's, is a normative account of a particular exploitative wrong. In theory, a strong account of acquisitive exploitation could require that an exploiter gains property interests as a necessary result of the exploitative wrong.⁶¹ Commentators have noted that 'exploitation' can accommodate cases where an exploitee *also* gains (for example, they are paid by their exploiter). For example, Alan Wertheimer characterizes this as 'mutually advantageous exploitation'. This means that it is, in principle, possible for adults who sell sex to be exploited.⁶² In these cases an exploitee has gained from a transaction, but less than an exploiter has gained.⁶³ A satisfactory account of exploitation then needs to determine what level of gain to an exploiter is unfair. For this purpose, Wertheimer appeals to the market price to say when transactions are exploitative (e.g. A has gained disproportionately more than B, according to the baseline). This is a 'disparity of value' argument, referred to in section

⁶⁰ Feinberg (n 6) 192.

⁶¹ Wertheimer (n 7) 13, argues that a strong account *ought* to require gain to an exploiter.

⁶² A position supported by the Committee on Women's Rights and Gender Equality of the European Parliament, *Report on Sexual Exploitation and Prostitution and Its Impact on Gender Equality* (2013.2103(INI)), and All-Party Parliamentary Group, *Prostitution and the Global Sex Trade* (3 March 2014).

⁶³ For discussion, see Bigwood (n 11) 166.

3.2 above. Thus, a requirement of gain need not exclude the possibility that an exploitee also gains.

A further line of argument is evidential. It will be easier to prove acquisitive exploitation if an exploiter goes on to benefit via gain of property interests or profit from his wrongful conduct. No doubt juries respond to what they perceive to be exploitation, and this judgment is more likely to be affirmative where an exploiter gains property interests or otherwise profits from his conduct. However, this evidential point is no substitute for principled analysis. Our normative account of acquisitive exploitation should not be constructed on the basis of how straightforward it will be to prove the exploitative wrong.

It is argued in this thesis that there is no principled basis for requiring benefit to an exploiter via gain or profit in a strong normative account of acquisitive exploitation. There are in fact weaknesses in the intuitive argument. It is hardly surprising that acquisitive exploitation will in some cases lead to benefit for an exploiter via profit or by the gaining of property interests. As Wilkinson recognizes, '[I]f A doesn't respect B as an "end", A is not likely to be too concerned about treating B fairly or about not taking advantage of B.'⁶⁴ On the other hand, there will be cases where an exploiter '[does] not get the exploitee to do, or to give them, what they want'.⁶⁵ Gain of property interests to an exploiter simply might not come about as planned. Moreover an exploiter 'can be mistaken about the value of what they demand and so fail to derive any real benefit from it, even if they get from it what it was they originally wanted'.⁶⁶

⁶⁴ Wilkinson (n 5) 34.

⁶⁵ *ibid* 18.

⁶⁶ *ibid* 18.

Exploitation will have various effects in the real world.

It is argued that the account of acquisitive exploitation presented in this thesis is the paradigm of acquisitive exploitation which succeeds. The paradigm of strong acquisitive exploitation focuses on already vulnerable persons being dishonestly targeted as ‘easy prey’, by an exploiter who engages in predatory conduct. In other words, this account of acquisitive exploitation uses exploitation as a success term, regardless of the fact that it does not require actual gain of property interests or loss to an exploitee. Indeed, other commentators have taken this view about exploitative wrongdoing. For example, Rick Bigwood argues that his account of legal contractual exploitation depends upon ‘some act on the part of [A] rather than in some quality of the outcome of the resultant transaction between [B] and [A]’.⁶⁷ And Robert Goodin has argued that ‘[T]o exploit people is to wrong them, however much or little they may lose or you may gain from the act.’⁶⁸ Perhaps this explains why acquisitive exploitation has been linked in recent times with property offences which do not require a particular gain or loss (the section 1 fraud offence), or which require only a very minimal interference with property interests (such as the English theft offence).

What, then, might successful acquisitive exploitation look like in the absence of any actual gain to an exploitee? Clearly benefit to an exploiter, such as financial benefit or gaining property interests, is not irrelevant and will occur in some cases. As highlighted in section 3.2 above, there is likely to be a relationship between use (of an exploitee) and benefit (to an exploiter) in practice. However, the key to this account of

⁶⁷ Bigwood (n 11) 128.

⁶⁸ Goodin (n 50) 182.

acquisitive exploitation lies in the use of a position of advantage to further an exploiter's goals. It comes via an exploiter opening up opportunities provided by an objectively vulnerable person—a vulnerable person whom an exploiter has dishonestly targeted. Recall Wood's argument that benefit-exploitation occurs 'when we take advantage of some attribute of the person from which we derive benefit or use to achieve our end'.⁶⁹ What will benefitting an exploiter's goals look like in practice? It will mean that an exploitee's attributes are used, and that use of one or more of these attributes contributes to an exploiter's goals.⁷⁰ Rick Bigwood's language is that 'Exploitative acts must, in some sense, inure to the benefit of those who perform them', with benefit interpreted broadly.⁷¹ So an exploiter could gain a position of advantage over a vulnerable older person, and then use the older person's generosity to set up a standing order to his own bank account. So here is an example as to how there might be overlap between use of an exploitee (an opportunity provided by a vulnerable person which furthers an exploiter's goals) and gain of property interests to an exploiter in practice.

Does this blur the line between acquisitive exploitation and inchoate acquisitive exploitation? Certainly requiring the result that an exploiter opens up opportunities by engaging in predatory conduct is modest and will not be easy to prove in practice. To this end it signifies a move away from a strong result-orientated account of exploitative wrongdoing. It must be proven that an exploiter (D) (i) dishonestly targets a vulnerable person (V) (ii) intending, by the targeting, to open up opportunities provided by V in order (iii) to pursue his own goals. An exploiter (iv) accordingly opens up

⁶⁹ Wood (n 12) 142.

⁷⁰ Wilkinson (n 5) 23-24.

⁷¹ Bigwood (n 11) 131.

opportunities by (v) engaging in predatory conduct. This conduct-orientated account may lead to difficulties when we consider how this normative account of the wrong should relate to criminal law in England and Wales. But as Andrew Ashworth has argued, a significant number of offences are defined in Anglo-American law in ‘inchoate mode’, i.e. ‘in the form of “doing x with intent to bring about y”.’⁷²

Ashworth’s argument is that:

[I]t is neither unnatural nor productive of difficulties or misunderstandings to define offences such as fraud and bribery in an inchoate mode, that is, to define them by reference to what the defendant was trying or intending to do rather than what harm or wrong he actually accomplished.⁷³

As we have explained in this section, the paradigm of acquisitive exploitation which succeeds is not devoid entirely of the need for a result. A result is required to the extent that an exploiter must open up opportunities by engaging in predatory conduct. We will return to the idea of predatory conduct in section 3.6 below. A full account as to how dishonestly targeting vulnerable persons determines the seriousness of the wrong is presented in section 3.5.

3.4 Who is a vulnerable person?

Our analytical account of acquisitive exploitation requires that an exploiter dishonestly targets an objectively vulnerable person. A focus on vulnerable persons helps to explain the wrongfulness of acquisitive exploitation and we explore this argument in

⁷² Andrew Ashworth, ‘The Criminal Law’s Ambivalence About Outcomes’ in Rowan Cruft and others (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Anthony Duff* (OUP 2011) 164.

⁷³ *ibid* 169-70.

section 3.5 below. It is first necessary to assess who is an objectively vulnerable person. The language of objectivity is used to emphasize that we are considering whether a person is to be considered vulnerable *generally speaking*, rather than in the context of their relationship with an exploiter. In other words, they are *already* vulnerable before encountering their exploiter. There is nothing significant in the use of the language of objectivity in and of itself. In fact, an assessment that a person is objectively vulnerable will not be value-free.⁷⁴

Defining who is an objectively vulnerable person promises to provoke lively debate. First, is there is a relevant distinction between objective and relational vulnerability? If vulnerability is always a relational concept, is the idea of an exploitee being vulnerable *before* an interaction with an exploiter logically flawed? Certainly the concept of a person being objectively vulnerable is controversial. An individual may be objectively identified as vulnerable but may *not* be vulnerable in the context of a particular interpersonal relationship, for example. In other words, some categories of persons identified as objectively vulnerable may not be relationally vulnerable (such as children or migrant workers). Clearly in identifying ‘objectively’ vulnerable persons we are making a classification about which persons should be considered vulnerable *generally speaking*. It is an evaluation as to whether a group of individuals require special protection and therefore should be considered objectively vulnerable for the purposes of a strong normative account of acquisitive exploitation. As we will argue in section 3.5 below, in targeting an objectively vulnerable person an exploiter targets who

⁷⁴ If we review this account of acquisitive exploitation in the context of criminal law theory (as we will in ch 5), then it is for juries to determine whether a vulnerable person was targeted, with direction from a judge on the relevant meaning of ‘vulnerable’. It is clear that this assessment will not be value-free. Alan Norrie, ‘After *Woollin*’ [1999] Crim LR 523, 543, argues that, ‘The criminal law is involved in a process of moral judgment, but uses a particular “neo-moral” or simulacral language to do so which can be described as cognitivist, subjectivist, factual or descriptive.’

he hopes to be an ‘easy target’. It is also argued in section 3.5 that some individuals are doubly vulnerable to being preyed upon by exploiters and therefore require special protection. Classifying certain groups of individuals as already vulnerable is not uncommon in English criminal law.⁷⁵ We must again emphasize our focus on building a strong normative account of acquisitive exploitation which is tailored to the concerns of criminal law theorists.⁷⁶

It could further be argued that identifying certain categories of people as already vulnerable amounts to unfairly labelling people and therefore ought to be avoided. For example, the Law Commission’s consultation paper on hate crime issued a strong warning against labelling disabled persons as vulnerable because this is to evoke ‘a damaging misperception of disabled people as weak and in need of paternalistic protection’, which ‘fails adequately to capture the fact that the offender has exploited the person’s disability “and is all the more culpable for it”’.⁷⁷ Perhaps for similar reasons recent reports on child sexual exploitation prioritize identifying young persons who are ‘at risk’ of sexual exploitation, thus avoiding the label ‘vulnerable’.⁷⁸ But this approach can also be criticized as open-ended. There is little sense in favouring an ‘at risk’ methodology here, since the list of persons ‘at risk’ will be wider than the examples of vulnerable persons identified below. Furthermore, the label of ‘at risk’ may similarly be perceived as negative.

⁷⁵ See Sexual Offences Act 2003, ss 16-24.

⁷⁶ See s 3.1 of this thesis.

⁷⁷ Law Commission of England and Wales Consultation Paper, *Hate Crime: The Case for Extending the Existing Offences* (Law Com Consultation Paper No 213, 2013) para 2.150 ff.

⁷⁸ Sue Berelowitz and others, “‘I thought I was the only one. The Only one in the world’: Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups, Interim Report’ (November 2012) 110-11.

There is no easy way to deal with these issues but it would not aid clarity to avoid identifying vulnerable persons altogether. The wrongfulness of targeting the vulnerable for one's own goals requires some understanding of who the vulnerable are, *and* what makes them vulnerable. I argue that there is a reasonably firm intuitive category of objectively vulnerable persons with scope for disagreement at the margins. We first highlight in section 3.4.1 illustrative examples of persons who are best seen as automatically vulnerable persons for the purposes of this account of acquisitive exploitation. We then summarize several strong reasons which explain what makes these groups of persons vulnerable, since this helps to explain why targeting already vulnerable persons is *per se* wrongful. To be clear, these reasons are not an abstract test for identifying automatically vulnerable persons for the purposes of this normative account of acquisitive exploitation. However, there is something sufficiently in common between the groups of persons identified below as automatically vulnerable to justify them being treated in the same way. This is because there are compelling intuitive reasons to say that they form the core of automatically vulnerable persons. In other words, in the 'automatically vulnerable' category, there are strong reasons to justify bringing these groups of persons into this category.

Of course there will be more uncertainty as we move to the penumbra, and for this reason the core category is supplemented by an open category. A person comes within the open category if compelling reasons are given as to why he as an individual is vulnerable. As we will see in section 3.4.2 below, this could include a wide range of persons. In order to determine if an individual comes within this open category, reference must be made to the reasons identified in section 3.4.1.⁷⁹ The concern across

⁷⁹ I identify core examples within both categories, but these examples are not presented as exhaustive.

both categories is to show that a person is vulnerable *in a significant sense*. Since we are all vulnerable to some degree, we should want to single out reasons to say that a person is objectively vulnerable if they are significantly or unusually vulnerable.⁸⁰

3.4.1 Automatically vulnerable persons

(A) Children

There is a strong case for considering children under-16 to be automatically vulnerable. Indeed, this is the approach adopted by English criminal law. In English law a large amount of sexual activity is prohibited where one of the parties is under-16. In fact, prohibitions are extended in some circumstances to young persons under-18.⁸¹ Moreover, there are a number of positive duties upon adults to protect children under-16 where a relationship of care is recognized.⁸²

A number of reasons can be cited supporting children under-16 as vulnerable. Children may lack mental capacity, have physical, mental or learning disabilities, find themselves in extremely grave circumstances or have another hold a position of trust in relation to them.⁸³ In principle, however, children may be able to ward off potential exploiters. For example, a recent report on child sexual exploitation noted that some

⁸⁰ For example, it is not cogent to rely upon Fineman's argument, Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 1, that vulnerability is 'universal and constant, inherent in the human condition' as a means of identifying core categories of vulnerable persons, since this sets the bar too low.

⁸¹ Sexual Offences Act 2003, ss 16-24.

⁸² Children and Young Persons Act 1933, s 1.

⁸³ See Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 158-59; Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (OUP 2012) ch 4.

children exhibit strong resilience to grave circumstances of abuse.⁸⁴ As we have already noted, we need to make some general observations for this account of acquisitive exploitation. The argument here is that the state of childhood itself means that under-16 year-olds are vulnerable for the purposes of this account. One particular concern is their limited capacity to make decisions in their best interests. One commentator has noted that '[T]heir cognitive abilities tend to be under-developed: they may have limited understanding (for example, of the impact of their conduct on others) and, in particular, little experience of applying the understanding they do possess to new situations.'⁸⁵ There is also evidence that children and young persons lack understanding regarding the meaning of consent in exploitative scenarios, and we will examine this argument in chapter 4.⁸⁶ It is therefore appropriate to identify objective vulnerability on the basis of chronological age as opposed to applying a competence test in this thesis. While a child may have 'sufficient understanding and intelligence to enable [them] to understand fully what is proposed' in the context of a medical decision, a capacity test is defective in the context of serious interpersonal exploitation.⁸⁷ An arbitrary line must be drawn identifying the under-16 as objectively vulnerable. The strong exploitative element means that they cannot independently assess how to advance their own interests.

It may be more difficult to cite the inherent limitations of childhood as a reason

⁸⁴ National Crime Agency, 'CEOP Thematic Assessment, The Foundations of Abuse: A Thematic Assessment of the Risk of Child Sexual Abuse By Adults in Institutions' (October 2013) 15 <www.nationalcrimeagency.gov.uk/publications/49-ceop-institutions-thematic-assessment/file> accessed 29 March 2015.

⁸⁵ Andrew Ashworth, 'Child Defendants and the Criminal Law' in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 174.

⁸⁶ s 4.4.1.

⁸⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 [184].

for vulnerability as we move to young persons aged 16 and over. The reason for saying that a young person is vulnerable would seem to lie in identifying that another person is in a position of trust in relation to them, and not because a young person is young *per se*. There are important questions as to why the legal age of consent is 16 in English law, but some sexual offences seek to protect young persons under-18. The relevant question here is whether under-18s ought to be considered automatically vulnerable for the purposes of this account of wrongful acquisitive exploitation. Since the context is exploring which victims of exploitation should be considered automatically vulnerable, as opposed to limiting the capacity of under-18s to make autonomous decisions, is an under-18 limit defensible?

The discussion so far has focused on children under-16 being automatically vulnerable. But we should also note that children are less likely to be targeted by exploiters in the course of, or as a means of, attacking property interests. The point is that children will not often have as many property interests (outside of bodily property interests) to target. So the idea of dishonestly targeting under-16s is arguably of less relevance with regard to acquisitive exploitation.

We will see below that persons for whom the would-be exploiter holds a position of trust in relation to them should also be considered automatically vulnerable. This may in practice cover young persons under-18. But what if there is no *legally* recognized position of trust? This may occur in cases of grooming, for example. We ought to take seriously the argument that there comes ‘a point for the vast majority of persons at which the boundaries of selves are sufficiently well understood’.⁸⁸ The

⁸⁸ John Stanton-Ife, ‘Horrible Crime’ in RA Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 157.

worry is that by considering under-18s automatically vulnerable we do not accept the force of this point. I argue that independent reasons will need to be given as to why a 16 or 17 year-old (who is not subject to a position of trust held by a would-be exploiter) is vulnerable.

(B) Mentally disordered

Section 1(2) of the Mental Health Act 1983 broadly defines mental disorder as ‘any disorder or disability of the mind’.⁸⁹ Mental disabilities and conditions are interpreted broadly in a number of legal contexts.⁹⁰ The Bradley Report identified a mental condition as anything ‘from depression and anxiety through to personality disorder and psychoses’.⁹¹ Guidance to the Equality Act 2010 identifies practical examples of mental disorders as including: depression, schizophrenia, eating disorders, bipolar affective disorders, obsessive compulsive disorders, as well as personality disorders and self-harming behaviour.⁹² The relationship between mental disorders and mental and learning disabilities is complex. On the one hand, the World Health Organization uses the term ‘disabilities’ as an umbrella term to include various disorders.⁹³ Notably the Law Commission’s recent consultation on insanity uses the phrase ‘mental disorder’ ‘to encompass all mental illnesses, disorders and disabilities of the mind including learning disabilities and difficulties’, and the Mental Capacity Act 2005 does not exclude

⁸⁹ Mental Health Act 1983, s 1(3), excludes dependence on alcohol or drugs as a disorder or disability of the mind for the purposes of s 1(2).

⁹⁰ RE Kendell, ‘The Distinction Between Mental and Physical Illness’ (2001) 178 *British Journal of Psychiatry* 490, 491.

⁹¹ Keith Bradley, *The Bradley Report: Lord Bradley’s Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (April 2009) 17.

⁹² HM Government, *Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability* (May 2011) 8.

⁹³ International Statistical Classification of Diseases and Related Health Problems (10th revision 2010) <www.who.int/classifications/icf/en/index.html> accessed 29 March 2015.

learning disabilities as a source of impairment.⁹⁴ By contrast, the Mental Health Act makes clear that persons with learning disabilities are not automatically suffering from a mental disorder or disability.

Again there are difficulties in generalizing in relation to the mentally disordered, not least because the category can be interpreted so broadly.⁹⁵ Mental disabilities or disorders may lead to a relevant impairment, which means that a person lacks mental capacity to make certain decisions. On other occasions, a person with a mental disability may have full capacity but may nonetheless have impaired decision-making processes.⁹⁶ These arguments underlie treating those who are mentally disordered as automatically vulnerable for the purposes of our account of acquisitive exploitation. But it would go too far to treat those with learning disabilities or disorders as falling into the same category. It is both the near universal acknowledgment that the mentally disordered are vulnerable, as well as its close ties with lack of capacity which set this category apart analytically. A safeguard for the mentally disordered is provided by identifying them as objectively vulnerable for the purposes of our account of acquisitive exploitation.

(C) Persons who are subject to a position of trust held by another

A core feature of a position of trust is that it typically involves a power differential between persons, which means that one person is in a dominant position with the other

⁹⁴ Law Commission Discussion Paper, *Criminal Liability: Insanity and Automatism* (2013) 4. Learning difficulties and disabilities are considered independently under s 3.4.2(B) below.

⁹⁵ For discussion, see Jill Peay, 'Mentally Disordered Offenders, Mental Health and Crime' in Mike Maguire and Robert Reiner (eds), *Oxford Handbook of Criminology* (5th edn, OUP 2012).

⁹⁶ There may be positive duties upon those who are aware that another person has a mental disorder, see Sexual Offences Act 2003, s 30(1)(d).

in a more subservient position. Annette Baier has argued that in order to get any sense of the variety of forms of positions of trust we must look at ‘varieties of vulnerability and at varieties of grounds for not expecting others to take advantage of it’.⁹⁷ Thus, positions of trust give rise to duties and responsibilities so that a dominant party is obliged to act or omit from acting in order to protect another person’s interests. This protective function might mean that something ought not to be done in relation to another person because that person is vulnerable. On other occasions, a position of trust might require positive measures, which may demand more from the holder of the position. A position of trust at law may be held in order to protect a wide range of interests, such as interests in sexual autonomy or property interests.⁹⁸

How can positions of trust be linked with this discussion of vulnerable persons? On the one hand, a position of trust may be imposed because a person is considered vulnerable and therefore requires special protection. But the existence of a position of trust in itself also leaves one party vulnerable. This point can be demonstrated in the context of principals and agents in trust law. When a principal entrusts an agent with property interests there is an increase in power for an agent, and a concurrent information deficit for the principal. A principal does not know how his agent will handle his property interests. Simon Gardner notes that despite the benefits of being able to entrust property to another person, the trust leaves ‘a principal more vulnerable than acting in person on his own behalf’.⁹⁹ This is because agents have no personal

⁹⁷ Annette Baier, ‘Trust and Antitrust’ (1986) 96 *Ethics* 231, 235.

⁹⁸ For example, Sexual Offences Act 2003, ss 22 and 27, identify guardians, carers, teachers and foster parents, among others, as being in positions of trust in relation to persons under-18 years of age. Fiduciaries are recognized as holding a position of trust in trusts law. For analysis, see Gardner (n 58) 16. Note that positive duties are imposed on adult members of a household to protect vulnerable persons in certain circumstances. See Domestic Violence, Crime and Victims Act 2004, s 5.

⁹⁹ Gardner (n 58) 16.

incentive to benefit a principal. In fact, ‘the selfless nature of a fiduciary’s role means that his principal’s interests are at best neutrally, and sometimes negatively, correlated with his own.’¹⁰⁰ There are several abuse of position of trust offences in English criminal law which apply to teachers, wardens and carers of young persons under-18.¹⁰¹ Special protection is afforded to 16 and 17 year-olds because those holding positions of trust defined in section 21 of the Sexual Offences Act 2003 have the power to determine fundamental aspects of young persons’ futures. The point is that the fact that a person is subject to a position of trust held by another person means he should be regarded as vulnerable. And this point of principle ought to carry over to those who we identify as objectively vulnerable for the purposes of our account of acquisitive exploitation.

(D) Workers who are in slavery, servitude, or are forced to work and/or persons who have been trafficked

Persons who have been trafficked into a country ought to be considered automatically vulnerable. Their lack of official papers and dependence on their trafficker place them in a unique position of vulnerability. However, a worker may also be vulnerable even where they have not been trafficked. In both cases, this may be because there are unusually grave circumstances of slavery, servitude or forced labour which come within the scope of Article 4 ECHR.¹⁰² Such cases may be identified if passports or other personal documents have been seized by employers, and/or if wages have been

¹⁰⁰ *ibid* 16. Therefore Gardner (n 58) 16, notes that ‘To facilitate the use of valuable fiduciary arrangements in the face of this misalignment between a fiduciary’s interests and his duty, the law has rules calculated to counteract it. These rules aim, directly or indirectly, to minimize the impact of the fiduciary’s own interests, and to maximize his incentive to serve his principal.’

¹⁰¹ Sexual Offences Act 2003, ss 16-24.

¹⁰² And now within the scope of Modern Slavery Act 2015, s 2.

withheld.¹⁰³ It should be assumed that those who are forced to work, or who have been trafficked for this purpose, have less free and informed decision-making power.¹⁰⁴ An individual in these circumstances is less able to give free and informed consent. As noted above, there will be marginal cases, even within this category. It is more difficult to argue that a worker should come into this category because he lacks information and independent advice about his working rights, for example.

(E) Persons subjected to physical or mental abuse

Persons subject to abuse ought to be considered automatically vulnerable for the purposes of our account, since they do not have the opportunity to protect themselves against acquisitive exploitation.

(F) Summary

Our approach has been to identify illustrative examples of automatically vulnerable persons for the purposes of our account of acquisitive exploitation. The point of this exercise is neither to unfairly label nor to privilege certain groups of persons, but to give some firm practical detail about acquisitive exploitation. In section 3.5 below we defend the focus of this account on the targeting of already vulnerable persons since, on first blush, making vulnerability a key component of the analysis of acquisitive exploitation might seem counter-intuitive.¹⁰⁵ The examples cited above are non-exhaustive. We have argued that children under-16, the mentally disordered, persons

¹⁰³ For discussion of indicators of acquisitive exploitation, see s 3.7.

¹⁰⁴ See Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

¹⁰⁵ For example, because the idea of vulnerable persons is more present in sexual offences (Sexual Offences Act 2003, ss 30-37) than in property offences in England and Wales.

subject to a position of trust held by another, workers who are forced to work and/or persons who have been trafficked, and persons subjected to physical or mental abuse ought to be considered automatically vulnerable. This reasoning rests on several core justifications.

First, the state of childhood itself justifies treating the under-16 as objectively vulnerable. The seriousness of exploitative conduct is sufficient to remove the need for a capacity-based assessment of vulnerability for under-16s in relation to acquisitive exploitation.

Second, in principle, those with learning disabilities or disorders are not automatically vulnerable for the purposes of our account of acquisitive exploitation. However, those who are mentally disordered should be categorized as automatically vulnerable in this account, given close ties with lack of capacity and impaired decision-making capacity.

Third, all persons who are recognizably under another person's power in a significant sense are objectively vulnerable for the purposes of this account. This is linked to the fact that the holder of that position holds the power to determine the weaker party's future.

Fourth, persons subjected to slavery, servitude and forced or compulsory labour and/or who have been trafficked are another group of already vulnerable persons. The rationale is found in the fact that in these circumstances an individual's fundamental right, protected by European human rights law, has been violated. Certainly these are vulnerable persons in need of state protection, and so ought to come within our category of automatically vulnerable persons for our account of acquisitive exploitation. Finally,

persons subjected to serious physical or mental abuse are intuitively automatically vulnerable, given that they have already been subject to a strong attack upon their personal autonomy.

As argued in section 3.4 above, these reasons cannot be interpreted as an abstract test for identifying vulnerable persons for the purposes of this account of acquisitive exploitation. Rather in section 3.4.1 we have attempted to draw out a reasonably firm intuitive core of objectively vulnerable persons via illustrative examples. These illustrative examples are supported by the strong reasons for classifying these groups of persons as vulnerable in this section. This modest general discussion of what makes these persons vulnerable is useful nevertheless, since it seems likely that this helps to explain why targeting the vulnerable *per se* is wrongful.

3.4.2 Persons who may be identified as vulnerable

In this category the key question is to identify reasons why an individual who does not fall into an automatic category ought to be considered vulnerable. Some illustrative examples with accompanying reasoning are given in this section. We should first ask whether any reasons ought *not* to serve as a justifying reason for vulnerability. For example, what if a person is addicted to alcohol or drugs? We may doubt whether this is a compelling reason because an individual may be partly responsible for their addiction. And the real-life circumstances of a particular case may be complex. For example, an individual's drug addiction may lead to their finding themselves in grave circumstances. Do we pay attention to the addiction or to the grave circumstances as a reason to say that this person is vulnerable? A concern is that some people in this category may at some point have decided to move along the path towards addiction.

There is no easy answer to this question because there is no settled social norm to guide the relationship between addiction and vulnerability.¹⁰⁶ This underscores the point that this category of persons who may be identified as vulnerable is contestable, and any proposed example must be supported with convincing reasoning.

(A) Older persons or persons living alone

It is right to challenge the notion that older persons are automatically vulnerable.¹⁰⁷ It is encouraging that a recent focus group on online fraud noted that scams against older persons are not necessarily more serious because older persons are more vulnerable than younger persons.¹⁰⁸ However, there may be convincing reasons to say that a particular older person is vulnerable. In order to demonstrate that an older person is vulnerable, reasons of lack of mental capacity, physical or learning disabilities, or grave circumstances may be put forward for assessment. For example, an assessment as to whether an older person lacks capacity would take the following form. One widely recognized definition of lack of capacity is given in the Mental Capacity Act 2005. Section 2(1) of the 2005 Act states that a person ‘lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain’. It is clear that an ability to engage in decision-making is key to capacity. The relevant conditions for decision-making include the ability to, ‘[U]nderstand the information relevant to the decision; to retain that information; to use that information as part of the

¹⁰⁶ Likewise, persons who are addicted to gambling may have some level of fault for this, but are nevertheless ripe targets for acquisitive exploitation.

¹⁰⁷ cf Domestic Violence, Crime and Victims Act 2004, s 5, which defines a person as vulnerable because of ‘old age’. On the question of when a person is regarded as ‘elderly’, see Jonathan Herring, *Older People in Law and Society* (OUP 2009) ch 5, who argues that a contextual approach is best.

¹⁰⁸ Jane Kerr and others, *Research on Sentencing Online Fraud Offences* (Sentencing Council 2013) 51.

process of making the decision; or to communicate his decision (whether by talking, using sign language, or any other means).'¹⁰⁹ It follows that a person may lack capacity to make some decisions regarding their personal welfare but be found to have capacity to make decisions about other (usually less significant) matters. Furthermore, the source of impairment will vary. For example, it may come about because a person has a recognized medical condition. Alternatively, it may be the case that mental capacity is not fully developed rather than a person having an impairment or disturbance. The Mental Capacity Act makes clear that an impairment or disturbance does not have to be permanent in order to say that a person lacks mental capacity.¹¹⁰

Using this reasoning, an older person may be found to lack mental capacity. If mental incapacity is found, the further link between lack of capacity and vulnerability is clear. We characteristically associate capacity to make decisions for ourselves with a concept of personal autonomy. The idea is that we are at our most vulnerable when we are unable to make decisions to further our own personal interests. This reasoning is supported by the fact that there are special protective measures in place to aid those who lack mental capacity to make certain decisions.¹¹¹ However, a link between lack of capacity and older persons is not to be assumed.¹¹² There is no necessary connection between older adults and vulnerability on the basis of lack of mental capacity, and this is why older persons do not fall into the automatically vulnerable category for the

¹⁰⁹ Mental Capacity Act 2005, s 3(1).

¹¹⁰ Mental Capacity Act 2005, s 2(2).

¹¹¹ For example, those who lack capacity may be considered unfit to plead at trial and may require special measures. See Law Commission, *Unfitness to Plead* (Law Com Consultation Paper No 197, 2013) paras 2.103-2.105.

¹¹² For discussion of negative stereotypes about old age and cognitive impairment, see Erdman Palmore, *Ageism: Negative and Positive* (2nd edn, Springer 1999) 22-24. See also Nina Kohn, 'Elder (In)justice: A Critique of the Criminalization of Elder Abuse' (2012) 49 *American Criminal Law Review* 1.

purposes of this thesis' account of acquisitive exploitation.

Alternatively it may be possible to argue that an older person is vulnerable because they are particularly isolated.¹¹³ This reasoning is not limited to older persons. A wide variety of persons may be isolated, and this reason for vulnerability could therefore include people living alone or who lack close attachments to other persons, regardless of age. Christina Victor and Keming Yang have produced empirical data to highlight high rates of loneliness in young adulthood and old age, as compared with low rates in early to mid adulthood.¹¹⁴ While social isolation and loneliness are different phenomena, they are both important in identifying whether a person's quality of life is significantly impaired, which may make them vulnerable.¹¹⁵

It should be emphasized that a position of trust held in relation to an older person will mean that they should be considered automatically vulnerable for the reasons highlighted in section 3.4.1(C) above.

(B) Idiosyncratic persons, persons with learning disabilities or difficulties, paranoid persons or those who have chaotic lives

It is not defensible to categorise these broad groups of persons as automatically

¹¹³ Research by Christina Victor and others, *Loneliness, Social Isolation and Living Alone in Later Life: Full Report* (Economic and Social Research Council 2003), found that 17% of older people have less than weekly contact with family, friends and neighbours.

¹¹⁴ Christina Victor and Keming Yang, 'Age and Loneliness in 25 European Nations' (2010) 31 *Ageing and Society* 1. See also Christina Victor and Keming Yang, 'The Prevalence of Loneliness Among Adults: A Case Study of the United Kingdom' (2012) 146 *The Journal of Psychology: Interdisciplinary and Applied* 85.

¹¹⁵ See Victor and others, *Loneliness, Social Isolation and Living Alone in Later Life: Full Report* (n 113).

vulnerable. However, a person may not suffer from a mental disorder but may have a personality which makes them ‘vulnerable in a way and to a degree not typical of the general population’ because they are a repeat victim of scams.¹¹⁶ There is a case for saying that a person is vulnerable if he has a learning disability or difficulty. A learning disability was originally based on a person having an IQ of 70 or below.¹¹⁷ In recent years there has been a move away from this approach. The Law Commission’s discussion paper on reforming the law on insanity argued that a learning disability involved:

A significantly reduced ability to understand new or complex information, to learn new skills (impaired intelligence), with a reduced ability to cope independently (impaired social functioning); and which starts before adulthood, with a lasting effect on development.¹¹⁸

Section 1(4) of the Mental Health Act 1983 supports this reading, stating that a learning disability or difficulty is ‘A state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning’. Learning disabilities or difficulties may lead to impairment sufficient to say that a person lacks mental capacity. In these circumstances lack of mental capacity can be presented as a reason to support identifying a person as vulnerable. However, learning disabilities or difficulties may also be independent reasons to say that a person is vulnerable. In other words, a person might have mental capacity to make a certain decision but be said to be vulnerable because they have a learning disability. More marginal reasons are that a

¹¹⁶ Sentencing Guidelines Council, *Sentencing for Fraud – Statutory Offences* (2011) 19. One context in which this could be prevalent is that of advance fee frauds.

¹¹⁷ Bradley Report (n 91) 19.

¹¹⁸ Used also by the Bradley Report, see Law Com Discussion Paper (n 94) para 18. This is the Department of Health’s definition in Department of Health, *Valuing People: A New Strategy for Learning Disability for the 21st Century* (2001).

person has a low IQ and/or is extremely gullible.¹¹⁹ Arguably one reason why a person is vulnerable where they have a learning disability or difficulty (but where they do not lack mental capacity) is that their disability may make them a greater target for acquisitive exploitation.

Alternatively, persons may have mental capacity and have no relevant disability but be paranoid. We can also include those who have chaotic lives, or drug addicts or persons addicted to alcohol or gambling. Arguably it will be difficult to find compelling reasons why these persons are objectively vulnerable, but it is not impossible.

3.4.3 Heightened vulnerability

A final point is to highlight that vulnerability can be aggravated by external factors. For example, a recent report by the National Crime Agency notes that institutions can aggravate existing vulnerability and increase ‘the power over [victims] that abusers can exercise. This means that institutions are high risk environments for children, young people and indeed other vulnerable people’.¹²⁰ Another example is that children under-16, who I have argued should be considered automatically vulnerable for the purpose of this account of acquisitive exploitation, may be even more vulnerable where they are particularly involved in using online technology.¹²¹ Of course, vulnerability can also be

¹¹⁹ For example, in the well-known theft case of *R v Hinks* (n 1), expert evidence was submitted to the court that Mr Dolphin had a low IQ, which was in the range of 70 to 80. However, Mr Dolphin was found to have had mental capacity to make a gift to Ms Hinks because he understood the concept of ownership.

¹²⁰ NCA (n 84) 6 ff.

¹²¹ See Laura Hoyano, ‘*R (on the application of E) v DPP* [2011] EWHC 146’ [2012] Crim LR 39, 43, for an argument that ‘vulnerability to sexual exploitation online is not amenable to a simplistic analysis’.

aggravated by exploiters themselves or by the means they use. For example, human trafficking seems to provide a pattern for vulnerability. In principle, identifying objectively vulnerable persons should be kept logically distinct from determining whether a person's vulnerability has been aggravated by another person, institution or societal factor. Needless to say, the distinction will be difficult to draw in practice.

3.5 Dishonestly targeting vulnerable persons

We turn next to an exploiter dishonestly targeting objectively vulnerable persons. The paradigm of strong acquisitive exploitation ought to focus on already vulnerable persons being dishonestly targeted as 'easy prey', and exploiters engaging in predatory conduct. The argument is that it is not as objectionable to prey on opportunities provided by non-vulnerable persons, as it is to dishonestly prey on opportunities provided by objectively vulnerable persons (such as a young child or a mentally disordered person). But the key question is: why is a separate criterion of an already vulnerable person necessary in addition to an exploiter's dishonest targeting of another person?

No doubt it is wrongful to target objectively vulnerable persons. One way of focusing this argument is to say that this pre-legal moral norm seems to be supported in the criminal justice system.¹²² For example, the offence of trafficking people for exploitation found in section 4(1)(a) of the Asylum and Immigration (Treatment of

¹²² Is it possible to identify a pre-legal norm? For example, Green, *Thirteen Ways* (n 13) 95-96, argues that 'the norm against stealing does have a pre-legal, natural existence, but that the norm is so thoroughly mediated and shaped by the law of property and by other cultural and social forces that we cannot make much practical sense of it without reference to such influences. In other words, the relationship between the law of theft and the moral concept of stealing is properly understood as a reciprocal one – with the former shaped by the latter, and vice versa.' cf Douglas Husak, *Overcriminalization* (OUP 2008), who finds support for his wrongfulness constraint from within the general part of the criminal law.

Claimants, etc.) Act 2004 penalizes individuals who force, threaten or deceive another person in order to induce that person to provide services or benefits of any kind. Section 4(4)(d) punishes persons who use or attempt to use another person for any of the purposes already identified, having chosen that person on the grounds that ‘he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose’.¹²³ There are no property offences in England and Wales that apply specifically to the ‘vulnerable’. However, making vulnerability a key component of an analytical account of acquisitive exploitation is hardly counter-intuitive. In other jurisdictions (for example, Germany, France, some U.S. states) there are such offences. The French Penal Code has an offence of fraudulent abuse of the vulnerable. Article 223-15-2 of the Penal Code states that it is an offence to fraudulently abuse:

[T]he ignorance or state of weakness of a minor, or of a person whose particular vulnerability due to age, sickness [or] infirmity...is apparent or known to the offender...in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him.

And section 243 of the German Criminal Code sets out the offence of aggravated theft, which occurs if the offender ‘steals by exploiting the helplessness of another person’.¹²⁴

It should also be noted that the targeting of vulnerable persons is also addressed through sentencing principles in England and Wales. The Sentencing Guideline Council’s report, *Overarching Principles: Seriousness*, indicates that deliberately

¹²³ And there are examples of the importance of ‘targeting’ in the property offences sphere. Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 163, notes that ‘The offence of burglary itself seems almost to be overshadowed by the focus on the targeting of the vulnerable victim (aggravated culpability) and the effects on such victims (aggravated harm).’

¹²⁴ For a full list of reasons, see s 243. Note that s 243(2) includes a *de minimis* argument, stating that an exceptionally serious case under s 243(1) will be excluded ‘if the property is of minor value’.

targeting a vulnerable victim is a factor indicating higher culpability, and that greater harm may be present.¹²⁵ The Guidelines state that ‘An offender is more culpable if he or she deliberately targets a victim who is vulnerable as a result of old age, youth or disability and there is a more than usually serious degree of harm where the victim is particularly vulnerable.’¹²⁶ And this position attracts public support. A 2012 Sentencing report found that both public opinion and victims of sexual abuse viewed offences committed against young, elderly or vulnerable victims as a necessary aggravating feature in sentencing cases.¹²⁷

It is suggested here that dishonestly targeting an objectively vulnerable person, with accompanying predatory conduct, is a form of cheating. Stuart Green puts forward the following account of cheating, ‘[D] must (1) violate a fair and fairly enforced rule, (2) with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship.’¹²⁸ We find support for this argument in Robert Goodin’s work, analyzed below. But dishonesty raises the moral stakes: first, it increases the seriousness of the wrong; secondly, it provides a clearer link to vulnerable persons. In other words, the addition of ‘dishonesty’ establishes this instantiation of wrongful exploitation more firmly as a form of cheating. Stuart Green powerfully argues that:

Dishonesty connotes some additional moral content. It suggests that the offender lacked integrity or probity. It conveys a moral sense that is independent of the law. To say that a defendant acted honestly or dishonestly is

¹²⁵ Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004) para 1.22.

¹²⁶ *ibid* paras 1.17, 1.22 and 1.23.

¹²⁷ Sentencing Council, *Attitudes to Sentencing Sexual Offences* (2012) viii.

¹²⁸ Stuart P Green, *Lying, Cheating, Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 58.

to say something more generally about his character as a person, beyond merely his specific acts.¹²⁹

To establish the wrong at the heart of acquisitive exploitation as closely tied to cheating, we need first to establish that there is a pre-legal duty not to dishonestly target vulnerable persons.¹³⁰ This argument accepts the claim that ‘[t]he fundamental form of wrongdoing is the violation of duties’ as its starting point.¹³¹ And if duties exist in relation to certain persons it follows that other persons hold certain rights. The best prospect for justifying the targeting of vulnerable persons part of the argument can be found in Robert Goodin’s work. The relevant moral argument made by Goodin is that there is a negative duty not to play for advantage against a vulnerable person because individuals have a ‘heavy moral responsibility to protect the weaker’.¹³² On Goodin’s account, A holds a duty if A knows that B is considered vulnerable in relation to A. Therefore, the status of the parties *in relation to each other* is an essential concern. Goodin’s argument is that a person is vulnerable in relation to an exploiter if their interests are strongly affected by an exploiter’s ‘actions and choices, regardless of the particular source of their vulnerability’.¹³³ It is clear just how central subjective ‘vulnerability’ is to Goodin’s thesis. This is because, absent B’s vulnerability, this negative moral duty will not attach to an individual. A broad view of vulnerability is taken, and this is consistent with a subjective analysis of vulnerability:

Some people are vulnerable to other people quite generally a large proportion of

¹²⁹ Green, *Thirteen Ways* (n 13) 11.

¹³⁰ See Kenneth Simons, ‘On Equality, Bias Crimes, and Just Deserts’ (2000) 91 *Journal of Criminal Law and Criminology* 237, 247-48.

¹³¹ Grant Lamond, ‘What is a Crime?’ (2007) 27 *OJLS* 609, 621.

¹³² Goodin (n 50) 167. There is also a positive duty: A is under a duty to take positive measures to come to B’s aid in circumstances where B is vulnerable. It is not discussed further here.

¹³³ *ibid* 187.

the time and with respect to a broad range of threats to their well-being. Other people are vulnerable only to particular other people, or only in passing circumstances, or only with respect to a narrow range of threats. The more vulnerable people are to you, and you alone, in any given situation, the stronger your duty to protect them in that circumstance.¹³⁴

The proposed definition of breach is that A has violated norms which govern his social interaction with B, and this is to be judged objectively.¹³⁵ Specifically, A must be appraised on the basis of whether he has engaged in ‘fair play’. The fair/unfair play distinction is drawn as follows:

‘Fair play’ is play according to the formal rules and informal ethos of the game. ‘Unfair play’ is play at variance with those standards. ‘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.¹³⁶

Therefore it is clear that Goodin’s interest is not in elucidating why dishonestly targeting objectively vulnerable persons is morally problematic. Goodin is concerned purely about subjective vulnerabilities, i.e. those which exist in the context of an exploiter-exploitee relationship. To this end, Goodin identifies four circumstances where a person may be vulnerable in relation to an exploiter. In these situations a negative moral duty would apply. It is not necessary to subscribe to the subjective part of Goodin’s analysis to learn something about this negative moral duty. What can be learned about a pre-legal moral norm which stipulates that it is wrong to dishonestly target objectively vulnerable persons? Some brief analysis of two of Goodin’s scenarios will be helpful to this task. They are selected to show that the moral duty should be guided by reference to unfair contest rather than by reference to an idea of

¹³⁴ *ibid* 196 fn 33.

¹³⁵ *ibid* 186. If indeed it is possible to settle on community norms of fair behaviour. Consider the difficulties in determining the meaning of ‘dishonesty’ in the law of theft (see Theft Act 1968, s 2 and *R v Ghosh* [1982] 2 All ER 689), and see ss 2.4.2(A) and 2.4.3 of this thesis for discussion.

¹³⁶ Goodin (n 50) 183.

unfitness.¹³⁷

Goodin's first suggestion is that it is 'wrong to play for advantage against other players who are unfit or otherwise unable to play in games of advantage'.¹³⁸ How does Goodin assess 'unfitness'? Consider the two specific examples given. The first is that it is unfair for dieters to be offered chocolates at low prices at supermarket checkout counters because it plays on their weakness of will. The second is that unfitness might partially explain 'why we think that drug pushers exploit addicts, and snake-oil salesmen exploit cancer patients: those people are in "no position to bargain"'.¹³⁹ However, it is doubtful whether Goodin identifies unfitness in the first example.

It is bizarre to say that dieters are unfit to play in games of advantage. The problem is that Goodin infers from their intention to diet that they have a weakened will to resist cheap sugary hits. But this point rests on faulty logic. It makes no conceptual space for the individual who might persistently diet but who is not frequently disposed to give in to their will. If anything the dieter might have greater strength of will than the general population. The point is that Goodin has not actually shown that B's will has been weakened—that would require B to give in to an offer which he finds tempting, and the example misses out this point. It is possible that the second example does not utilize the same logic and so fares better. The argument is that B is unfit and is therefore vulnerable because he is caught up in a position of extremity and/or addiction. Using the ordinary meaning of the word 'addict' would mean that B has repeatedly given in to the urge to take drugs in the past and would therefore qualify as 'unfit'.

¹³⁷ For analysis of all four circumstances, see Jennifer Collins, 'The Contours of Vulnerability' in Jonathan Herring and Julie Wallbank (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013).

¹³⁸ Goodin (n 50) 185.

¹³⁹ *ibid* 185.

Goodin's example is helpful to the extent that it serves as a reminder against generalizations. We cannot justify a moral duty not to dishonestly target objectively vulnerable persons across the board on the basis that vulnerable persons are unfit. No doubt in some cases an objectively vulnerable person will be unfit. That is, 'unfit' in the sense that he is not able to advance his own interests, or is impaired from doing so.¹⁴⁰ Even then, this reading of 'unfitness' will need to be made perspicuous, and may be better elucidated by reference to lack of capacity or a similar idea. But it was argued above that an objectively vulnerable person may be able to withstand the advances of a would-be-exploiter. In fact, they may be as robust as a non-vulnerable person in practice. Using the notion of 'unfitness' would require an unnatural adaptation of the term. 'Unfitness' cannot be an adequate justification for a negative duty not to dishonestly target vulnerable persons for exploitation.

By contrast, Goodin's other example highlights a compelling idea:

Even in games of sport, you play only those who are a fair match for you in size or skill. This, perhaps, is the central objection to all forms of economic exploitation. In cases involving vastly disproportionate bargaining power, we think it inappropriate (unfair, exploitative) for the strong to press their advantage against a hopelessly outmatched opponent.¹⁴¹

In this passage the key idea is that B is vulnerable in circumstances where A plays for advantage against him, where B is 'no match for [A] in games of advantage'.¹⁴²

Moving away from the example of economic exploitation, it is possible to conceive of many different variations of interpersonal relationships, with it being fairly typical that

¹⁴⁰ Do we hold a moral conviction that a drug addict is 'unfit' if at some point in time he chose to take drugs (i.e. ruling out children who are born with addiction to drugs because of their treatment *in utero*)? And ought addiction associated with drug-taking be regarded as having more serious effects on capacity than addiction to sugar and fattening foods?

¹⁴¹ Goodin (n 50) 185.

¹⁴² *ibid* 185.

one party is not a match for the other. However, Goodin's account does not shed light on the reasons for saying that one party is no match for a stronger party. For example, B may be vulnerable because of the circumstances in which he finds himself in relation to A. On other occasions, A's involvement with B may also affect whether B is vulnerable (or whether B's vulnerability is heightened). This may happen where A is at fault. For example, trafficking another person into or out of the United Kingdom may make a person vulnerable to sexual or labour exploitation. The idea of 'vastly disproportionate bargaining power' draws a limit on vulnerability. Since we do not often require parties to transactions to have exactly the same level of bargaining power, vulnerability could be understood too loosely if any level of bargaining imbalance will suffice.

In the context of objectively vulnerable persons, the same concern with seriously unequal contest must hold.¹⁴³ While it may be morally wrongful to intentionally hit a fit adult, there is something that is *always* morally wrongful about hitting a mentally disordered person or a young child. There comes a point where a moral norm is persuasive that some persons are less able to protect their own interests. A vulnerable party is simply not a match for the stronger party. And the way to ensure that this moral norm is respected is to acknowledge that some interactions between persons should not be pursued because the setting is one of unfair contest. This helps us to answer why it is wrong of exploiters to dishonestly target vulnerable persons. As was shown in section 3.2, an exploiter seeks to target a vulnerable person as a way into acquisitive exploitation. They are fully prepared to avail themselves of the opportunities provided by a vulnerable person, and then proceed to do so. An exploiter

¹⁴³ The line as to who is an 'unmatched opponent' is drawn by who is determined to be objectively vulnerable.

violates a norm against unfair contest, since he dishonestly secures and uses a forum where parties are seriously and unevenly matched. An objectively vulnerable person is less able to protect their interests in this scenario. An exploiter breaches a negative moral duty not to target vulnerable persons; an exploiter has set out to dishonestly ‘violate a fair and fairly enforced rule’.¹⁴⁴

What are the implications of this argument? One possible argument is that dishonestly targeting vulnerable persons will cause more harm to vulnerable persons than it would cause to non-vulnerable persons. This type of argument was put forward by the Court of Appeal in *R v Tomney*.¹⁴⁵ In *Tomney* the defendants appealed their sentences for offences of fraud, conspiracy to defraud, and cheating the public revenue. The facts assumed a general unpleasant pattern: members of the Tomney family ‘targeted elderly vulnerable people, in particular women, often living alone, and then offered to carry out work to their driveways which was of little or no value for extortionate amounts of money’.¹⁴⁶ In fact, their aim was then to commandeer additional remedial work, at extra cost to the client. The extra work was often unnecessary and ineffective. For example, Brian Tomney and others made a deal with an elderly Mr Smith to repair his driveway. Instead of using sealant, they poured milk over the driveway. The work was of no value, though Mr Smith paid £800 for it. Subsequently Mr Smith was ‘pressurized’ into providing an excellent reference for the Tomneys’ work, and this reference was put online so as to mock Mr Smith.¹⁴⁷ In

¹⁴⁴ Green, *LCS* (n 128) 58.

¹⁴⁵ *R v Tomney (Brian)* [2012] EWCA Crim 2545. The language used by sentencing judges is particularly vivid in relation to those persons who target vulnerable persons, see *Archbold: Criminal Pleading, Evidence and Practice 2013* (61st edn, Sweet and Maxwell 2013).

¹⁴⁶ *R v Tomney (Brian)* (n 145) [32].

¹⁴⁷ *ibid* [54].

another instance, work carried out on 88-year-old Ms Molloy's garden wall led to Brian Tomney procuring an agreement to buy her house below market value. This happened within thirty minutes of Mr Tomney meeting Ms Molloy. At trial, Mr Tomney argued that the discount on the house price was due to an attached tenancy, and the fact that he was to do thousands of pounds of repairs. In upholding the sentences, the Court of Appeal said:

One wonders if any of the appellants have the slightest idea of the effect upon an elderly person of being cheated in this way, sometimes of their life savings. Once the elderly person realizes what happens, even if they are suffering from dementia, it can be humiliating for them. It can destroy their sense of dignity and their confidence. It can often lead to a significant deterioration in their mental health. Those who prey on the elderly and the vulnerable can expect little mercy from this court.¹⁴⁸

Be that as it may, does dishonestly targeting objectively vulnerable persons lead to more harm? An exploiter has dishonestly used an exploitee in order to pursue his own goals. Admittedly, an exploiter may find it easier to establish a position of advantage in relation to an objectively vulnerable person. Martin Wasik speculates that it will often be the case that 'targeting of a vulnerable victim will be associated with the further aggravating factor of breach of trust, such as where a child or elderly person has been abused by a carer'.¹⁴⁹ But for all of that, there is still no necessary alignment between a person being objectively recognized as 'vulnerable', and a person having certain subjective vulnerabilities in relation to their exploiter—the latter the means of an exploiter gaining a position of advantage over an exploitee. The gist of the wrong is tied to the fact that, by dishonestly targeting an objectively vulnerable person, an exploiter *hopes* to gain easy advantage over this person. There is the sense that there is

¹⁴⁸ *ibid* [85].

¹⁴⁹ Martin Wasik, 'Crime Seriousness and the Offender-Victim Relationship in Sentencing' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsch* (OUP 1998) 114.

a better chance of gaining advantage over an objectively vulnerable person where he has acted dishonestly, though this may not be played out in practice.¹⁵⁰ But there *is* increased culpability where a vulnerable person is dishonestly targeted by an exploiter, as discussed above. This is because an individual is hoping that an objectively vulnerable person will be an ‘easy target’ for exploitation. We also argued that those who prey upon the vulnerable are likely to have a secondary reason for doing so, beyond the greater likelihood of the exploiter succeeding in his goals. This is because an objectively vulnerable person may be less likely to report their ill-treatment and/or it may be difficult to build a case based upon their testimony and evidence.

3.6 Predatory conduct: illustrating the means used

In sections 3.4 and 3.5 we have critically examined why it is important that an exploiter dishonestly targets objectively vulnerable persons, and how vulnerable persons are to be identified. We now need to examine the practical workings of predatory conduct. Recall that an exploiter may need to use conduct for two different purposes. The first is to establish an advantage over an exploitee, utilizing an exploitee’s particular vulnerabilities in relation to him. The second is to use an exploitee’s attributes to further his goals. It was argued in section 3.2 above that both elements must always be present in a successful case of acquisitive exploitation, but an exploiter may find that he does not have to do much to establish his advantage over an exploitee. In cases where an exploiter engages in both aspects, it may be impossible to distinguish the two moves in practice.

¹⁵⁰ This is because an objectively vulnerable person will not necessarily be any more ‘useful’ to an exploiter.

The means used by an exploiter to open up an opportunity may be independently wrongful. For example, strong coercive conduct may be an independent wrong. So on some occasions the wrongful nature of predatory conduct is *itself* a form of wrongdoing. This begs the following questions: in cases in which significant deception or coercion exists, what does acquisitive exploitation add to the analysis? Is acquisitive exploitation a distinct wrong, or does it mainly go to the gravity or seriousness of the wrongs of deception or coercion, for example? Clearly wrongful acquisitive exploitation may overlap with independently wrongful deception or coercion. However, if there is to be acquisitive exploitation then the other features of the normative account of the exploitative wrong (set out in section 3.2 of this thesis) must be satisfied. In other words, the wrongful method of using a person via acquisitive exploitation is distinctive. It requires dishonest targeting of a vulnerable person, with an exploiter intending, by the targeting, to open up opportunities provided by an exploitee in order for an exploiter to pursue his own goals. An exploiter accordingly opens up opportunities by engaging in predatory conduct. It is clear that predatory conduct (which may involve independently wrongful conduct) is only one part of this serious exploitative wrong. For this reason, independently wrongful coercion or deception does not overshadow the distinctiveness of the exploitative wrong even if they are present.

We further argue that it is likely to be over-simplistic to assume that there will be significant deception or coercion in cases of acquisitive exploitation. As we will see below, the independent wrongfulness of the means used will not always be clear-cut. For example, the independent wrongfulness of manipulative conduct is less widely recognized and less convincing than strong coercive conduct. However, it is imperative to scrutinize these assumptions and their implications. Coercion and deception have

been identified as independent grounds for property offences in England and Wales. But manipulation of the vulnerable might provide an independent basis for criminalizing acquisitive exploitation. We will return to these arguments below and again in chapter 5 of this thesis. It is important to note at this stage that if acquisitive exploitation were to be criminalized, then predatory conduct would be an element of the crime to be proven. Predatory conduct is not simply a moral concept that underlies the acquisitive exploitation, but is itself part of acquisitive exploitation.

It is now important to think about what predatory conduct may be employed. It is hardly self-evident what types of conduct will actually ‘use’ vulnerable persons in the sense that an exploitee furthers an exploiter’s goals. We will have to focus on identifying conduct on the basis that we can expect it to use vulnerable persons in practice. What types of conduct are relevant? The literature on interpersonal exploitation highlights a range of relevant conduct which includes: coercion, force, threats, duress, undue influence, intimidation, harassment, deception, false pretence, false representation, and manipulation.¹⁵¹ I will focus on what I take to be four important types of conduct, but my analysis is not intended to be exhaustive. They are: coercive conduct (including conduct which threatens, pressurizes or intimidates); deceptive practices; manipulative techniques; and abuse of positions of trust.¹⁵² Inevitably there will be overlaps between these types of conduct. It is also important to highlight that conduct may lie along a spectrum: conduct may at first be used quite

¹⁵¹ These types of conduct have been identified as the means of committing financial exploitation of the elderly in several U.S. states. For example, Missouri’s elder abuse statute, No. 689, states that financial exploitation can be committed against an elderly or disabled person by ‘deception, intimidation, undue influence, or force’.

¹⁵² Another possibility is to consider the relevance of ‘stealing’ as another form of predatory conduct; however, it is doubtful whether ‘stealing constitutes an independent moral norm’ – see Green (n 128) 89; Bernard Gert, *Morality: A New Justification of the Moral Rules* (OUP 1988).

innocently, but may come to be used in a predatory manner where an exploiter's goals develop.¹⁵³ This brief introduction to this section has sought to convey that, while it is necessary to begin to set out and debate the means used, neither the connections nor the conclusions we can draw from them are conceptually tidy. It is to this task we now turn.

3.6.1 Coercive conduct

One means of engaging in predatory conduct is by using coercive conduct or conduct which threatens, pressurizes or intimidates. Generally speaking, coercive conduct undermines individual freedom because it uses 'the threatened imposition of a disadvantage as [the] means of securing a particular outcome'.¹⁵⁴ Grant Lamond has argued that coercing a person is to 'deliberately interfere with his actions through the use of force or threats, and the nature of this interference gives rise to the need to provide a specific sort of justification appropriate to it'.¹⁵⁵ Clearly a judgment is required to decide whether conduct is coercive, and Lamond argues that this involves considering the 'complex mix of judgments we intuitively make about what is and what is not an instance of coercion'.¹⁵⁶

¹⁵³ A similar point has been made in relation to forced labour, see Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' (Joseph Rowntree Foundation 2010) 4.

¹⁵⁴ Grant Lamond, 'The Coerciveness of Law' (2000) 20 OJLS 39, 54.

¹⁵⁵ Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 Legal Theory 35, 36.

¹⁵⁶ Grant Lamond, 'Coercion' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 642.

It seems plausible to say that there is a spectrum of coercive conduct. Coercion is a method which is morally wrong in its strong form, but which is more morally ambiguous as threats become less compelling. Thus the question as to whether this type of conduct uses vulnerable persons may depend on the intensity of coercive conduct. It is arguable that strongly coercive conduct, which relies upon a blend of threats, pressure and intimidation, might have the strongest connection with successful use of vulnerable persons.¹⁵⁷ We can query whether the same holds true for less strong types of coercive conduct, which may employ pressure without an accompanying threat, for example. There is also the question as to whether engaging in coercive conduct is independently wrongful. For example, stronger forms of coercive conduct may be the source of a second type of wrong in our account of acquisitive exploitation, whereas weaker forms of coercive conduct may not support an argument that there is a further type of wrongdoing.

While there is no guarantee that even strongly coercive conduct will use a vulnerable person, it is useful here to shed light on what is involved in strongly coercive conduct. What would be a strong account of coercive conduct? There is scope for debate, but threats, pressure and intimidation would plausibly feature in a strong account. Elements of using threats in relation to the will of another person and applying pressure are readily associated with coercive conduct.¹⁵⁸ It seems reasonable to add that intimidation can undermine individual freedom so it should also be considered. In

¹⁵⁷ Mitchell Berman, 'The Normative Functions of Coercion Claims' (2002) 8 *Legal Theory* 45, 46, '[T]he single unified conception of coercion that theorists seek...is of little, if any, normative significance.'

¹⁵⁸ See Robert Nozick, 'Coercion' in Sidney Morgenbesser, Patrick Suppes and Morton White (eds), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1968) 440; Alan Wertheimer, *Coercion* (Princeton University Press 1987). For a different account which focuses upon an individual's power to coerce, see Scott Anderson, 'The Enforcement Approach to Coercion' (2010) 5 *Journal of Ethics and Social Philosophy* 1.

coercion's strong form, then, we are seeking to identify strong threats accompanied by the application of serious pressure and/or intimidation.

Turning first to the nature of a threat, a threat is used in order to force another person 'to act against their will' and typically 'as the first party wishes, rather than as they would choose themselves'.¹⁵⁹ Those who have written about coercive conduct have acknowledged that threats can be deployed using physical force or rational compulsion.¹⁶⁰ No doubt we have a clearer sense of threats using physical force. Threats can also create rational compulsion, but not because they 'deprive the recipient of the *ability* to refuse to comply'.¹⁶¹ Threats may appear conditional if an individual 'is given a choice between doing what is demanded or opting instead for the threatened consequences'.¹⁶² The salient point, however, is that the person who is threatened 'does not regard suffering the consequences as a reasonable or acceptable alternative to doing as demanded'.¹⁶³ Furthermore, threats can be explicit or implicit.

The argument in favour of linking coercive conduct with successful acquisitive exploitation hinges on there being a strong or significant threat in the context of an interpersonal relationship. Scott Anderson argues that a threat is most significant where the following two factors are at a high level, 'the threat's credibility (the likelihood that the threatener can and will execute the threat) and the magnitude of the harm or

¹⁵⁹ Lamond (n 156) 642.

¹⁶⁰ *ibid* 642.

¹⁶¹ *ibid* 643.

¹⁶² Nozick (n 158) 440.

¹⁶³ Lamond (n 156) 643.

disadvantage threatened'.¹⁶⁴ Anderson argues that if a threat is unbelievable or of no real practical importance, it does not 'create coercive pressure' and is not 'psychologically potent for the coercee'.¹⁶⁵ So a threat becomes significantly more potent, and significantly more likely to enable an exploiter to gain an advantage over a vulnerable person, or to use a vulnerable person, where it is both credible and made in the context of an existing relationship between a coercer and coercee.

Another aspect of strongly coercive conduct is the idea of putting pressure on another person's will. Pressure is the means by which an individual is forced 'to act as the coercer wants them to act, and presumably contrary to their own intention'.¹⁶⁶ It seems clear that applying pressure on another person can take various forms. Theorists who have written about coercion have recognized that there is no clear way of identifying the relevant level of pressure necessary for coercive conduct.¹⁶⁷ There is, however, an argument that strong pressure is not necessary in relation to objectively vulnerable persons. This is because already vulnerable persons may have a tendency to try to please those who stand in a more powerful position in relation to them and/or an inability to resist an exploiter's targeting. So the level of pressure required for successful exploitation may in fact be quite modest.

Closely connected to strongly coercive conduct are intimidating behaviours. The focus of intimidating conduct is subtly different from the application of pressure. Intimidating conduct does not rely upon pressure or a threat, though it may be

¹⁶⁴ Anderson (n 158) 18.

¹⁶⁵ *ibid* 4 and 18.

¹⁶⁶ Joel Feinberg, 'Coercion' in Edward Craig (ed), *Routledge Encyclopedia of Philosophy*, vol 2 (Routledge 1998) 387.

¹⁶⁷ Lamond (n 154) 40, and Wertheimer, *Coercion* (n 158) 217-19.

accompanied by either. Rather, intimidating behaviours are used to create fear, and this aim may be achieved using a wide range of bullying tactics which include aggression. Intimidation involves one party making clear that they have significant power at their disposal. Again it is clear that there is a spectrum of intimidating conduct. There are questions as to whether intimidating conduct must be of a sufficiently serious nature to use a vulnerable person. As in the case of pressure, it may be easier to use a vulnerable person by way of intimidation or pressurizing techniques simply because a vulnerable person may be more susceptible to these types of influences.

There is an argument then that strongly coercive conduct will use vulnerable persons for the purposes of our account of acquisitive exploitation. This type of conduct may be used to produce detrimental physical, psychological or financial effects on a vulnerable victim. For the purposes of this account, however, the use of an exploitee to further an exploiter's goals will suffice. No doubt weaker threats, pressure and intimidation can also be used, independently or in combination, as means of establishing advantage or in order to use an exploitee's attributes. But *prima facie* there may be a less compelling case for linking weaker forms of coercive conduct with successfully exploiting vulnerable persons.

However, the use of threats should be handled carefully. Given the broad scope for understanding 'threats' as including conditional offers, we can envisage vulnerable persons being used by conditionally threatening conduct. Recent research on grooming processes in the context of sexual exploitation has shown the strong influence of implicit threats which are conditional within the context of intimate relationships.¹⁶⁸

¹⁶⁸ Barnardo's, *The Tangled Web* (n 33). Of course, it should be said that not all conditional offers will actually be threatening—for example, driving up the price of essential goods after a storm.

For example, research has highlighted that young persons who have been groomed may be afraid to report the nature of their relationship with a groomer. This is because a groomer has sought to create an implicit understanding that if they do so a vulnerable person's own involvement in criminal activity will be revealed. It seems that using implicit threats to expose criminal involvement is a powerful reason why predatory conduct goes 'under the radar'.¹⁶⁹ There is an added twist. Conditional threats, be they implicit or explicit, may tend to prompt vulnerable persons to 'respond'. This is significant, since the response may appear to constitute consent. The relevance of consent to acquisitive exploitation will be thoroughly examined in chapter 4 of this thesis. For the purposes of this discussion, however, coercive conduct which involves the use of threats, or independently threatening conduct, must also have a strong association with successful acquisitive exploitation.

We should add that this discussion is not a debate whether coercive conduct is *best* described as predatory conduct which uses already vulnerable persons. Strong coercion itself is regarded as a serious wrong, and a number of criminal law offences target coercive conduct which uses threats and pressure.¹⁷⁰ Undoubtedly there are reasons independent of acquisitive exploitation to be concerned about coercive conduct. This raises the point that coercing a vulnerable person is likely to be a wrong *additional* to the wrong of using a vulnerable person.¹⁷¹ However, there may be difficulty determining an exact cut-off point where we can say that the coercive conduct is not in

¹⁶⁹ Frank Perri and Richard Brody, 'The Optics of Fraud: Affiliations that Enhance Offender Credibility' [2012] *Journal of Financial Crime* 355, 359, argue that in relation to affinity fraud, fraudsters often 'mislead victims by convincing them that, by cooperating with the government to investigate the discovered fraud, they may be persecuted for their religious beliefs or their race'.

¹⁷⁰ For example, Theft Act 1968, ss 8 and 21.

¹⁷¹ Joel Feinberg (n 6) 178 argues that there are four ways of conceptualizing the relationship between exploitation and coercion. For discussion of coercion, see s 4.4.2 below.

itself wrongful, and this will involve the use of moral judgments.

Finally, there is the practical issue of identifying coercive conduct, both as a means of using characteristics or vulnerabilities of vulnerable persons, and as independently wrongful conduct. So long as coercive conduct is visible it will be a good indicator of predatory conduct. It can then be assessed to consider whether it leads to acquisitive exploitation. However, doubts can be raised about the open nature of coercive conduct. Implicit threats and conditional offers, subtle pressure, and intimidation may all be difficult to recognize, and measures ought to be adopted to ensure that these types of conduct are identifiable.

3.6.2 Deceptive practices

Deceptive practices may also be employed to ‘use’ a vulnerable person. As we will see, a category of deceptive practices embraces a wide range of conduct, so some types of deceptive practices may have a greater tendency to use vulnerable persons than others. Let us first draw attention to the wide range of deceptive practices. An individual may use deceptive practices in order to deceive another person and this aim may be pursued using active or passive measures. Making a false representation to another person is an active attempt to deceive a person. Failing to correct another person about a key fact which is incorrect is a passive attempt to deceive a person. Neil MacCormick has provided the clearest account of lying, which is an active attempt to deceive.¹⁷² First, there is the need for a serious representation ‘by one person to another’.¹⁷³ This

¹⁷² Neil MacCormick, ‘What Is Wrong With Deceit?’ (1982) 10 Sydney Law Review 5. For discussion of the use of deceptive practices by the police, see Andrew Ashworth, ‘Should the Police Be Allowed to Use Deceptive Practices?’ (1998) 114 LQR 108.

¹⁷³ MacCormick (n 172) 8.

element of seriousness is important because it places the person who is being lied to in a vulnerable position in relation to the individual who is attempting to lie. MacCormick argues that the addressee ‘must actually recognize that the speaker’s utterance of his proposition (or his gesture, or whatever) is intended seriously, and openly so intended’.¹⁷⁴ Finally, if the lie is to be successful it must be ‘taken seriously and believed’.¹⁷⁵

Alternatively, deceptive practices may mislead another person. Again, there can be active attempts to mislead another person (a representation would suffice), or passive attempts to mislead them (such as leaving it open to another person to draw inferences from an omission). Stuart Green argues that actively misleading another person is ‘leading the listener to believe something false by saying something that is either not true or has no truth value’.¹⁷⁶ Green argues that there is a moral distinction between lying and merely misleading, and he has sought to defend this claim with Matthew Kugler using empirical work.¹⁷⁷

How might deceptive practices lead to a vulnerable person being ‘used’? MacCormick argues that active attempts to lie are wrongful because a statement is made ‘which one openly intends to be taken seriously as actually believed by oneself, and to be believed by the speaker’.¹⁷⁸ This is to breach conditions of authority and of

¹⁷⁴ *ibid* 9.

¹⁷⁵ *ibid* 9.

¹⁷⁶ Green, *LCS* (n 128) 80.

¹⁷⁷ Stuart P Green and Matthew B Kugler, ‘Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud’ (2012) 75(2) *LCP* 33.

¹⁷⁸ MacCormick (n 172) 14.

trust which must exist in order for a lie to be believed. Therefore lies can be linked with using vulnerable persons to the extent that they involve ‘disrespect for persons’, which we saw in section 3.5 is key to the wrongfulness of this account of acquisitive exploitation.¹⁷⁹ We can also envisage an exploiter being able to gain advantage over a vulnerable person from lying, such as by deceiving her into giving over financial interests. Arguably, this element of gaining advantage is more clearly met where an individual has a duty not to lie to and/or mislead a vulnerable person, and this duty is breached. In principle, passive attempts to mislead can also be linked with using vulnerable persons. However, there will be cases where it is difficult to say that misleading another person has been used to open up an opportunity provided by a vulnerable person.

Another consideration is whether the use of deceptive practices is independently wrongful. This will depend on the nature of the deceptive practice employed and whether it is successful. MacCormick emphasizes that there are degrees of wrongdoing with regard to lying, to the extent that ‘[S]ome lies actually are trivial lies and more or less trivially wrong. Some are very harmful and thus very wrongful’.¹⁸⁰ However, MacCormick adopts a consequentialist reading of lying, arguing that ‘Although lying is wrongful as a means, it is its intended and foreseen consequences for the victim which are essential to its criminality’.¹⁸¹ This argument takes too many steps for our purposes. We are here concerned with whether lying (as a form of deceptive practice) is independently wrongful. There is a strong case to say that it is. This is because successful lying breaches trust and authority conditions, identified above. A vulnerable

¹⁷⁹ *ibid* 15.

¹⁸⁰ *ibid* 18.

¹⁸¹ *ibid* 15-16.

person believes that he ‘is justified in putting [his] faith’ in a predator.¹⁸² And if that statement is untrue, then a predator is to blame because he has breached his authority position. There is greater scope for debate as to whether misleading conduct is independently wrongful. Stuart Green has argued that misleading conduct is not as wrongful as false representations are because it involves a different dynamic. Specifically, he argues that persons must be responsible for the rational conclusions they draw from misleading conduct.¹⁸³ Jonathan Adler notes that every individual is a ‘rational, autonomous being and so fully responsible for the inferences he draws, just as he is for his acts. It is deception, not lies, that requires mistaken inferences and so the hearer’s responsibility’.¹⁸⁴ I argue that in the case of vulnerable persons, Green and Adler’s arguments do not hold true; misleading *vulnerable* persons may be wrongful predatory conduct. It is important not to assume that this is because objectively vulnerable persons are unable to engage in free and informed decision-making. Nevertheless, this form of conduct ought to be considered predatory because there is the added concern that objectively vulnerable persons may be unable to self-protect in the way envisaged by Green and Adler. This was the central theme of section 3.5, when we defended the wrongfulness of an exploiter dishonestly targeting a vulnerable person by predatory conduct.

3.6.3 Manipulative techniques

A third category, manipulative techniques, can be linked with using vulnerable persons. Manipulative techniques are used in order to influence behaviour and a number of

¹⁸² Green, *LCS* (n 128) 79.

¹⁸³ *ibid* 79.

¹⁸⁴ Jonathan Adler, ‘Lying, Deceiving or Falsely Implicating’ (1997) 94 *Journal of Philosophy* 435, 437.

techniques can be used to achieve this conditioning aim.¹⁸⁵ For example, manipulative techniques may utilize deceptive techniques or pressurizing behaviour. However, there is also something distinctive about manipulative techniques which means they stand apart from the conduct we have considered so far. This distinctiveness is in part based upon the subtlety of this type of conduct. In his important article on manipulation, Joel Rudinow writes that manipulation is accompanied by an air of mystery.¹⁸⁶ Rudinow argues that manipulative techniques seem ‘delicate, sophisticated, even artful in comparison with the hammer-and-tongs crudity of coercion’.¹⁸⁷ The assumption is that we cannot exhaustively analyze the diverse forms that manipulative techniques may take, but we can make moves to identify relevant characteristics which may link up with the successful exploitation of vulnerable persons.

One feature of manipulative techniques is that they typically involve an information advantage, possessed by the person who is engaging in the conduct. It is easier to engage in successful manipulation where the individual who engages in the conduct knows what the person they are manipulating will find tempting.¹⁸⁸ Michael Kligman and Charles Culver argue that this is to be aware of ‘the manipulable features of [another person’s] motivational system’.¹⁸⁹ No doubt exploiters rely on this feature of an informational advantage. If an individual has knowledge of an exploitee’s vulnerabilities in relation to him, and of attributes which are ripe to be used, it will be easier to exploit.

¹⁸⁵ Joel Rudinow, ‘Manipulation’ (1978) 88 *Ethics* 338, 339.

¹⁸⁶ *ibid* 339.

¹⁸⁷ *ibid* 339.

¹⁸⁸ *ibid* 346.

¹⁸⁹ Michael Kligman and Charles Culver, ‘An Analysis of Interpersonal Manipulation’ (1992) 17(2) *Journal of Medicine and Philosophy* 173, 187.

It might be argued that manipulative techniques need to be covert. For example, Anne Barnhill argues that it is a key feature of manipulation that ‘the manipulated person doesn’t realize that she’s been influenced by another, or doesn’t realize the way in which she’s being influenced.’¹⁹⁰ This intuition can be doubted. Surely covert behaviour is not the only type of conduct which can lead to this type of influence?¹⁹¹ Probably the most that can be said is that manipulative techniques may involve a spectrum of conduct, including both overt and covert behaviour. The conduct of an individual can be increasingly linked with manipulative techniques where ‘the communicative stance or approach taken by A towards B loses [its] straightforward and open quality’.¹⁹² Moreover, there is scope for debate about whether fully overt manipulative conduct is independently wrongful. Patricia Greenspan argues that a person may know everything they ‘need to know in order to weigh [their] reasons properly and yet still have a complaint’.¹⁹³ This is because their ‘autonomy was violated, just insofar as distracting influences were introduced into [their] deliberations, even if [they] knew enough and had sufficient self-control to dismiss their force as reasons’.¹⁹⁴ Arguably in this scenario the conduct is less wrongful. So it is possible to envisage a spectrum, with manipulative techniques wrongful at only one end of the spectrum. At this ‘weak’ end of the spectrum we can also highlight manipulative techniques which are ‘paternalistic’, such as where the targeted person ‘may not

¹⁹⁰ Anne Barnhill, ‘You’re Too Smart to be Manipulated by This Paper’ (Draft for presentation at the Bowling Green Applied Ethics Workshop) 8 <www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/philosophy/documents/conferences/2012/what-manipulation.pdf> accessed 29 March 2015.

¹⁹¹ See Patricia Greenspan, ‘The Problem With Manipulation’ (2003) 40(2) *American Philosophical Quarterly* 155, 158. cf Rick Bigwood, *Exploitative Contracts* (n 11) 134, who argues that manipulation is typically hidden from a manipulee.

¹⁹² Kligman and Culver (n 189) 186-87.

¹⁹³ Greenspan (n 191) 159.

¹⁹⁴ *ibid* 159.

initially share the end toward which he is manipulated but *would* share it if he saw the overall practical picture'.¹⁹⁵

A further feature of manipulative techniques is that there is a link between the relevant manipulative conduct and the person who engages in it. This becomes confusing when the source of influence *appears* to originate from the person who is manipulated, such as where the influence appears to be 'supplied by the manipulee's psychology rather than by the manipulator himself'.¹⁹⁶ However, the relevant question is whether the element of psychological manipulation can be linked back to a manipulator. It is through the manipulator that 'the manipulee is deluded about...the extent to which he is the agent of his action: the agency of others is to some degree "masked"'.¹⁹⁷ Identifying this causal nexus will not always be straightforward.

Now that we have highlighted some key characteristics of manipulative techniques we can ask how this type of conduct can be employed to use vulnerable persons in cases of acquisitive exploitation.¹⁹⁸ We have seen that manipulative techniques often involve a manipulator holding an information advantage. The point is that manipulative techniques isolate a relevant weakness in a person in order to influence their behaviour. For example, an individual knows an objectively vulnerable person's weaknesses, preferences etc., and uses manipulative techniques to open up the opportunities a vulnerable person provides. An informational advantage increases the

¹⁹⁵ *ibid* 155.

¹⁹⁶ *ibid* 158.

¹⁹⁷ *ibid* 158.

¹⁹⁸ Rudinow (n 185) 345, 'To describe some piece of behavior as manipulative is usually to diagnose or interpret it, to say of the behavior something which calls for support by reference to details of the history and contextual surroundings of the behavior.'

chances that a vulnerable person will be successfully used.

A complication is that manipulative techniques may produce ‘consent’ from the person who has been ‘worked on’. There are difficult questions to address: is this consent valid? Does consent negate successful acquisitive exploitation? We will consider these issues in chapter 4. For now it will suffice to say that in my view the best approach is to recognize that consent may be elicited from a grooming process, and that this consent should not be automatically dismissed because it is linked with predatory conduct. However, when it comes to building an account of acquisitive exploitation lack of consent is not called for.

We should note, however, that the motivations of a person engaging in the manipulative conduct will sometimes not easily be linked with predatory conduct. For example, Patricia Greenspan notes that ‘[m]anipulation is often commended in popular literature as a “people-management” skill’.¹⁹⁹ So manipulative techniques can be used as a means of exercising control over group dynamics, such as where ‘some license to manipulate is granted to an agent who serves in a particular role’.²⁰⁰ Greenspan gives the example of conventions used in order to achieve group consensus in meetings.²⁰¹ Arguably this may amount to a permissible use of another person. We could therefore argue that this type of case will not have a strong connection with predatory conduct, nor therefore with wrongful acquisitive exploitation. An exploiter is not targeting the vulnerable for their own goals in this scenario, and it is therefore not compelling to view this as predatory conduct.

¹⁹⁹ Greenspan (n 191) 155.

²⁰⁰ *ibid* 160.

²⁰¹ *ibid* 160.

Does this distinction between manipulative techniques which constitute predatory conduct and manipulative techniques which do not constitute predatory conduct mean that there is a distinction between inchoate and complete exploitative wrongdoing? Clearly some types of manipulative conduct will not be sufficiently serious to constitute predatory conduct, and that is the argument put forward in this section. Difficult decisions as to what is predatory conduct will need to be drawn and this task cannot be fully resolved in this thesis. However, the exploitative wrong itself is identified by the exploiter's culpability and predatory conduct. The argument in this thesis is that dishonestly targeting a vulnerable person by engaging in predatory behaviour itself *amounts to* (i.e. constitutes) using the vulnerable person. Such exploitation is not the *only* way to use a vulnerable person, but it is one (very significant) way. This preserves our underlying Kantian intuition that the wrongfulness of acquisitive exploitation lies in the use of another person, without requiring a general account of what it is to 'use' another person (a task that Kantians have struggled to fulfill).

By contrast with our discussion of coercive conduct and deceptive practices, there is a weaker case for saying that manipulative techniques are themselves wrongful. The argument is that some types of strongly manipulative conduct may be considered socially acceptable. Specifically, they may not greatly impinge upon a person's ability to live a personally autonomous life. A strong case for saying that manipulative techniques are in themselves wrongful would require the violation of a duty that these techniques ought not to be used, say because of limited capacities of those targeted by manipulative techniques.²⁰²

²⁰² Patrick Todd, 'Manipulation' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Blackwell 2013) 3139, 3140.

3.6.4 Abuse of a position of trust

An exploiter's abuse of a position of trust is another relevant form of predatory conduct. As before, whether conduct in fact uses a vulnerable person will need to be reviewed in the circumstances of a particular case.

A brief outline of the nature of positions of trust was given in section 3.4.1(C) above. I argued that where a person holds a legal position of trust in relation to another, the other individual is automatically vulnerable for the purposes of this account of acquisitive exploitation. Some further elaboration of positions of trust will be helpful here. First, the source of the position (for example, at law or in morality) will dictate the duties and responsibilities of that position, but that does not mean that those duties and responsibilities will be clearly defined. For example, a legal duty *not* to do something may be imposed because a person occupies a position of trust recognized in law. In other circumstances there may be a legal duty to do something because a position of trust has been imposed by law. Imposing positive duties on persons is controversial but is sometimes necessary in order to protect vulnerable persons.²⁰³

The meaning of a 'position of trust' at law can be endlessly debated. Clearly the stakes are raised if the duty attached to the position is positive. In principle, however, holding a position of trust at law which enforces negative duties may also be problematic. For example, former foster parents are under a negative duty not to have sex with their former charges who are under-18 years-old, even though the general age of consent is 16.²⁰⁴ This may be criticized as impeding compliance with the rule of law

²⁰³ For example, Domestic Violence, Crime and Victims Act 2004, s 5.

²⁰⁴ Sexual Offences Act 2003, s 25. 'Family relationships' are defined in s 27 of the Act.

as an ideal. Andrew Ashworth argues that ‘A person may well know that there is a law of sexual offences, and a law prohibiting incest or familial sex, without realizing that it applies to former foster children who are over 16 but under 18.’²⁰⁵ There is scope to grapple with difficult questions about who should be held to be in a position of trust, but this is not the purpose of this chapter.

What amounts to a breach of a position of trust? It is impossible to answer this question in the abstract since the answer will depend upon the nature of the position of trust. Generally speaking, a breach of a position goes against the moral norms and/or legal duties imposed by the position. Following on from the points above, a person can breach their position by failing to do an act which he is obliged to do by virtue of his position. Alternatively, an individual could breach the position by actively doing something that he should not do in his position of trust. How then might breach or abuse of a position of trust be linked with successful acquisitive exploitation? When an individual goes against the expectations of a legal position of trust, his conduct can also be linked with predatory conduct. He thereby seeks to gain advantage over the vulnerable person who is protected by that trust relationship.²⁰⁶ And then, when a particular position of advantage is held in the context of this exploiter-exploitee relationship, a vulnerable person is open to being used.²⁰⁷ As we have seen in section 1

²⁰⁵ Andrew Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid It’ (2011) 74 MLR 1, 10-11.

²⁰⁶ See Sentencing Council, *Attitudes to Sentencing Sexual Offences* (n 127) 52, ‘Where offenders were responsible for the care of older or young people this was considered a breach of trust and therefore an aggravating factor. Being in any position of trust was described as an aggravating factor, because the offender may not have had access to the victim if they had not been in that position. Victims/survivors with learning difficulties were given as an example of vulnerable people; however if the offender had a position of trust such as doctor or teacher, this was also felt to aggravate even if the victim did not have any additional vulnerabilities.’

²⁰⁷ Annette Baier (n 97) 231-32, ‘Exploitation and conspiracy, as much as justice and fellowship, thrive better in an atmosphere of trust.’ The idea of ‘positional grooming’ is discussed as a key finding in NCA, *CEOP Thematic Assessment* (n 84) 5.

above, an exploiter can prey on a wide range of an exploitee's attributes to this end.

3.7 Conclusion

'Wrongful interpersonal exploitation' encompasses a complex set of wrongs. These wrongs are linked by the basic intuition that exploitation involves 'taking unfair advantage of another person'.²⁰⁸ This expresses an important idea, but exploitation's wrongfulness can and should be made specific. The main task of this chapter has been to begin to develop a strong account of wrongful acquisitive exploitation. It is hoped that this is an account which criminal law theorists will debate. I have argued that we should begin with an exploiter's dishonest attack on a vulnerable person, since an exploiter thereby wrongfully secures a forum where parties are seriously and unevenly matched. One should then consider the opportunities presented to an exploiter. Is there an easy pathway to gain? Is an exploiter in a ready-made position of advantage in relation to the person targeted? What attributes of an exploitee can an exploiter use to further his own goals? This allows us to see that there will be a great deal of variety in how an exploiter responds to opportunities. Then, we need to examine how the 'use' of an exploitee furthers an exploiter's goals. Indeed we have seen that the two ideas are best seen as linked.

The practical issues identified in this chapter are difficult. We saw that we will first need to identify who is a vulnerable person. Secondly, the idea of predatory conduct is crucial. It is all well and good to refer to a wide range of conduct used by an exploiter, but links between predatory conduct and acquisitive exploitation must be

²⁰⁸ Feinberg (n 6) 179. See s 1.2 of this thesis for discussion.

elaborated. There are further practical issues, such as the issue of identifying acquisitive exploitation. No doubt this will be awkward, especially since this account does not require gain to an exploiter via profit or loss (though it may be present in practice). It is therefore useful to identify a set of indicators which point towards acquisitive exploitation, in a similar way in which indicators are used to identify cases of forced labour.²⁰⁹ If this strong account of acquisitive exploitation is reviewed in the context of property interests, a relevant set of indicators could include: significant elements of planning (which may suggest deliberate targeting); the identification of vulnerable persons, including persons who have been trafficked (who may be identified as easy bait by exploiters); the withdrawal of a person from friends and family (indicating that they may have some other person exerting influence over them); the loss of a person's bank cards, or personal information given to another person (indicating that their gullibility, kindness etc. has been used by another); the use of visibly coercive, deceptive or manipulative techniques, possibly in an aggressive way (indicating predatory conduct); groups of persons engaging in coercive, deceptive or manipulative techniques (suggesting deliberate targeting). This is a preliminary list, and there is scope for it to be refined further. It follows that all of these scenarios will need to be examined in order to ascertain whether there has actually been acquisitive exploitation.

We have placed a question mark around the role of consent. What amounts to valid consent? How, if at all, is it relevant in exploitative circumstances? How should it be conceptualized as relating to *this* strong account of acquisitive exploitation? These

²⁰⁹ International Labour Organization, 'Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement' (Geneva 2005) 32. See also ILO Convention No 189, *Domestic Workers Convention* (2011). For discussion, see Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 ILJ 67; *CN v UK* (2013) 56 EHRR 24 [80].

issues are key to the success of this account and we turn to them in the next chapter.

Chapter 4

Consent Eclipsed

4.1 Introduction

A strong account of acquisitive exploitation was defended in chapter 3. The modest aim of this chapter is to explain *why* lack of consent is sidelined from *this* account, as opposed to accounts of other types of wrongful interpersonal exploitation. At first glance this omission is provocative. One might expect there to be a close association between acquisitive exploitation and lack of consent, which ought to be reflected in a strong account of the wrong. This expectation could arise because we would anticipate an exploitee not to be able to consent to acquisitive exploitation in the first place or because any consent an exploitee has given is invalid. Is there a strong case for marking out lack of consent in our account of acquisitive exploitation?

Current definitions of other types of wrongful interpersonal exploitation are far from settled on this point.¹ A lack of consent approach has been rejected in the Palermo Protocol's account of trafficking for exploitation, for example.² Article 3(a) defines human trafficking for exploitation without making reference to lack of consent. In fact, Article 3(b) states that any consent present is irrelevant where there has been trafficking in persons. Notably only some concepts which are key to labour exploitation (slavery, servitude, or forced or compulsory labour) require lack of consent. Forced labour is

¹ See the discussion in s 1.3 of this thesis.

² UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

accompanied by lack of consent since it is work ‘exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.³ By contrast, there are stronger reasons to think that lack of consent is important when defining sexual exploitation of young adults aged 16 and over. Anne Marie Carrie, Barnardos Chief Executive, has argued that:

In recent years there has been great progress in addressing [sexual exploitation] at a national and local level, but everyone coming into contact with vulnerable teenagers needs to remember that they are children too, and cannot consent to their own abuse.⁴

We also noted Catherine MacKinnon’s argument in section 1.3.1 of this thesis, that the selling of sex is inextricably linked with a seller’s lack of consent. But looking at how other types of wrongful interpersonal exploitation have been defined is not the only way of determining how a strong account of acquisitive exploitation ought to be constructed. Perhaps it is important to note that we are building an account of acquisitive exploitation linked to English property offences, and that many major property offences in contemporary English criminal law do not require lack of consent as an element.⁵ Is this the reason to sideline lack of consent in a strong account of acquisitive exploitation?

It is argued in this chapter that a lack of consent requirement is excluded from our account because it does not stand up to critical doctrinal analysis in core cases of acquisitive exploitation. It is simply not the case that lack of consent is likely to feature

³ ILO Convention No 29. This was used as ‘a starting point’ for interpretation of forced labour in Article 4 ECHR in *Van der Musselle v Belgium* (App no. 8919/80, Judgment of 23 November 1983) [32]; and *Siliadin* (2006) 43 EHRR 287 [117].

⁴ ‘Grooming Victims “Still Being Failed”, Say MPs’ (10 June 2013) <www.bbc.co.uk/news/uk-politics-22836634> accessed 29 March 2015.

⁵ cf Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (HUP 2013) 105-08, who argues that lack of valid legal consent ‘is a necessary, though not sufficient, condition for theft to occur’.

in central cases of acquisitive exploitation. A process of acquisitive exploitation can realistically elicit apparent consent from exploitees. This is part of exploiters getting exploitees ‘on board’. This is a feature of acquisitive exploitation which was highlighted in chapter 3 of this thesis.⁶ But the next point is that any apparent consent is not necessarily going to be invalid. In fact, there *may be valid consent* on the facts of core cases of acquisitive exploitation. The point is that exploitative conduct, undertaken with the relevant fault, may be just as likely to eclipse *valid* consent as it is to eclipse an exploitee’s lack of consent. In this chapter I explore policy and doctrinal arguments which have been used to resist this reasoning in relation to other types of interpersonal exploitation, arguing that they do not withstand critical analysis in relation to acquisitive exploitation. There is no sound doctrinal argument to say that acquisitive exploitation necessarily requires lack of consent. In fact, valid consent might be found to be present in some cases of acquisitive exploitation. And it is argued that policy arguments should not be the primary basis for constructing our strong normative account of acquisitive exploitation.

If lack of consent is not at the heart of the exploitative wrong, then how should the wrongdoing be defined? The whole weight of the normative account is put on the dishonest targeting of vulnerable persons, with an exploiter intending by this targeting to open up opportunities provided by an exploitee to pursue his own goals. An exploiter accordingly opens up opportunities by engaging in predatory conduct. Acquisitive exploitation is one way in which a person can be wrongfully used.

Section 4.2 begins with a preliminary discussion of consent. In section 4.3 we challenge the use of policy arguments to rule out the issue of valid legal consent in

⁶ s 3.2.

cases of acquisitive exploitation. Section 4.4 considers whether there is a firm doctrinal basis for linking acquisitive exploitation and lack of consent. Finally, section 4.5 provides a conclusion to the chapter.

4.2 What is consent?

We first need to clarify the meaning of ‘consent’. Peter Westen’s authoritative study of consent identifies both ‘thin’ (i.e. factual) and ‘thick’ (i.e. legal) accounts of valid consent. ‘Thin’ factual consent arises when an individual has acquiesced in a course of conduct (factual attitudinal consent), which they may have gone on to express (factual expressive consent).⁷ According to Westen, only factual attitudinal consent is a necessary condition for factual consent. This is a state of acquiescence which is ‘a subjective attitude or feeling that one experiences internally on a first-person basis’.⁸ In other words, factual consent does not require an external display to another person in order to be valid. In fact, it may be possible for a person to acquiesce in another person’s conduct without having a strong preference for it. Preference *or* indifference toward the option will suffice.⁹ There are several minimum conditions for acquiescence which are: ‘consciousness, capacity for judgment, exercise of that capacity for judgment, and a dominant and continuing self’.¹⁰ There is, however, scope for disagreement about Westen’s account of factual consent. For example, is a state of acquiescence the salient requirement for minimal consent? Larry Alexander argues that

⁷ See Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004) 9.

⁸ *ibid* 4.

⁹ *ibid* 32-33.

¹⁰ *ibid* 34.

consent is a mental waiver to ‘any objection to having one’s moral or legal boundaries crossed’.¹¹ This is because ‘[O]ne cannot intend another’s crossing of one’s moral or legal boundary, for one cannot intend another’s act. And acquiescence can occur from a sense of the futility of objecting without waiving one’s moral or legal objection.’¹² Douglas Husak suggests that factual attitudinal consent could be ‘a different mental state in different contexts’.¹³ However, Husak argues that ultimately Westen’s requirement of acquiescence is most convincing as an explanation of the mental state of consent, and this is because of its basic focus on a ‘simple mental’ state of desire.¹⁴ Moreover, it can be argued that expression of this internal state of consent is also a necessary condition for valid factual consent (i.e. factual attitudinal consent must be accompanied by factual expressive consent). For example, Tom Beauchamp has argued in favour of an ‘authorization’ or an ‘expressive dimension’.¹⁵ While ‘authorization is a permission-giving act’, it is a fairly modest requirement. Beauchamp notes that authorization ‘could be performed even if the consent were not informed’.¹⁶

The wider point is that the most demanding requirements for factual consent require investigation as to ‘the nature of mind *and* action’.¹⁷ However, Vera Bergelson argues that conditions for factual consent ought to vary depending upon the context in

¹¹ Larry Alexander, ‘You Got What You Deserved’ (2013) 7 Crim L and Philosophy 309, 311.

¹² *ibid* 311.

¹³ For discussion, see Douglas Husak, ‘The Philosophy of the Criminal Law: Extending the Debates’ (2013) 7 Crim L and Philosophy 351, 354.

¹⁴ *ibid* 354.

¹⁵ Tom L Beauchamp, ‘Autonomy and Consent’ in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2009) 58.

¹⁶ *ibid* 58.

¹⁷ *ibid* 57 [my emphasis].

which consent is given.¹⁸ She argues that a rule should be established which ‘would assign the attitudinal model to one group of cases and the expressive model to the other.’¹⁹ This is because ‘consent should be treated differently depending on whether the act of the perpetrator is prima facie wrong or not.’²⁰ In Bergelson’s words:

[W]hen the act is prima facie morally neutral, we do not need to question the actor’s reasons for action, and attitudinal consent is enough to defeat criminal harm. However, when the act is prima facie wrong (As in the cases of intentional infliction of physical harm), and it requires an explanation (defense), the actor’s reasons for action become crucial. To invoke the defense of consent, the perpetrator needs to be aware of the victim’s consent. And the only way the perpetrator may be aware of consent is if the victim has expressed it.²¹

This debate about the nature of factual consent cannot be resolved here. However, it is important to note the possibility for factual consent to mean different things in different contexts, and Bergelson’s work is useful in highlighting this point.

A ‘thicker’ legal account of consent also needs to be considered. This involves assessing whether key ideas are present for a legal system to hold consent legally valid. Westen labels this ‘prescriptive consent’.²² The selection of these factors will vary across jurisdictions and contexts. Westen argues that in the sexual offences context ideas of voluntariness, knowledge and competence are key to this assessment.²³ For example, with regard to sexual interests in English law, section 74 of the Sexual Offences Act 2003 states that a person ‘consents if he agrees by choice, and has the

¹⁸ Vera Bergelson, ‘The Meaning of Consent’ (2014) *Ohio St J Crim L* 171, 176-80.

¹⁹ *ibid* 176.

²⁰ *ibid* 179.

²¹ *ibid* 179.

²² Westen (n 7) 180.

²³ *ibid* 180.

freedom and capacity to make that choice'. In this context an analysis of valid legal consent depends upon proof of agreement, choice, freedom and capacity. Commentators have noted that this is hardly a perspicuous definition of valid legal consent because it relies upon a set of contestable concepts, and we return to this point below.²⁴ In relation to sexual exploitation in psychotherapy, Alan Wertheimer argues that valid consent requires the following mix of factors: competence, the absence of coercion and distorted decision-making, and an informed decision.²⁵ In Anglo-American law more generally, Stephen Wilkinson argues that the main elements for valid consent are information, competence and voluntariness.²⁶ John Kleinig argues that valid consent requires '[T]he act of an agent who is competent to consent; it must be voluntary, in the sense of being free from coercion; it must be based on understanding, in the sense that it is appropriately informed; and it must be intentional'.²⁷ Keith Hyams notes that decisions about the limits of valid legal consent 'lead us into a maze of disagreement with no obvious way out'.²⁸ For example, in what circumstances ought a person be held legally able to make a decision for themselves? What harm or offence is caused to third parties if consent can be given?²⁹ There will be no comprehensive way of considering these issues for every jurisdiction, and this

²⁴ See Andrew Ashworth and Jennifer Temkin, 'The Sexual Offences Act 2003 (1): Rape, Sexual Assaults and the Problems of Consent' [2004] Crim LR 328, 336; Victor Tadros, 'Rape Without Consent' (2006) 26 OJLS 515, 520-523.

²⁵ Alan Wertheimer, *Exploitation* (Princeton University Press 1999) 174.

²⁶ Stephen Wilkinson, *Bodies for Sale, Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 76.

²⁷ John Kleinig, 'The Nature of Consent' in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2009) 14. Note that Kleinig's account requires a 'communicative act', while Westen's (n 7) 4, does not.

²⁸ Keith Hyams, 'When Consent Doesn't Work: A Rights-Based Case For Limits to Consent's Capacity to Legitimise' (2011) 8(1) Journal of Moral Philosophy 110, 111.

²⁹ Westen (n 7) 125.

determination must also be context-specific. Bergelson notes that questions about what constitutes legally valid consent have been considered in a wide variety of contexts:

[A]ssisted suicide, experimental medical treatment, underage sex, sex with the mentally ill, nontraditional sexual practices (e.g., sadomasochistic encounters or erotic asphyxiation), consumption of drugs, dangerous competitions (e.g., drag racing), and so on.

Let us further interrogate conditions for valid legal consent using the concepts required by section 74 of the Sexual Offences Act 2003. Despite the difference in context, it is likely that such concepts will also be key to assessing whether there is valid legal consent in a case of acquisitive exploitation. This is because agreement, choice, freedom and capacity are core to autonomous decision-making. First there must be ‘agreement’. A minimal sense of agreement would arise if an individual internally acquiesces to another’s conduct. This would satisfy Westen’s requirement of factual attitudinal consent. A more demanding standard would be to require an individual to express their acquiescence, which amounts to factual expressive consent. Assuming that ‘agreement’ extends even beyond expression, and thus a category of factual consent, the focus then moves to the fact that ‘agreement’ is tied up with an individual’s ability to *choose* a certain option. On this view ‘agreement’ and ‘choice’ are closely linked. What is necessary for an individual to be able to make a choice?

It must be clear that he intends to choose *this* particular option. A person chooses something which bears ‘a certain description’.³⁰ There cannot be an assumption that an individual offers *carte-blanche* consent. It is also key to ‘choice’ that an individual is able to make an informed choice. Whether an individual has sufficient knowledge or understanding will depend on what is taken to be the

³⁰ Kleinig (n 27) 18.

appropriate level of knowledge or understanding in a particular context. For example, Tom Beauchamp has emphasized that agreement '[M]ay be uninformed and irresponsible (but valid) or it may be ill-informed or misinformed and by virtue of that either fail as consent or have its moral force qualified in some way'.³¹ Beauchamp notes that in relation to consent to medical treatment '[U]nderstanding need not be complete, because a grasp of the material facts is generally sufficient, but in some cases a person's lack of awareness of even a single risk or missing fact can deprive him or her of adequate understanding'.³²

Section 74 also refers to freedom to consent. Key to valid legal consent is that an individual is able to make a decision voluntarily. Coercion may present a strong ground of constraint to the extent that it inhibits valid consent being given, or because it renders any apparent consent defective. For example, Stephen Wilkinson notes that '[T]he use of coercion to gain consent typically renders any resultant consent invalid'.³³ A focus on coercion is present in commentary on interpersonal exploitation and we return to this point in section 4.4.2 below. We saw in chapter 3 that coercion need not involve threats and can include offers.³⁴ However, there is no bright-line rule for deciding when consent has been given voluntarily. We cannot expect an individual's decision-making to be entirely unconstrained. That would be unrealistic and too far removed from everyday life.³⁵ For example, there are questions about whether manipulation may inhibit a person's freedom to consent, to which there are no easy

³¹ *ibid* 16.

³² Beauchamp (n 15) 69.

³³ Wilkinson (n 26) 97.

³⁴ For discussion, see Kleinig (n 24) 16.

³⁵ See J L Austin, 'A Plea for Excuses' in Herbert Morris (ed), *Freedom and Responsibility* (1961) 8, quoted in Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 352.

answers. Beauchamp warns that it is easy to overstate the extent to which manipulation will pose a ‘threat of control’.³⁶ He argues that ‘We typically make decisions in a context of competing influences such as familial constraints, legal obligations, offers of rewards, and institutional pressures.’³⁷ No doubt some types of manipulative practices will not undermine an individual’s ability to act freely.³⁸ Some influences will simply ‘not control decisions to a morally questionable degree’.³⁹ This argument is relevant to our consideration of acquisitive exploitation’s effect on legally valid consent in section 4.4.2 below. Recall that we argued in chapter 3 that manipulative techniques will be one means of engaging in predatory conduct in a strong account of acquisitive exploitation.⁴⁰

Finally, there is the requirement that an individual has capacity to consent. A particular jurisdiction will decide when and in what contexts an individual has capacity to give valid legal consent. The position in English law is that children under the age of 16 are unable to give valid consent to sexual activities. This, then, is one context in which children are not regarded as sufficiently mature to make decisions about their own conduct. This could be because their cognitive or emotional capacities are held to be inadequately developed to make this type of decision.⁴¹ In relation to medical

³⁶ Beauchamp (n 15) 71.

³⁷ *ibid* 71.

³⁸ Kleinig (n 27) 16, ‘[L]ack of voluntariness may have a variety of sources—most dramatically from the knife to the throat but more subtly from the felt threat of social ostracism...It is generally agreed for example, that assent given as a result of physical threats is coercive, but there is more debate about the coerciveness of moral and social pressures (say, social opprobrium and peer pressure) and even more contentious is the inclusion of certain ‘inner’ forces (say, compulsions that affect what one agrees to do).’

³⁹ Beauchamp (n 15) 71.

⁴⁰ s 3.6.3.

⁴¹ See Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 158-59; Andrew Ashworth, ‘Child Defendants and

treatment, however, a fixed age limit is not adopted in deciding whether a child holds capacity to offer valid legal consent. The *Gillick* test is used, which considers whether a child has ‘sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision’.⁴² The salient concern is whether a child has attained ‘an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests’.⁴³ This is to respect the fact that as children develop ‘they will acquire an increasing capacity for making determinations’.⁴⁴

Westen argues that legal consent will be found if a relevant set of factors for valid consent are satisfied, *or* because a legal system *imputes* valid legal consent. Unlike prescriptive consent, imputed consent is entirely fictitious. It is ascribed to an individual without them ‘otherwise experiencing or expressing such factual consent’.⁴⁵ While such judgments are usually dressed up to represent consent, the reality is that there is no need to refer to consent in making this kind of decision.⁴⁶ For this reason, imputed consent is loaded from the outset with other ideas, since it functions ‘solely to constitute legal judgements about people’s relationships to one another’.⁴⁷

What is the proper method of studying valid legal consent and acquisitive exploitation? In principle, a doctrinal analysis is necessary. Specifically, this involves

the Doctrines of the Criminal Law’ in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 174.

⁴² *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [186].

⁴³ *ibid* [188]. For discussion, see Jonathan Herring, *Medical Law and Ethics* (2nd edn, OUP 2008) 166-170, 185-87.

⁴⁴ Kleinig (n 27) 14.

⁴⁵ Westen (n 7) 7.

⁴⁶ *ibid* 8.

⁴⁷ *ibid* 5.

investigating whether there is factual and prescriptive consent in cases of acquisitive exploitation. In the next section we assess the influential role that policy has played in deciding whether valid legal consent exists in cases of serious sexual exploitation. We argue that a policy-based approach should not compromise a sound doctrinal analysis in conceptualizing consent and acquisitive exploitation.

4.3 The role of policy arguments

Policy arguments inevitably come into play in assessing valid legal consent. For example, policy will inform the selection of necessary conditions for prescriptive consent. We saw in section 4.2 above that ideas of agreement, choice, freedom and capacity are key to valid legal consent in the English sexual offences context. But a decision about which concepts ought to inform valid legal consent in a particular context are open to debate and will be influenced by policy arguments. Furthermore, since many concepts key to prescriptive consent are contested concepts, evaluative judgments will inform their interpretation. As for ‘imputed’ legal consent, this involves entirely evaluative judgments which will be heavily influenced by policy. Policy and doctrinal arguments cannot be cleanly separated in determining whether conditions for valid legal consent have been satisfied.

There is an added complication when considering the relationship between valid legal consent and acquisitive exploitation. We argued in chapter 1 of this thesis that the umbrella term of ‘wrongful interpersonal exploitation’ must be disaggregated into accounts of specific exploitative wrongs.⁴⁸ However, the contours and limits of these specific accounts are themselves unsettled. In fact, policy judgments are likely to

⁴⁸ ss 1.2 and 1.3.

influence how a specific account of wrongful interpersonal exploitation—be it labour, sexual, or trafficking for exploitation—is constructed. So our troubles are heightened when we seek to conceptualize the relationship between wrongful acquisitive exploitation and valid legal consent. *Both* are difficult concepts. Policy will influence the definition of acquisitive exploitation *and* an assessment of valid legal consent. It is difficult to discern where doctrinal arguments end and policy arguments start, and in relation to which concept they apply (i.e. acquisitive exploitation or consent).

We have argued that a doctrinal approach should be applied in assessing the relationship between valid legal consent and acquisitive exploitation, and that this analysis will necessarily be influenced by policy arguments. It is unfortunate then that in relation to sexual exploitation of young adults aged over 16, policy arguments appear to have been prioritized at the expense of doctrinal arguments. There is a powerful policy argument that recognising valid legal consent in these cases is too risky for vulnerable victims.

In a recent review of investigations into sexual exploitation of young persons in Oxfordshire, the Office of the Children's Commissioner criticized professional culture amongst child support agencies who had interacted with victims.⁴⁹ Young persons had been characterized as being badly behaved rather than viewed as victims.⁵⁰ They had also been described by professionals as 'promiscuous', 'liking the glamour', and as complicit in 'risky behaviour'.⁵¹ The report noted that several 'common phrases used to

⁴⁹ Sue Berolowitz and others, "“I thought I was the only one. The Only one in the world”: Office of the Children's Commissioner's Inquiry into Child Sexual Exploitation in Gangs and Groups, Interim Report' (November 2012) 47.

⁵⁰ *ibid* 47.

⁵¹ *ibid* 47.

describe the young person's behaviour were: the young person is "sexually available" [and] she/he is "asking for it".⁵² Moreover, a 2012 report into cases of sexual exploitation in Rochdale referred to case files which cited young persons over 16 years of age as 'making their own choices' and 'engaging in consensual sexual activity'.⁵³ This represents young persons who are legally able to make choices about their sexual conduct as partly responsible for or complicit in their own sexual exploitation. In these cases, regarding apparent 'consent' as valid legal consent led to regressive decisions to abandon investigation of allegations of sexual exploitation.⁵⁴ The wider point is that in serious cases of exploitation, the presence of valid legal consent can operate as a reason to withhold the criminal justice system's scrutiny of exploitative conduct. Moreover, it risks holding exploiters complicit in their own exploitation.⁵⁵ We criticized these deficiencies in the investigation of crime in section 1.6.1 of this thesis.

The wrongfulness of sexual exploitation is distinct from that of wrongful acquisitive exploitation, but we can envisage a similar argument being used to inform the limits of an account of acquisitive exploitation. This could lead to the conclusion that valid legal consent ought never to arise in cases of acquisitive exploitation because it impedes the criminal justice system's scrutiny of the exploitative wrong. Alternatively it could be argued that lack of consent ought to be a necessary element of a strong account of acquisitive exploitation.

⁵² *ibid* 47.

⁵³ Rochdale Borough Safeguarding Children Board, 'Review of Multi-agency Responses to the Sexual Exploitation of Children' (2012) 9.

⁵⁴ *ibid* 9.

⁵⁵ cf the recent vote by MEPs, supporting a motion to adopt the 'Nordic model' of prostitution. See <www.europarl.europa.eu/news/en/news-room/content/20140221IPR36644/html/Punish-the-client-not-the-prostitute> (26 February 2014) accessed 29 March 2015. This model decriminalizes the selling of sex, but penalizes those who buy sex.

I argue that it is misguided to prioritize policy arguments at the expense of doctrinal arguments in identifying the contours of acquisitive exploitation. It is argued in section 4.4 below that *lack of* valid consent in cases of acquisitive exploitation is *not* a doctrinal surety. In fact, it is possible that valid legal consent may be present in the facts of acquisitive exploitation. There is no sound reason to underplay the complexity of the relationship between consent and acquisitive exploitation in doctrinal terms. Blindly allowing policy to dictate the consent issue undermines the complexity of exploitative wrongdoing. For example, it is quite plausible that acquisitive exploitation will involve a grooming process. We saw that this was also the case in relation to sexual exploitation in chapter 1. We argued that an intractable issue is whether apparently valid consent given by a 16 or 17 year-old at an early stage in a relationship ought to be considered valid on the basis of an initial ‘consensual’ sexual relationship.⁵⁶ We asked whether automatically discounting the relevance of consent at an early stage, in case it leads to exploitation, is too high a conceptual price to pay for protecting vulnerable young adults.⁵⁷ What if an exploiter’s aim to attack sexual interests does not come to fruition? This intractable question arises because sexual exploitation is a complex phenomenon, and such complexity is also present in cases of acquisitive exploitation. Moreover, policy arguments may not point strongly in one direction in relation to consent. For example, denying a 17 year-old the ability to give valid consent to early-stage grooming because of public policy concerns itself has deleterious effects on personal autonomy. This could serve to reduce personal autonomy if we deny valid consent where it is present. In other words, policy arguments can be deployed *against* using the law in a protectionist way.

⁵⁶ s 1.3.1.

⁵⁷ *ibid.*

In this thesis I argue that policy based arguments should not dictate how our account of acquisitive exploitation is constructed.⁵⁸ Rather, reappraisal of the criminal justice system's response to acquisitive exploitation is the correct means of responding to policy concerns. This was an argument defended in chapter 1. It is doctrinally flawed to downplay the complexity of the consent issue in a core account of acquisitive exploitation because of policy concerns. This complexity is highlighted in the doctrinal analysis which follows. It demonstrates why acquisitive exploitation is not necessarily anything to do with lack of consent.⁵⁹ In turn this explains why it is defensible to *exclude* a lack of consent element from our strong account of the wrong.

4.4 Acquisitive exploitation and lack of consent: a *non sequitur*

The principled approach is to begin by acknowledging a unique feature of various types of interpersonal exploitation. Several commentators have acknowledged a tendency for there to be the appearance of consent in cases of interpersonal exploitation.⁶⁰ Wilkinson's powerful intuition is that '[W]e don't normally want to describe those wrongs which involve the complete absence of consent as exploitation.'⁶¹ This seems persuasive where attacks upon property interests are involved. Arguably some forms of exploitation seem to require apparent consent. For example, where a 'confidence trick'

⁵⁸ I accept that there will be theoretical *and* policy arguments in play in constructing a robust account of acquisitive exploitation, for the reasons identified at the start of this section. But the argument here is that it does not follow that policy arguments should be treated as trumping doctrinal arguments.

⁵⁹ Thus supporting Wertheimer's argument (n 25) 251-252, that an exploitee can still complain about exploitation, even if he agreed to it.

⁶⁰ See Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP 1988) 200. cf John L Hill, 'Exploitation' (1994) 79 Cornell Law Review 63; Justin Schwartz, 'What's Wrong With Exploitation?' (1995) 29 *Nous* 158.

⁶¹ Wilkinson (n 26) 72.

is involved, a ‘victim needs actually to *hand over* the cash or to *sign* the contract’.⁶² Thomas Hafemeister has observed that ‘[U]nlike physical abuse and neglect, financial abuse is more likely to occur with the tacit acknowledgement and consent of the [exploitee] and can be more difficult to detect and establish.’⁶³ I argued in chapter 3 that exploiters who seek to target an exploitee’s property interests are likely to convince them to agree to take up their ‘offer’. Part of the complexity of acquisitive exploitation is that we can expect an exploitee to have been framed to have given ‘consent’ to go along with an exploitative relationship, in order to further an exploiter’s goals.⁶⁴ In this chapter we need to consider whether there are real practical and conceptual differences between someone who may know he is being exploited but who has no choice in the matter, as contrasted with someone who may not know that advantage is being taken of him. We return to this argument in section 4.5 of this chapter after we consider whether valid legal consent is in fact possible in cases of acquisitive exploitation.

In fact, it is arguable that objectively vulnerable persons are more likely to give apparent ‘consent’ to exploitation. Allen Wood notes that those who are in dire straits will be more likely to give ‘consent’:

Someone who is propertyless and starving has a lot to gain by striking a deal with an employer who is willing to offer bare subsistence in exchange for long, hard labour under dangerous conditions – and a lot to lose (namely, life itself) if no such exploitative bargain is in the offing...A gambler who owes a large

⁶² *ibid* 74-75.

⁶³ Thomas Hafemeister, *Elder Mistreatment: Abuse, Neglect, and Exploitation in Aging America* (Washington 2002) 382.

⁶⁴ Of course, there will be exceptions. Alan Wertheimer, ‘Exploitation’ in *The Stanford Encyclopedia of Philosophy*, s 3 (21 December 2012) <<http://plato.stanford.edu/entries/exploitation/>> accessed 29 March 2015, ‘There are some instances of alleged exploitation in which the issue of consent does not seem to arise. There are cases in which the exploitee may be entirely passive. A may sell photographs of B without B’s knowledge, or rob a purse from a sleeping B or follow B’s taillights in a dense fog. In these cases, B’s will is not involved. Call this nonvolitional exploitation.’ These ‘nonvolitional’ cases can best be understood as marginal examples of exploitation and are therefore not considered as part of our core account of acquisitive exploitation.

amount of money to ruthless and violent characters will be in desperate need of the loan shark who offers the needed funds at a usurious rate of interest; such a person will be more than willing under these conditions to consent to virtually any terms of payment.⁶⁵

Stephen Wilkinson argues that '[T]ypical victims of exploitation (such as the starving person and the indebted gambler) are likely to be all *too* willing to be exploited, all *too* willing to give their consent, owing to the absence of less bad alternatives.'⁶⁶ This leads to heightened vulnerability when the objectively vulnerable are targeted. It is the especially vulnerable who *will* give apparent 'consent' to exploitation. It follows that acquisitive exploitation is a difficult wrong to identify. This presence of apparent consent means that acquisitive exploitation of the vulnerable is likely to go 'under the radar'. Of course the relationship between apparent consent and 'real' consent will not always be one and the same. It is therefore necessary to consider whether such apparent consent can amount to 'real' consent.

Can we expect any apparent consent to be valid factual consent in cases of acquisitive exploitation? In principle the answer can be yes, save in the most egregious cases such as where an individual is unable to make rational judgments. In section 4.2 above we saw that conditions for minimal factual consent are modest. Westen's conditions for factual attitudinal consent require a person to be conscious and able to make a judgment for himself, exercised by subjective acquiescence.⁶⁷ And cases of acquisitive exploitation are likely to involve an individual making a conscious decision to choose 'the exploitative arrangement rather than some other (even worse)

⁶⁵ Allen Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136, 149.

⁶⁶ Wilkinson (n 26) 74.

⁶⁷ Westen (n 7) 36.

alternative'.⁶⁸ Of course the most seriously objectively vulnerable persons may not meet these minimum standards.⁶⁹

One response to this line of argument is to say that any apparent consent in core cases of acquisitive exploitation is at most 'minimal' factual consent. A more demanding interpretation of consent could quite plausibly lead to lack of consent in core cases of acquisitive exploitation. And this might support an argument for building lack of consent into the core account of the wrong. This could be supported on the grounds that exploitees lack agency to give valid legal consent, and/or because the use of coercion obviates any valid legal consent. The following subsections demonstrate why both lines of argument are open to challenge on doctrinal grounds.

4.4.1 Exploitees lack agency?

We saw in section 4.2 above that an individual's knowledge and capacity to make a decision are key to valid legal consent. For reasons we will explore in this sub-section, there is a pull to overlook exploitees' agency in exploitative situations, thereby passing over the opportunity to candidly assess knowledge and competence. This renders valid legal consent a non-issue.

First, it is tempting to characterize exploitees as lacking sufficient capacity in

⁶⁸ Wilkinson (n 26) 74.

⁶⁹ And this is the reason why minimal consent (i.e. factual attitudinal consent) ought not to be included as a necessary element in our account of acquisitive exploitation. Moreover, vulnerable victims of acquisitive exploitation may react in quite different ways to an exploiter's conduct. I struggle to see why we should limit the range of possible reactions to acquisitive exploitation by *requiring* minimal consent. The best view is that minimal consent may be present in practice but ought not to be insisted upon as an element of the normative account of the wrong.

cases of acquisitive exploitation because the idea of capacity has been put under strain in relation to other types of serious interpersonal exploitation. This concern arises because there are close links between various types of serious interpersonal exploitation and objectively vulnerable persons. Exploiters have reason to target those who are objectively vulnerable in the hope that they will lack capacity or will have impaired capacity. Indeed research suggests that objective vulnerability is a risk factor for sexual exploitation. Individuals who have tumultuous lives are at greater risk of sexual exploitation, for example. This category of persons includes ‘children living in care, particularly residential care, those who are excluded from mainstream school and those who misuse drugs and alcohol’.⁷⁰ It is also clear that young persons who are prone to go missing are at greater risk of sexual exploitation.⁷¹ Research by the Howard League for Penal Reform report found that young women who have been exploited were ‘[E]conomically and socially marginalized, often not in school, training or employment. They will spend a lot of time hanging out in parks, in or around fast food restaurants or taxi offices, and wandering the streets’.⁷² Moreover, recent fraud arrests demonstrate a close link between vulnerable victims and financial exploitation. In one recent case, victims of financial exploitation were elderly widows with early onset dementia who lacked close family support networks.⁷³ The victims also had substantial personal

⁷⁰ Barnardo’s, *Puppet on a String: The Urgent Need to Cut Children Free From Sexual Exploitation* (2011) 6.

⁷¹ Barnardo’s, *The Tangled Web: How Child Sexual Exploitation is Becoming More Complex* (2012) 6. The Home Affairs Select Committee, ‘Child Sexual Exploitation and the Response to Localised Grooming: Follow-Up’ (15 October 2014) 5, noted that one of the important aspects of the cases of sexual exploitation in Oxford was that ‘[t]he victims had frequently gone missing from home and several had been exploited whilst in the care of Oxfordshire Social Services’.

⁷² Howard League for Penal Reform, *Out of Place: The Policing and Criminalization of Sexually Exploited Girls and Young Women* (2012) 24.

⁷³ Sandra Laville, ‘16 People Arrested Over Alleged £1m Scam Targeting Pensioners’ *The Guardian* (London, 26 June 2013) <www.theguardian.com/uk/2013/jun/25/essex-police-pensioner-grooming-inquiry> accessed 29 March 2015.

savings. Paul Sadler, Susan Kurrle and Ian Cameron have identified a link between cognitive impairment (particularly dementia) and elder financial abuse.⁷⁴ This research involved a small sample, reviewing cases of elder abuse in a one-year period for a small number of local service providers for elderly people. Further research into this link between dementia and cases of financial exploitation is required. What is clear, however, is that the element of targeting already vulnerable persons can be used as a strong presumption against agency on the part of exploiters.

Secondly, doubt can also be cast on the knowledge of vulnerable persons to consent to serious exploitation, and some may try to apply this analysis to acquisitive exploitation. Recent research into sexual exploitation has identified that young persons over 16 years of age (who are in principle able to give valid consent to sexual activities) struggle to understand the meaning of consent. This issue is particularly pertinent where consent has not been modelled to young persons in childhood and early adulthood, and/or where they have been subject to sexual abuse in the past.⁷⁵ Given the importance of this issue, the Child and Woman Abuse Studies Unit (CWASU) at London Metropolitan University has been commissioned ‘to conduct a study into young people’s understanding of consent to sexual activity and how this shapes their expectations, choices and experiences’.⁷⁶ Surely in those cases where young persons do not understand consent, this is a weighty reason to say that they lack knowledge required for valid decision-making. It follows that they cannot have given valid legal consent.

⁷⁴ Paul Sadler, Susan Kurrle and Ian Cameron, ‘Dementia and Elder Abuse’ (1995) 14(1) *Australasian Journal on Ageing* 36, 38.

⁷⁵ OCC Interim Report (n 49) 48.

⁷⁶ *ibid* 48.

The issue of exploiters possessing adequate knowledge can be further challenged in cases of sexual exploitation. An exploiter may have sufficient knowledge of what they are doing in the first instance, such as where they send naked images of themselves to their ‘boyfriend’. The Child Exploitation Online Protection Centre (CEOP) has noted the proliferation of self-generated indecent imagery (SGII) which appears to be consensual. But what if a picture is subsequently distributed to another person? How should subsequent distribution of that image affect the issue of prior valid consent? Should it matter that an exploiter lacked knowledge at the time of consenting that the image would be widely distributed?⁷⁷ Opportunities for sexual predation using the internet mean that a wide range of children and young adults could be particularly vulnerable to sexual exploitation, expanding the ‘at risk’ category beyond clear limits.⁷⁸ A 2012 Barnardo’s report noted that eleven of their services said that ‘the internet was implicated in almost every referral they had received in 2011-12’.⁷⁹ As well as presenting greater risk opportunities, difficult judgments will need to be made about how a knowledge requirement for valid consent should apply in relation to the exchange of images.

Certainly arguments about lack of capacity and/or knowledge could apply to certain cases of acquisitive exploitation. But I cast doubt on the claim that we would want to use lack of agency as a justification for how we draw the contours of our core account of acquisitive exploitation. The argument advanced here is that exploiters *will*

⁷⁷ Child Exploitation and Online Protection Centre, ‘Threat Assessment of Child Sexual Exploitation and Abuse 2013’ (June 2013) 6.

⁷⁸ Barnardo’s, *The Tangled Web* (n 71). See also Christopher Hope, ‘Facebook is a “Major Location for Online Child Sexual Grooming”, Head of Child Protection Agency Says’ *The Telegraph* (London, 15 October 2013) <www.telegraph.co.uk/technology//10380631/Facebook-is-a-major-location-for-online-child-sexual-grooming-head-of-child-protection-agency-says.html> accessed 29 March 2015. See CEOP (n 77) 10 ff.

⁷⁹ Barnardo’s, *The Tangled Web* (n 671).

sometimes have sufficient capacity and knowledge to offer valid legal consent to acquisitive exploitation. A careful doctrinal approach does not justify applying these broad arguments to our core account of acquisitive exploitation. Recent doctrinal work on sexual exploitation and financial exploitation is to be welcomed, and can be used in order to highlight the shortcomings of assuming lack of agency in cases of acquisitive exploitation.

Is there any reason to think that exploitees will necessarily lack agency in core cases of acquisitive exploitation? An important study into financial exploitation of the elderly challenges the notion that exploitees lack capacity and adequate knowledge.⁸⁰ One of the report's most interesting insights is that the agency of *both* exploiters and older victims have parts to play in shaping the limits of financial exploitation. The report argues that:

The elderly person is not a passive actor in these incidents, but contributes to a dynamic that engulfs both the elderly person and the perpetrator. Thus, there is a need to reconceptualise the maltreatment of elderly persons away from something that 'happens' to elderly persons, towards increased understanding that the maltreatment of elderly persons takes place within a dyadic relationship.⁸¹

The argument is that exploitees may be active participants in financial exploitation in some cases and may have knowledge and capacity sufficient for valid consent. Jackson and Hafemeister's report found that elderly victims of pure financial exploitation 'tended to be physically and financially independent'.⁸² The idea of physical independence is of interest to us here. The report referred to the fact that elderly

⁸⁰ Shelly Jackson and Thomas Hafemeister, *Financial Abuse of Elderly People vs Other Forms of Elder Abuse: Assessing their Dynamics, Risk Factors, and Society's Response* (Final Report to the National Institute of Justice 2010) 9. The report distinguishes between pure financial exploitation and hybrid financial exploitation, the latter of which overlaps with other forms of abuse.

⁸¹ *ibid* 13-14.

⁸² *ibid* 288.

victims of financial exploitation, when compared with the average elderly person, ‘tended to have fewer communication problems, less cognitive confusion/dementia, less dependence on others, likely to be younger in age, and to not be experiencing poor social support’.⁸³ This is a clear indicator that lack of capacity will not accompany every case of financial exploitation. Indeed, the report makes clear that this is not even a predominant characteristic of these cases.⁸⁴ Indeed, capacity can even be present in the context of sexual exploitation of young persons aged 16 and over. Margaret Melrose criticizes the fact that young children and young persons are ‘conflated’ in the literature on sexual exploitation. Melrose argues that this is ‘infantilising’ to young adults.⁸⁵ The argument is supported by the fact that 11 to 18 is a wide age-range, with even the addition of one extra year bearing significantly on a young person’s ability to make decisions for themselves.⁸⁶ Melrose further argues that it is a mistake to overlook the fact that ‘[T]he majority of young people who become involved in commercial sex markets tend to be between 15 and 17 years old. Thus, the majority are not pre-pubertal children as the terminology of [child sexual exploitation] might imply.’⁸⁷ Melrose puts the point starkly, ‘The young person who becomes involved in commercial sex markets voluntarily, as a result of exercising their own agency, is an anomaly that [the child

⁸³ *ibid* 288.

⁸⁴ *ibid* 288, ‘These variables were supplemented with our interview findings indicating that [pure financial exploitation] elderly persons tended to live alone, have no children, be without a history of childhood family violence, have good relationships with their perpetrators (who were both relatives and nonrelatives), and not be currently experiencing family violence.’

⁸⁵ Margaret Melrose, ‘Young People and Sexual Exploitation: A Critical Discourse Analysis’ in Margaret Melrose and Jenny Pearce (eds), *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013) 14.

⁸⁶ *ibid* 14.

⁸⁷ *ibid* 14.

sexual exploitation] discourse cannot accommodate.’⁸⁸

Recognising capacity does not mean that exploitees need be held complicit in, or responsible for, their own abuse. Jackson and Hafemeister observe that recognizing elderly persons as participants in their abuse ‘is not to say they should be viewed as having caused or be held “responsible” for the occurrence of the abuse’.⁸⁹ The Trafficking Research Project emphasizes that recognizing capacity of victims to consent does not absolve ‘the state of its responsibility to protect victims of violence and exploitation’.⁹⁰ This recent work on human trafficking also notes that ‘The duty to protect should not be mitigated by individual choice. Rather, understanding the processes through which children negotiate risk would inform policy making concerned about protecting the best interests of children.’⁹¹ The argument put forward in chapter 1 of this thesis is that study of wrongful interpersonal exploitation must be accompanied by reevaluation of the criminal justice response to serious exploitation.

In principle, there is no firm doctrinal link between lack of knowledge and cases of serious acquisitive exploitation. An exploitee may have had adequate knowledge of the decision he was making in cases of acquisitive exploitation. Peter Westen notes that:

[J]urisdictions require greater competence, knowledge, freedom, and motivation for some choices (e.g. life-threatening surgery) than for others (e.g. gifting

⁸⁸ *ibid* 16. cf Catherine MacKinnon, ‘Trafficking, Prostitution, and Inequality’ (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 271, 291, who argues that considering that ‘women who are pimped are exercising “agency” as independent entrepreneurs is a fantasy of privilege’.

⁸⁹ Jackson and Hafemeister (n 80) 6-7.

⁹⁰ The Trafficking Research Project, ‘Exploiting Age: The Risk of Ignoring Agency’ (17 May 2013) <<http://thetraffickingresearchproject.wordpress.com/2013/05/17/exploiting-age-the-risk-of-ignoring-agency/>> accessed 29 March 2015.

⁹¹ *ibid*.

property), thereby causing a person's legal consent to be a function of what she is consenting to.⁹²

We might reasonably expect a knowledge requirement to be more modest in relation to acquisitive exploitation than in relation to sexual exploitation. This is not to say that the issue of adequate knowledge will be straightforward. Of particular interest is the way in which an exploitee's emotional concerns may have a more powerful effect than knowledge on their decision-making. Jackson and Hafemeister note a tension between an older person's financial and emotional wellbeing in cases of financial exploitation.⁹³ There is evidence that subjects of financial exploitation were 'more interested in remaining in their home than retaining their assets'.⁹⁴ One reason for this was taken to be because of 'socioemotional selectivity'.⁹⁵ The point is that 'when the future is perceived as limited, people become more focused on emotional goals'.⁹⁶ This orientation on emotional goals can have an important effect on exploitees' conclusions about an exploitative arrangement. The report puts the point strongly:

[F]inancially exploited elderly people often lacked a necessary inherent skepticism of others, lacked someone they could consult with or who would monitor their activities, were possibly experiencing some relatively unapparent higher-level cognitive decline, were worried about a possible future loss of independence, all of which combined to permit an opportunistic white-collar-crime perpetrator to take advantage of the situation and resulted in financial exploitation of the elderly.⁹⁷

There is a concern that an exploitee might have sufficient knowledge regarding exploitative circumstances, but may choose to reject the financial implications in favour

⁹² Westen (n 7) 125.

⁹³ Jackson and Hafemeister (n 80) 302-303.

⁹⁴ *ibid* 304-305.

⁹⁵ *ibid* 304-305.

⁹⁶ *ibid* 304-305.

⁹⁷ *ibid* 304-305.

of his emotional welfare. Is it compelling therefore to argue that an exploitee therefore lacked sufficient knowledge? Or does this cut to the heart of an exploitee's knowledge in the first place? The key question for this thesis' purposes is what level of knowledge is needed in order to make an informed choice in the face of acquisitive exploitation? How much knowledge is adequate knowledge? We cannot reach a determinative position on this question in relation to acquisitive exploitation. It is sufficient for the purposes of this chapter to cast significant doubt on the fact that an exploitee necessarily lacks knowledge in core cases of acquisitive exploitation.

This subsection has challenged the idea that exploitees lack agency in cases of acquisitive exploitation. Since acquisitive exploitation involves the dishonest targeting of objectively vulnerable persons, it is possible to get distracted by this vulnerability and to over-extend its implications. It is all too easy to confuse a person's vulnerable status with lack of capacity and/or knowledge. On the contrary, there will be variable levels of knowledge and capacity in real-life cases of acquisitive exploitation, which may enable an exploitee to give valid legal consent. This feature ought to be reflected in the core account of the exploitative wrong. This absence of a lack of consent element in our account is based on this reasoning.

4.4.2 Much ado about coercion

Another argument to explain why lack of consent might be held to accompany cases of serious exploitation is because an exploiter has used coercion. Emphasis has been placed on coercion in discussions of human trafficking for exploitation and sexual exploitation, for example. There is the strong coupling of sexual exploitation with coercion. When arguing in favour of new prostitution offences in Parliament, Baroness

Howarth argued that coercion was always a feature involved in the selling of sex.⁹⁸ We identified similar reasoning in Catherine MacKinnon's work on prostitution in chapter 1 of this thesis.⁹⁹ Research into organized sexual exploitation perpetrated by groups and gangs has also shown that this often involves strong coercion.¹⁰⁰ Victims are often trafficked within towns and cities in the United Kingdom, 'and forced or coerced into sex with multiple men. They may also be used to recruit new victims. This serious organized activity can involve the buying and selling of young people'.¹⁰¹ Moreover, a 'boyfriend' model is also often referred to in research into sexual exploitation, and clearly brings to the fore issues of coercion.¹⁰² A recent Home Affairs Select Committee's report highlighted that cases in which a victim perceived an offender to be their 'boyfriend' are often characterized by pressure or even coercion, where victims are asked 'to perform sexual acts with their [boyfriend's] friends as a favour'.¹⁰³ In many cases victims 'are required to attend parties and sleep with multiple men and threatened with violence if they try to seek help. They may also be required to introduce their friends as new victims'.¹⁰⁴ It follows that sexual exploitation may

⁹⁸ Policing and Crime Bill 2009, House of Lords Debates (3 November 2009) <www.parliament.the-stationery-office.co.uk/pa/ld200809/ldhansrd/lhan128.pdf> accessed 29 March 2015.

⁹⁹ s 1.3.1. MacKinnon (n 88) 273-74, 'Prostitution here is observed to be a product of lack of choice, the resort of those with the fewest choices, or none at all when all else fails. The coercion behind it, physical and otherwise, produces an economic sector of sexual abuse, the lion's share of the profits of which goes to others. In these transactions, the money coerces the sex rather than guaranteeing consent to it, making prostitution a practice of serial rape. In this analysis, there is, and can be, nothing equal about it. Prostituted people pay for paid sex. The buyers do not pay for what they take or get. It is this, not its illegality, that largely accounts for prostitution's stigma. People in prostitution, in this view, are wrongful saddled with a stigma that properly belongs to their exploiters.'

¹⁰⁰ Report by the Director for Children Services, *Action in Response to Child Sexual Exploitation in Oxfordshire* (26 November 2013) 35.

¹⁰¹ *ibid* 35.

¹⁰² *ibid* 35.

¹⁰³ Home Affairs Select Committee (n 71) 58.

¹⁰⁴ Report by the Director for Children Services (n 100) 35.

produce a type of ‘coerced consent’ by a variety of means:

[C]oercion and/or pressure in the boy/girlfriend relationship; coercion and/or pressure in peer on peer relationships, especially where a peer is themselves being groomed for sexual exploitation; coercion and/or pressure from gangs or groups; the use of the internet to apply coercion and/or pressure to engage in sexual activity.¹⁰⁵

We saw in section 4.2 above that freedom from constraint is a necessary condition for valid legal consent. Coercion undermines a decision-maker’s ability to make a voluntary decision. Does this justify lack of consent being a necessary part of a core account of acquisitive exploitation?

I argue that coercion ought not to be given significance beyond what it can bear in relation to acquisitive exploitation. A crucially important doctrinal point is that coercion will feature in only *some* cases of serious acquisitive exploitation.¹⁰⁶ Stuart Green puts the point clearly. There are at least four possibilities when conceptualizing the relationship between exploitation and coercion more generally:

(1) A proposal can be coercive without being exploitative, as when a doctor tells her patient that she will no longer treat him unless he gives up smoking; (2) A proposal can be exploitative without being coercive, as when a tugboat encounters a ship in distress and offers to tow it for a fee that greatly exceeds the normal market price for such services; (3) A proposal can be both coercive and exploitative, as when an extortionist threatens to break a victim’s kneecaps unless the victim pays the extortionist \$1,000; and (4) A proposal can be neither coercive nor exploitative, as when a seller offers to sell a buyer some property at a reasonable, market-based price.¹⁰⁷

I want to highlight such complexity in this sub-section. Even in relation to very serious types of interpersonal exploitation, such as sexual exploitation and trafficking for

¹⁰⁵ *ibid* 35.

¹⁰⁶ *cf* Wilkinson (n 26) 80.

¹⁰⁷ Stuart P Green, *Lying, Cheating, Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 97. And see Alan Wertheimer, ‘Remarks on Coercion and Exploitation’ (1997) 74 *Denver University Law Review* 889.

exploitation, a more complicated picture between exploitation and coercion can be painted. We can begin with anecdotal accounts that human trafficking does *not* necessarily involve coercion. A leading barrister has observed that he has recently had cases which do not involve coercion, ‘I have conducted four trafficking cases over the last two years and am currently preparing my fifth, which involves, allegedly, 138 or so Hungarian women answering adverts posted on “adult” internet sites for “work” in the UK.’¹⁰⁸ Of course the importance of this anecdotal account cannot be overstated, but it highlights the real life complexity of trafficking for exploitation.

It is also clear that some models of sexual exploitation will utilize more subtle forms of pressure than strong coercion. For example, the ‘boyfriend’ model of sexual exploitation will incorporate a broad range of conduct. In practice, this may be because the sexual activity is procured primarily for the boyfriend’s advantage and any pressure used can be associated with peer pressure. Moreover, an ‘inappropriate relationship’ model has been characterized as involving ‘one abuser who has inappropriate power—physical, emotional or financial—or control over a young person. The young person may believe that they have a genuine friendship or loving relationship with their abuser’.¹⁰⁹ It is conceivable that consent is given on a first occasion, but as more pressure—even coercion—is applied, it is more questionable whether this is still valid consent.

However, it is possible to argue that any non-coercive conduct involved in sexual exploitation is really just grooming. And the next step is to argue that grooming

¹⁰⁸ Simon Davis, ‘Human Trafficking’
<www.stphilips.com/Eshot2013/Criminal/Criminal_landing__SW_NOV.aspx> accessed 7 April 2014.

¹⁰⁹ Report by the Director for Children Services (n 100) 35.

is simply *part of the process* of sexual exploitation. This supports an argument that it does not matter if exploitative conduct begins with a victim having sex with their older boyfriend with no apparent coercion. What matters is that the process ends with a victim having sex with many others, in circumstances where coercion is applied. In other words, coercion at a later stage ‘taints’ any previous consent given.¹¹⁰ This view can be linked to Catherine MacKinnon’s powerful feminist critique of prostitution.¹¹¹ MacKinnon argues that we ought not to take a ‘snapshot’ of consent at one point in time. Rather, a view must be taken ‘of what is known about the sex industry, including conditions of entrance, realities of treatment, and possibility for exit’.¹¹² No matter a person’s choices upon entering into prostitution, the process ‘supports their continuous violation’.¹¹³ On MacKinnon’s view, what matters is that at some stage in the process of exploitation there is coercion, and therefore lack of consent. Lack of consent arises because of the use of coercive techniques *at some stage* in the process.

This is to support a ‘collective’ lack of consent model, produced because of the use of coercion at some stage in the process of sexual exploitation. No doubt this is informed by policy concerns to stem the tide of sexual exploitation. Agencies who worked closely with young persons in Rochdale and Oxford have been criticized for not linking cases of sexual exploitation. A recent report has found that the ‘professional focus...was on individual cases rather than on the wider picture’.¹¹⁴ The concern is

¹¹⁰ *ibid* 35, ‘The abuser grooms the victim by striking up a normal relationship with them, giving them gifts and meeting in cafes/fast food outlets or shopping centres. A seemingly consensual sexual relationship develops but later turns abusive.’

¹¹¹ MacKinnon (n 88) 276.

¹¹² *ibid* 276.

¹¹³ *ibid* 297-98.

¹¹⁴ OCC Interim Report (n 49) 9.

that, viewed in isolation from other cases, an exploitative sexual relationship can look consensual. Moreover, it is particularly difficult to set appropriate ‘thresholds for intervention with adolescents’.¹¹⁵ A ‘collective’ lack of consent model therefore helps to target sexual exploitation. But there are significant concerns about adopting this policy-based reasoning. To the extent that it forces us to look at the whole picture of overlapping cases, rather than the circumstances of a particular case, it forces us to generalize about sexual exploitation and coercion in ways which are not doctrinally robust.

I argue that this is to overlook the complexity of sexual exploitation. The sea change in recent theoretical literature on sexual exploitation is that coercion can exist at one or more points in time, or not at all. In some cases, there will be a need to consider when pressure crosses over into coercion, which in turn inhibits an individual’s freedom to make an unconstrained choice. And if consent is present, ought it to be ‘contextualized’ against this picture of exploitation?¹¹⁶ However, in other cases of sexual exploitation, coercion may not be present at all.¹¹⁷ It is doctrinally disingenuous to say that sexual exploitation necessarily involves coercion at a later point in time. Margaret Melrose has argued that:

The [child sexual exploitation] discourse cannot and does not account for the sexual agency of young people who become involved because this discourse suggests that all young people are coerced, manipulated or forced into selling or exchanging sexual services by predatory or abusive adults (usually men, who

¹¹⁵ Isabelle Brodie and Jenny Pearce, ‘Exploring the Scale and Nature of Child Sexual Exploitation in Scotland’ (Scottish Government Social Research 2012) 34. And see OCC Interim Report (n 49) 19-20.

¹¹⁶ See Jenny Pearce, ‘Contextualising Consent in Child Sexual Exploitation’, in Margaret Melrose and Jenny Pearce (eds), *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013). For such a contextual interpretation, see *R v C* [2012] EWCA Crim 2034 [15].

¹¹⁷ Recent research has sought to highlight the diversity of the grooming process, see Barnardos, *Puppet On A String* (n 70).

are often masquerading as boyfriends).¹¹⁸

Jenny Pearce identifies a spectrum, with consent (which represents control by a young person) on one end and coercion (which represents control by another person) on the other end.¹¹⁹ Concepts of choice, capacity and collaboration determine where on the spectrum a particular episode lies. We ought not to discount this important doctrinal insight. First, we have seen that research reveals a number of models of exploitative conduct used by exploiters in the sexual exploitation sphere. Second, there will be spectrums of pressure affecting voluntariness in cases of sexual exploitation of young persons aged over 16.

In constructing a strong account of acquisitive exploitation, we support the case for intellectual honesty. In fact, there is no necessary link between acquisitive exploitation and coercion, and thus between acquisitive exploitation and lack of consent. The nub of the problem is that coercion is not present in every case of acquisitive exploitation. This is a critically important doctrinal point. I argued in chapter 3 that exploiters engaging in acquisitive exploitation may utilize a range of predatory conduct.¹²⁰ Where it is used, coercion may impact differently on an exploitee's freedom to consent to abuse of a position of trust or manipulative techniques. However, it is important to emphasise that the effects of coercion on lack of consent will not be clear-cut. We also argued in chapter 3 that within a category of 'coercion' exploiters may use pressure or intimidating conduct. Since there is a spectrum of coercive conduct which can be used in cases of acquisitive exploitation, it

¹¹⁸ Melrose (n 85) 14.

¹¹⁹ Pearce (n 116).

¹²⁰ And, as we see in ch 5 of this thesis, a criminal offence penalizing acquisitive exploitation need not in principle be limited to censuring coercive conduct.

is *not clear* what effect this conduct will have on an exploitee's freedom to consent. Coercion is a method which is closely tied to lack of consent in its strong form, but it is more ambiguous whether this will be the case as threats become less compelling. For example, it is also possible that strong manipulative techniques will have a substantial effect on an individual's freedom to choose.

A strong account of acquisitive exploitation must reflect whether there is a close doctrinal connection between lack of consent and acquisitive exploitation. Where it is used, coercive conduct does not necessarily lead to lack of consent for reasons elucidated in section 3.6.1. Nor is coercive conduct used in every case of acquisitive exploitation. While other forms of predatory conduct may have effects upon an exploitee's ability to consent, we cannot clearly link acquisitive exploitation and lack of consent in the abstract. A wide variety of predatory means can be used, and we ought also to expect that they will impact an exploitee's freedom to consent in a variety of ways. Thus we have secured yet more support for this thesis' characterization of a strong account of acquisitive exploitation.

4.4.3 Summary

Recent work on sexual exploitation and financial exploitation sheds new light on consent and exploitation in doctrinal terms. A careful doctrinal approach ought to inform how we build a robust account of wrongful acquisitive exploitation. Acquisitive exploitation can exist irrespective of conclusions on consent. Building on the argument of chapter 3 that there will be a spectrum of predatory conduct, so too will there be a spectrum in relation to consent in cases of acquisitive exploitation. In the most

egregious examples of acquisitive exploitation there may be no valid legal consent.¹²¹ But in other cases of acquisitive exploitation conditions for valid consent may be met. Accordingly it makes little doctrinal sense to require lack of consent as a necessary element in this thesis' account of acquisitive exploitation.

Perhaps this doctrinal analysis explaining why legal consent is sidelined from our normative account is not decisive, however. It could be argued that in some contexts (such as in discussions of wrongful interpersonal exploitation) the level of consent which is legally acceptable is set too high, so that valid 'legal' consent should not be regarded as actual consent. We must again return to our discussion of policy arguments addressed in section 4.3. It was argued in section 4.3 of this chapter that policy arguments inevitably come into play in assessing valid consent, and policy and doctrinal arguments cannot be cleanly separated in determining whether conditions for valid legal consent have been satisfied. One concern explored was that in serious cases of interpersonal exploitation, the presence of valid legal consent can operate as a reason to withhold the criminal justice system's scrutiny of exploitative context. But we also saw that policy arguments can be deployed *against* using the law in a protectionist way. Ultimately there must be some means of determining the consent issue in cases of serious interpersonal exploitation. It is argued in this thesis that it is doctrinally flawed to downplay the complexity of the consent issue in a core account of acquisitive exploitation because of policy concerns. Rather, reappraisal of the criminal justice system's response to acquisitive exploitation is the correct means of responding to policy concerns. As our doctrinal argument has shown, acquisitive exploitation is not

¹²¹ This is different from those cases where the question of valid consent ought never to be considered, for example, in relation to rape. While rape may be described as a form of exploitation, it is a non-consensual wrong and is *not* best described as exploitative. For discussion of exploitation being 'morally occluded' as the wrong of rape, see Wilkinson (n 26) 74-75.

necessarily anything to do with valid consent or with lack of consent. This is why it is defensible to exclude a lack of consent element from our strong account of the wrong.

4.5 Conclusions

In principle the linking of acquisitive exploitation with an exploitee's lack of consent is a *non sequitur*. There is no sound doctrinal argument to say that acquisitive exploitation necessarily leads to lack of consent. In fact, valid consent might be found to accompany some cases of acquisitive exploitation.¹²² And policy arguments should not be the primary basis for constructing our account of acquisitive exploitation. It is on these grounds that we justify excluding lack of consent from this thesis' strong account of acquisitive exploitation. It is the argument of this chapter that there are not real practical and conceptual differences between someone who may know he is being exploited but who has no choice in the matter, as contrasted with someone who may not know that advantage is being taken of him. The whole weight of the normative account is put on the dishonest targeting of vulnerable persons, with an exploiter intending by this targeting to open up opportunities provided by an exploitee to pursue his own goals. An exploiter accordingly opens up opportunities by engaging in predatory conduct. Acquisitive exploitation is one way in which a person can be wrongfully used and does not depend upon an exploitee's cognizance of their own wrongful use.

Does this mean that lack of consent is irrelevant to our strong account of acquisitive exploitation? One possibility is that we could admit *evidence of consent* as

¹²² For example, Alan Wertheimer, *Exploitation* (n 25) 205, argues that 'a defect in consent is not a necessary condition of exploitation, that one can be exploited even if one's decision is fully voluntary and informed'.

part of the picture of acquisitive exploitation.¹²³ On this approach, any apparent consent given by an objectively vulnerable person may act as an important indicator of acquisitive exploitation. The circumstances leading up to this apparent consent could then be interrogated. For example, did the process of acquisitive exploitation seek to elicit consent? Is predatory conduct, as identified in chapter 3, present? And is there a clear link between predatory conduct and an exploitee's apparent consent? Apparent consent, given by objectively vulnerable persons, may be a useful contextual tool. To be clear, this is not to undermine the fact that there may be valid consent in cases of acquisitive exploitation. The focus on apparent consent is to assess whether it is a normative pointer to acquisitive exploitation.

We now have a robust and coherent account of acquisitive exploitation. The account defended in this thesis is doctrinally sound and is deeply rooted in the harsh realities of the wrong. It is high time that criminal law theorists scrutinized this account as it relates to English property offences.

¹²³ See Simon Gardner, 'Appropriation in Theft: the Last Word?' (1993) 109 LQR 195, for an argument that consent ought to be a 'non-technical ingredient of the flavour of the situation as a whole'. This position is endorsed by Alan Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 Legal Studies 402, 418. However, Gardner's description may be regarded as too vague. The clearer argument is that lack of consent can be used as evidence of acquisitive exploitation or as a pointer to the exploitative wrong.

Chapter 5

Acquisitive Exploitation and Criminal Law: An Opening Bid

5.1 Introduction

At a time when important questions are being asked about the robustness of the criminal law response to exploitation of persons, I have argued that there remains a blind spot in criminal law theory in England and Wales. There is consensus that several property offences may be used to penalize exploitation, such as the fraud offence found in section 1 of the Fraud Act 2006. But it was argued in chapter 2 that there are several important problems with the current haphazard approach. First, it is not clear what the scope of the wrong of exploitation under discussion actually is. Since ‘exploitation’ is itself an umbrella term, the exploitative wrong in question must be clearly defined before existing offences can be said to penalize it. Illogically this reasoning has been bypassed. Secondly, even if a robust account of acquisitive exploitation can be articulated, current property offences may only penalize acquisitive exploitation in certain limited circumstances. But there may be grounds for penalizing acquisitive exploitation more consistently and with improved labelling. The neglected normative questions are: (i) what is meant by exploitation discussed in the context of property offences, i.e. acquisitive exploitation; and (ii) ought the criminal law be used to penalize acquisitive exploitation, and, if so, how?

Chapters 3 and 4 addressed the first question by presenting a strong account of acquisitive exploitation. This account focused on the dishonest targeting of a

vulnerable person; an exploiter's intentional opening up of opportunities presented by a vulnerable person; and the use of predatory conduct by an exploiter to further his own goals. We have also explained why lack of consent (or indeed valid consent) should not be part of the account. It is hoped that this account will provoke further debate. Using this account, the foundations have been laid for a frank and principled discussion about acquisitive exploitation and criminalization. Does acquisitive exploitation meet principled thresholds for criminalization? If so, in what circumstances should a person be held criminally responsible for engaging in acquisitive exploitation, whether as an aggravated property offence or as a freestanding 'exploitation' offence? Are civil and/or regulatory measures more appropriate means of addressing acquisitive exploitation?

The purpose of this chapter is to craft a credible opening bid regarding these complex criminalization questions. Section 5.2 surveys the idea of principled criminalization by examining thresholds to criminalization and key norms which have been well defended by criminal law theorists. Section 5.3 tests acquisitive exploitation against these arguments. Are there in principle grounds for criminalizing acquisitive exploitation? The answer will depend upon how these thresholds and norms are interpreted. For example, viewed through a strong 'libertarian' perspective acquisitive exploitation is simply a form of opportunism—a legitimate though underhand way by which exploiters 'get ahead'. But there is reason to think that the criminal law can and should be more interventionist, and section 5.4 explores the emergence of an anti-exploitation norm in the common law. On the basis of positive arguments about this threshold to criminalization question in sections 5.3 and 5.4, section 5.5 recaps current problems with the way in which the criminal law in England and Wales criminalizes acquisitive exploitation. Section 5.6 considers whether a fairly labelled property

offence or a substantive ‘acquisitive exploitation’ offence is defensible. Finally, section 5.7 brings together these strands of argument in a conclusion to the chapter.

5.2 Background: justifying criminalization

Does acquisitive exploitation merit criminalization? It is first necessary to refer to the rich body of scholarship on principled criminalization, invigorated by Joel Feinberg’s first volume of *The Moral Limits of the Criminal Law* in 1984, and continued in a further three volumes.¹ The list of contemporary contributions is extensive and includes Douglas Husak’s *Overcriminalization*, Andrew Simester and Andreas von Hirsch’s *Crimes, Harms and Wrongs*, and Andrew Ashworth and Lucia Zedner’s *Preventive Justice*.² The common thread which runs through these powerfully argued monographs is that core principles must shape any compelling criminalization argument. The criminal law is a censuring institution which carries weighty implications for those who breach its requirements—in some cases depriving a person of their liberty. A concern to produce principled jurisprudence therefore begins by spelling out the significance and consequences of criminalization. Douglas Husak states that ‘The criminal sanction is the most powerful weapon in the state arsenal; the government is permitted to do nothing worse to its citizens than to punish them.’³ John Kleinig brings out the condemnatory side of criminal censure by noting that ‘Not only does criminalisation threaten a serious state intrusion, but, because that intrusion takes

¹ Joel Feinberg, *Harm to Others* (OUP 1984); *Offense to Others* (OUP 1985); *Harm to Self* (OUP 1986); *Harmless Wrongdoing* (OUP 1988).

² Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008); AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014). See also RA Duff and others, *Criminalization: The Aims and Limits of the Criminal Law* (OUP 2014).

³ Douglas Husak, ‘Reservations about *Overcriminalization*’ (2011) 14 *New Crim L Rev* 97, 102.

the form of punishment, it does so in a way that is condemnatory.’⁴ Andrew Ashworth and Lucia Zedner insist that a criminal offence authorizes ‘the exercise of some of the most privatory and condemnatory forms of state power against its citizens’.⁵

On this view it follows that a state’s decision to censure conduct publicly using the criminal law must explain ‘the censure that punitive interventions communicate’.⁶

Andrew Simester and Andreas von Hirsch argue that:

[B]y criminalising the activity of Φ ing, *the state declares that Φ ing is morally wrongful*; it instructs citizens not to Φ ; it warns them that, if they Φ , they are liable to be convicted and punished within specific ranges (the levels of which signify the seriousness with which the Φ ing is regarded); and, further, the state undertakes that, on the proof of D’s Φ ing, it will impose an appropriate measure of punishment, within the specified range, that reflects the blameworthiness of D’s conduct.⁷

Not every example of state punishment ‘is necessarily worse than any alternative mode of treatment’.⁸ It is the *broad category* of criminal sanction, as a response to wrongdoing, which requires justification.⁹ Because of the significant consequences of criminalization there is strong support for minimalism in the state’s use of the criminal law. Some commentators such as Husak go so far as to say that citizens have *a right* not to be punished.¹⁰

⁴ John Kleinig, ‘The Paternalistic Principle’ [2014] Crim L and Philosophy 1, 2 [official page no. not yet assigned].

⁵ Andrew Ashworth and Lucia Zedner, ‘Preventive Orders: A Problem of Undercriminalization?’ in RA Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 82.

⁶ Kleinig (n 4) 2.

⁷ Simester and von Hirsch (n 2) 7.

⁸ Douglas Husak, ‘Why Criminal Law: A Question of Content?’ (2008) 2 Crim L and Philosophy 99, 104.

⁹ *ibid* 105.

¹⁰ Douglas Husak, *Overcriminalization* (n 2) 58.

If the criminal law has a communicative function, it is also important that the criminal law makes good sense to those who never breach its prohibitions. Andrew Ashworth and Jeremy Horder note that the criminal law ‘speaks to those who are tempted to commit a criminal offence by instituting a threat of punishment in order to supply a pragmatic reason for not doing it’.¹¹ This is what Stanton-Ife refers to as the criminal law’s conditional dimension: ‘don’t Φ or else’.¹² The point is that citizens must be able to shape their behaviour in conformity to a system of criminal law which represents important values. The ‘categorical dimension’ of the criminal law is also critical.¹³ This means that the criminal law does not operate solely to dissuade individuals from engaging in criminal activity. Rather, ‘The message of the law of murder for example is that it is forbidden, not that, or not merely that, it is going to be extremely costly to murder someone else.’¹⁴ This sets the criminal law apart from the civil law and from regulatory measures. However, HLA Hart argued that the criminal law also sends out another message to individuals. That is, an individual should be able to weigh up whether the costs of breaching the criminal law are outweighed by any gains of engaging in particular criminal activity.¹⁵

There is an alternative to the deontological justifications for criminalization outlined above. That is, that the criminal law can be ‘morally neutral’ when it is used

¹¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 22.

¹² John Stanton-Ife, ‘What is the Harm Principle For?’ [2014] *Crim L and Philosophy* 1, 7 [official page no. not yet assigned].

¹³ *ibid* 7.

¹⁴ *ibid* 8.

¹⁵ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardner ed, 2nd edn, OUP 2008) 3. For discussion, see Leo Zaibert, *Punishment and Retribution* (Ashgate 2006) ch 1.

solely as a regulatory tool.¹⁶ An economic analysis of criminal law highlights that criminal law is one type of legal ‘control mechanism’ for preventing or deterring certain harmful behaviour.¹⁷ This is a consequentialist justification since it requires the costs of criminalization to be outweighed by the criminal law’s usefulness in enabling ‘society to get closer to a socially optimal level of harmful activity’.¹⁸ As Roger Bowles, Michael Faure and Nuno Garoupa note: ‘The appropriate domain for the use of criminal law is thus determined pragmatically by the costs and benefits of using criminal law tools relative to those of using non-criminal instruments.’¹⁹ Consequentialist justifications for criminalization therefore blur the line between civil law and criminal law measures by using the criminal law solely as a means of achieving regulatory aims.²⁰ Alison Jones and Rebecca Williams note that on this approach to criminalization there is nothing inherently significant in the selection of the criminal law to sanction behaviour.²¹ Criminal law measures are simply used when they are most cost efficient in imposing a sanction.²²

It is argued in this chapter that consequentialist justifications for criminalization are less powerful than those which take into account deontological justifications.

¹⁶ Rebecca Williams, ‘Cartels in the Criminal Law Landscape’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011).

¹⁷ Roger Bowles, Michael Faure and Nuno Garoupa, ‘The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications’ (2008) 35 *Journal of Law and Society* 389, 390. Bowles, Faure and Garoupa 415, argue that behaviour is ‘socially harmful’ when the costs to third parties are outweighed by the benefit to the first party.

¹⁸ *ibid* 395.

¹⁹ *ibid* 395.

²⁰ For discussion, see Paul Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert’ (1996) 76 *Boston University Law Review* 201.

²¹ Alison Jones and Rebecca Williams, ‘The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?’ (2014) *Journal of Antitrust Enforcement* 1, 14.

²² *ibid*.

Andrew Ashworth states that given the serious ‘consent and consequences of public censure and punishment – in terms of restrictions on, and even deprivations of, basic liberties – there is a strong case for restricting criminalisation to moral wrongs attaining a certain level of seriousness.’²³ That is not to say that regulatory offences do not have a place in a principled system of criminal law, but there is a compelling argument that they should be categorized as offences which do not involve a serious public wrong.²⁴ However, it is argued in this thesis that Husak, Simester and von Hirsch, Ashworth and Zedner are right to conceptualize the criminal law as a condemnatory tool and a censoring institution. In other words, the criminal law must have a deontological starting point. This view of criminalization is further developed in this section. This in turn influences our analysis in section 5.3 below, in which we consider how principles for criminalization should be interpreted in relation to this thesis’ account of acquisitive exploitation.

The message emerging from contemporary criminal law scholarship is that clear, promulgated, and defensible principles must guide criminalization decisions. We will see below that some key principles are modest in that they are necessary rather than sufficient conditions for criminalization. However, a principled system of criminal law must also be informed by a set of ‘substantive norms’ which shape its content.²⁵ If a state seeks to enact a new criminal offence it must bear the justificatory burden of proof. This follows from Husak’s argument that individuals have a right not to be

²³ Andrew Ashworth, ‘Criminalising Omissions’ in *Positive Obligations in Criminal Law* (Hart 2013) 34.

²⁴ A point made by Ashworth (n 23) 24.

²⁵ See Ashworth and Zedner, *Preventive Justice* (n 2) 265, for use of the terms ‘substantive norms’ and ‘limiting principles’.

punished by the state.²⁶ If a state seeks to infringe this right, it must provide cogent and compelling arguments. Husak puts the point crisply: attempts to justify a criminal offence ‘must be sufficient to override the rights infringed by punishment’.²⁷ The ideal is that a state’s proposal of a criminal law offence will provoke spirited debate, and such a proposal must be evaluated against key principles and norms of the criminal justice system.

How can this logic be applied in relation to a particular criminalization problem? Best practice demands that *alternatives* to criminalization are first considered.²⁸ The criminal law should not be the first port of call in responding to wrongful conduct. In fact, it should be a ‘last resort’.²⁹ A ‘last resort’ thesis is justified because of the strong censure attached to criminal sanctions, communicated to citizens of a state when criminal sanctions are used. The point is that we must reserve use of criminal sanctions only for those cases which cannot be dealt with using less intrusive means. It is also an attempt to ensure that the communicative aspects of criminal sanctions remain effective. For this reason, there is concern to curb the creation of new criminal offences in England and Wales which are politically-motivated responses to social problems.³⁰ Use of the criminal law as ‘a multi-purpose solution to

²⁶ For discussion, see Husak, ‘Why Criminal Law?’ (n 8) 105.

²⁷ *ibid* 107.

²⁸ For discussion as to what constitutes a criminal sanction, see Grant Lamond, ‘What is a Crime?’ (2007) 27 OJLS 609, 609-610. One possibility is that it is a prohibition which attracts criminal proceedings, as argued by Glanville Williams, in ‘The Definition of Crime’ (1955) 8 CLP 107, 130.

²⁹ Douglas Husak, ‘The Criminal Law as Last Resort’ (2004) 24 OJLS 207. And see Ministry of Justice, *Criminal Offences Gateway Guidance* (30 July 2013) <<http://lawcommission.justice.gov.uk/docs/criminal-offences-gateway-guidance.pdf>> accessed 29 March 2015.

³⁰ A criticism made of New Labour, see Nigel Morris, ‘Blair’s “Frenzied Law Making”: A New Offence for Every Day Spent in Office’ *The Independent* (London, 16 August 2006).

contemporary social ills' is disruptive to defendants' lives, and risks diluting the meaning of criminal sanctions.³¹ In practice, it is difficult to obtain accurate data about how many criminal offences have been created in England and Wales in recent years. James Chalmers and Fiona Leverick identified that 634 offences were created in 2010.³² This figure stands some distance from the Ministry of Justice's estimate that 174 offences were created in the same period.³³

The costs associated with imposing criminal law sanctions must also be borne in mind when considering a criminalization question. There is no overlooking the expense of a system of criminal justice. Central government for England and Wales spent £17.1 billion on the criminal justice system between 2012 and 2013.³⁴ High costs involved in producing and enforcing a piece of criminal law legislation may support civil law and/or regulatory measures without accompanying criminal law measures. Moreover, loss borne by those who are stigmatized by criminal sanction, and their families, must also be taken into account.³⁵ The mere fact that an individual has to disclose previous criminal records if asked to do so by prospective employers in England and Wales may

³¹ Adam Crawford, 'Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice' (2009) 49 *British Journal of Criminology* 810, 826.

³² James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] *Crim LR* 543, 544. For a sceptical view about the accuracy of overcriminalization claims, see Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 *MLR* 936.

³³ For a recent argument that an upward trajectory of criminalization is not found in the post-war period, see James Chalmers, Fiona Leverick and Alasdair Shaw, 'Is Formal Criminalisation Really On The Rise?' [2015] *Crim LR* 177.

³⁴ National Audit Office, *The Criminal Justice System: Landscape Review, Report by the Comptroller and Auditor General* (7 March 2014) <www.nao.org.uk/wp-content/uploads/2015/03/The-Criminal-Justice-system-landscape-review.pdf> accessed 29 March 2015.

³⁵ On effects on family members, see Marc Mauer and Meda Chesney-Lind (eds), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New Press 2002).

harm employment prospects.³⁶ Even if there is a category of ‘non-stigmatic’ criminal measures, it is quite plausible that they will cause harm to a defendant.³⁷ For example, there may be psychological harm caused by significant worry and stress.

It is also important to note that ‘No system of criminal justice can be expected to implement an ideal theory of criminalization.’³⁸ Grant Lamond is correct to argue that the best legal rule may not ‘fully reflect the best moral position’.³⁹ There may be pragmatic and evidential reasons why criminalization decisions are made in certain ways. Also noteworthy is the fact that criminal law sanctions are not detached from the practical workings of a criminal justice system. Even if a proposal reaches the statute books, ‘the law in action is bound to differ radically from the law on the books’.⁴⁰ The discretion allocated to officials in applying the criminal law cannot be overlooked, and we made this point in section 1.6.1 of this thesis.⁴¹

Given these limitations, what alternatives to criminalization exist? In some cases civil law measures alone (i.e. without supporting criminal law measures) will provide an adequate legal response. For example, the taxation system, the law of torts,

³⁶ For discussion, see Helen Lam and Mark Harcourt, ‘The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public’ (2003) 47 *Journal of Business Ethics* 237; Elena Larrauri Pijoan, ‘Criminal Record Disclosure and the Right to Privacy’ [2014] *Crim LR* 723, 724-46.

³⁷ For analysis of the idea of ‘stigmatic’ offences, see John Stanton-Ife, ‘Strict Liability: Stigma and Regret’ (2007) 27 *OJLS* 151.

³⁸ Husak, ‘Why Criminal Law?’ (n 8) 115.

³⁹ Grant Lamond, ‘Coercion’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 651 fn 11.

⁴⁰ Husak, ‘Why Criminal Law?’ (n 8) 115.

⁴¹ *ibid* 115, ‘The imperfections in a criminal code may be rectified by the good judgment of persons with responsibilities to enforce the law. Conversely, a perfect criminal code will not yield a justification for the criminal law if the justice it embodies is systematically undermined by poor decisions of police, prosecutors, and judges.’

trusts and contract may provide sufficient means of responding to acquisitive exploitation, and we will explore this line of argument in section 5.3 below. Alternatively there may only be grounds for regulatory measures. It is a matter for debate whether regulatory measures are always independent of the criminal law or whether they are distinctive criminal law measures.⁴² For example, James Chalmers notes that there has been a longstanding tradition of using ‘regulatory criminal law’ in England and Wales.⁴³ Jeremy Horder has recently argued that ‘[T]he substantive and procedural lines between “truly” criminal offences and “merely” administrative penalties have begun to become, and will continue to become more blurred.’⁴⁴ Without seeking to resolve that debate here, we can note the different function of regulatory measures. Ashworth and Zedner argue that:

Whereas the criminal law is a censuring institution, regulation has a less morally condemnatory tone. It is still concerned to prevent unwanted behaviour by attaching penalties to it, but without the weight of public censure for significant wrongs....One key element of the systems of administrative or regulatory offences in many continental European jurisdictions is that the penalties are set at a low level. The purpose of these mechanisms is to subject those who commit minor infractions to a lower-level system of sanctions that is efficient enough to ensure no resulting loss of preventive efficacy.⁴⁵

For example, Monetary Administrative Penalties are used to censure less serious wrongs.⁴⁶ Finally, it is also important to recognize that low-level conduct may not

⁴² See Nicola Lacey, ‘Criminalization as Regulation: The Role of Criminal Law’ in Christine Parker and others (eds), *Regulating Law* (OUP 2004); RA Duff, ‘Crimes, Regulatory Offences and Criminal Trials’ in Heinz Müller-Dietz and others (eds), *Festschrift für Heike Jung* (Baden-Baden 2007); Darryl Brown, ‘History’s Challenge to Criminal Law Theory’ (2009) 3 *Crim L and Philosophy* 271; Law Commission, *Criminal Law in Regulatory Contexts Consultation Paper* (Law Com No 195, 2010).

⁴³ James Chalmers, ‘“Frenzied Law Making”: Overcriminalization by Numbers’ [2014] *CLP* 1, 19.

⁴⁴ Jeremy Horder, ‘Bureaucratic “Criminal” Law: Too Much of a Bad Thing?’ in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) [working paper] 32.

⁴⁵ Ashworth and Zedner, *Preventive Justice* (n 2) 116.

⁴⁶ Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Crim L and Philosophy* 21, 33.

merit a legal response at all. For example, deterrence could be encouraged via the education system, with those engaging in problematic conduct dealt with privately in schools, families or workplaces. Where such informal measures are taken to be appropriate, the concern must be to ensure that fair processes are upheld.

Of course, civil law and/or regulatory measures do not preclude a criminal law response.⁴⁷ Conduct may *also* justifiably attract criminal law sanctions, although strong justification for a criminal law offence will be required. A criminalization proposal must be tested against principles and norms which are considered key to developing principled jurisprudence. If we put to one side ‘co-ordination offences’, commentators argue that serious wrongdoing is a necessary pre-requisite to criminalization.⁴⁸ There are several ways of elucidating ‘serious wrongdoing’. Some accounts focus on the issue of whether an individual needs to breach a duty in order for their conduct to be wrongful.⁴⁹ Andrew Simester identifies conduct as being wrongful when, ‘all things considered, [one] ought not to do it’, with scope for substantive elaboration of what one ‘ought not to do’.⁵⁰ The key point for our purposes is to emphasize that criminalization is a condemnatory response to wrongdoing, communicating ‘to the offender, the victims and the wider community that a public wrong was committed’.⁵¹ This explains the focus on *serious* wrongdoing. The point is that it is manifestly unfair, even ‘morally

⁴⁷ See Law Commission, *Criminal Law in Regulatory Contexts* (n 42).

⁴⁸ Though not without exception. See Victor Tadros, ‘Wrongfulness and Criminalization’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 157.

⁴⁹ Mitchell Berman, ‘Justification and Excuse, Law and Morality’ (2004) 53 Duke LJ 1, 7; John Gardner, ‘Wrongs and Faults’ in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 51, 55.

⁵⁰ AP Simester, ‘Enforcing Morality’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 481, 483. For discussion of a substantive account of wrongfulness, see Antje du Bois-Pedain, ‘The Wrongfulness Constraint in Criminalisation’ (2014) 8 Crim L and Philosophy 149.

⁵¹ RA Duff and Stuart P Green, ‘Introduction’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 9.

defamatory’, to ‘publicly convey that D acted reprehensibly having established nothing of the kind’.⁵² It follows that the case for criminalization is strongest where a wrong is serious.⁵³ This is not to say that every serious wrong will merit criminalization. All-things-considered some serious wrongs will not justify criminal law censure. Simester and von Hirsch’s insufficiency claim is necessary because we would not wish to criminalize all instances of serious wrongdoing.⁵⁴ However, a claim that serious wrongfulness is insufficient grounds for criminalization attracts lively debate. For example, John Stanton-Ife has recently argued that serious wrongfulness may be sufficient to establish a *pro tanto* case for criminalization in some circumstances.⁵⁵ According to Stanton-Ife, *pro tanto* reasons operate in the following way:

[*Pro tanto* reasons] yield to other factors in particular cases. They are genuine in the sense that even if defeated in a given case, they still have a normative pull or leave some remainder: if, say, I broke a promise to someone because I needed to help out in an emergency, I still owe an apology or at least an explanation to the person to whom I broke the promise.⁵⁶

If the criminal law is a ‘moralized blaming institution’, Stanton-Ife argues that it is counter-intuitive that ‘the wrongfulness of rape or murder is *no* positive reason, not even a reason subject to potential defeat, for its criminalisation’.⁵⁷ In response, Simester and von Hirsch stress that the example of rape does not provide a *pro tanto* reason for criminalization. They argue that it is not possible to build a case for

⁵² James Edwards, ‘Publication Review: *Crimes, Harms, and Wrongs* by AP Simester and Andreas von Hirsch’ [2012] Crim LR 75.

⁵³ Henry Hart, ‘The Aims of the Criminal Law’ (1958) 23 LCP 404, 412, wrote that states must be ‘able to say in good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community’.

⁵⁴ See Simester and von Hirsch (n 2) ch 11.

⁵⁵ Stanton-Ife, ‘What is the Harm Principle For?’ (n 12) 11.

⁵⁶ *ibid* 10.

⁵⁷ *ibid* 12.

criminalization on the basis of the wrongfulness of rape, because rape's wrongfulness 'is *not* independent of the grave harms that it involves'.⁵⁸ In other words, it is not the wrongfulness of rape which independently provides a reason for criminalization but the fact that it is accompanied by harm. This brief discussion highlights that there is ambiguity in how an idea of serious wrongfulness should be interpreted.

Linked to serious wrongfulness is the further requirement that only *public* wrongs are candidates for criminalization. Sandra Marshall and Anthony Duff argue that serious wrongs only merit criminalization if they constitute 'attacks on the community'.⁵⁹ This occurs if 'the individual goods which are attacked are goods in terms of which the community identifies and understands itself'.⁶⁰ In these circumstances, a serious wrong constitutes 'a matter on which the community should take a shared and public view, and [can] claim normative authority over its members'.⁶¹ Duff argues that this is because the wrong is not simply shouldered by the victim: the community *shares* in this wrong to an individual victim as 'one of their own'.⁶² The decision to use criminal law measures asserts the normative authority of the collective. Through criminalization the wrong is *shared in* by the collective on behalf of the victim.⁶³ Grant Lamond has argued that aspects of Marshall and Duff's account are

⁵⁸ AP Simester and Andreas von Hirsch, 'On the Legitimate Objectives of Criminalisation' (2014) 8(3) *Crim L and Philosophy* 1, 10.

⁵⁹ SE Marshall and RA Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 20-21.

⁶⁰ *ibid* 19.

⁶¹ *ibid* 13.

⁶² RA Duff, *Punishment, Communication and Community* (OUP 2001) 60-64.

⁶³ Marshall and Duff (n 59) 21, '[I]t is not "our" wrong instead of hers...it is "our" wrong because it is a wrong done to her, as one of us—as a fellow member of our community whose identity and whose good is found within that community.'

unconvincing.⁶⁴ For example, it is difficult to understand why some crimes (such as sexual attacks) are crimes because community values have been attacked as opposed to a particular victim having been attacked.⁶⁵ Moreover, it can be argued that the criminal law does not necessarily embody its members' core values. In other words, it is not clear that the 'values attacked by crime are *constitutive* of the community's identity'.⁶⁶ In Lamond's view, the quality of the argument is improved if we view crimes as serious public wrongs which the community holds *responsibility* for censuring. The central point is that the community is not necessarily the victim, but it is 'the appropriate body to bring proceedings and impose punishment'.⁶⁷ This is certainly a plausible argument, but to be coherent it requires explanation of the reasons *why* the community is better placed than an individual to hold responsibility for punishment. It is difficult to identify a precise basis for this. It may be because the state can punish more effectively than 'lay' punishment administered by citizens. Lamond's argument may also reflect a concern to ensure that fair processes are upheld, and that defendants' human rights are protected, since the community would normally hold such responsibility.

An addendum to our discussion of wrongfulness is necessary. A fault requirement ought also to accompany this requirement for serious wrongdoing. This ensures that criminal law measures are only used in relation to 'morally culpable' acts.⁶⁸ Indeed, commentators have strongly argued that criminal censure should be reserved for

⁶⁴ Lamond, 'What is a Crime?' (n 28) 617-618.

⁶⁵ *ibid* 617.

⁶⁶ *ibid* 617. Lamond continues, 618, 'They will be the values *of* that community, in the sense of the things which that community values highly, but not necessarily the values in terms of which members of the community identify themselves with each other.'

⁶⁷ *ibid* 621.

⁶⁸ Sanford Kadish, 'The Use of Criminal Sanctions in Enforcing Economic Regulations' in Sanford Kadish (ed), *Blame and Punishment: Essays in the Criminal Law* (Macmillan 1987) 40, 51.

those who act culpably, so excluding situations where harm is caused accidentally.⁶⁹

We have seen that serious wrongdoing with fault and the need for a public wrong are necessary thresholds to criminalization. We now add to these requirements the need for harm.⁷⁰ John Stuart Mill's formulation of a harm principle is well-known, '[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'⁷¹ The gist of Mill's argument is that the absence of harm to others means that criminalization is not in principle an option. Joseph Raz has further refined this view, arguing that harm to the person who engages in the conduct crosses a threshold to criminalization.⁷² Leaving aside Raz's paternalistic argument, it is generally agreed that conduct need not actually cause harm *to others* in order to in principle qualify for criminalization. Joel Feinberg's argument regarding a harm threshold puts all of the emphasis on effectiveness:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no means that is equally effective at no greater cost to other values.⁷³

Both Feinberg and Mill's accounts require a consequentialist calculation when assessing whether this threshold has been crossed. In principle, however, a harm threshold is only crossed if there is further proof of a close connection with harm.

⁶⁹ Andrew Ashworth, 'Conceptions of Overcriminalization' (2008) 9 Ohio State J Crim L 407, 411. Lamond, 'What is a Crime?' (n 28) 619, 'Fault-based crimes are first and foremost moral wrongs, and their wrongfulness turns primarily (if not exclusively) on their violation of (legally independent) moral norms, not legal norms. What makes them appropriate for this type of legal response is not that they involve the knowing defiance of the law, but that they involve the deliberate violation of moral rights and interests, or other moral values. Hence, the traditional association of ordinary crimes with wrongs *mala in se*, i.e. those that are wrong apart from the law.'

⁷⁰ See John Kleinig, 'Crime and the Concept of Harm' (1978) 15 American Philosophical Quarterly 32.

⁷¹ John Stuart Mill, *On Liberty* (first published 1859, Harmondsworth 1979).

⁷² Joseph Raz, *The Morality of Freedom* (OUP 1986) 422.

⁷³ Feinberg, *Harm to Others* (n 1) 26.

Ashworth and Zedner note that ‘Feinberg, for example, brings into the calculation such matters as the gravity of the harm-to-be prevented, its degree of probability, and the social value of the (otherwise dangerous) conduct.’⁷⁴ The general point is that a harm threshold is crossed if the criminalization of conduct will proportionately prevent harm or prevent the risk of harm to others. A harm principle might justify a wide range of criminal offences.⁷⁵ For example, the substantive offence of fraud found in section 1 of the Fraud Act 2006 is drafted in inchoate mode, and this is justified on the basis that criminalizing harmless fraudulent conduct prevents the risk of harm to others.⁷⁶

Of course a harm threshold hinges on the meaning of ‘harm’, a term which is notoriously difficult to elucidate. Commentators have used Feinberg’s definition of harm to others as a ‘setback to interests’ as a working definition, but this relies heavily on individual readings as to what will come within this scope.⁷⁷ A more sophisticated view is given by Andreas von Hirsch and Nils Jareborg, who argue that harm is tied to the *effects* of criminal wrongdoing upon the ‘living standard’ of typical victims.⁷⁸ In considering the meaning of harm, it is also necessary to distinguish between different types of harms. For example, Simester and von Hirsch disaggregate direct primary harms, remote primary harms, and secondary reactive harms.⁷⁹ Categories aside,

⁷⁴ Ashworth and Zedner, *Preventive Justice* (n 2) 105.

⁷⁵ *ibid* 104.

⁷⁶ See Jeremy Horder, ‘Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation’ in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart 2012) 79.

⁷⁷ Feinberg, *Harm to Self* (n 1) 33.

⁷⁸ Andreas von Hirsch and Nils Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 OJLS 1. Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 LQR 225, 242, [von Hirsch and Jareborg construe] living standard as a measure of the means and capabilities that would ordinarily conduce to the achievement of a good life.’

⁷⁹ Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 2) 44-50.

commentators note that a harm principle tells us very little beyond when criminalization is in principle possible.⁸⁰ A harm principle can be used to justify almost any criminal sanction on the basis that it will prevent the risk of harm to others.⁸¹ Joseph Raz has argued that in the absence of ‘a connection to a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions’.⁸²

It follows from this discussion of a harm principle that *further* constraints, grounded in political theory, must be satisfied if a criminal offence is to be found justifiable. Douglas Husak identifies the need for ‘internal’ and ‘external’ constraints to the criminal law.⁸³ ‘Non-trivial harm’, ‘wrongfulness’, ‘desert’ and the ‘burden of proof’ being on the state are key internal constraints to criminalization.⁸⁴ We focus here on external constraints, since we have dealt with several of these internal constraints (wrongfulness, harm) earlier in this section. Moreover, the burden of proof issue has been convincingly sidelined from the issue of criminalization.⁸⁵ On Husak’s account, the right not to be punished will only be outweighed by a need for criminal censure where a criminal offence requires: a substantial and legitimate ‘governmental interest in enacting the law’; a clear trajectory towards achieving this purpose; and a

⁸⁰ Andrew Ashworth and Lucia Zedner, ‘Prevention and Criminalization: Justifications and Limits’ (2012) 15 *New Crim L Rev* 542, 548.

⁸¹ This is an argument which has been made many times. For example, see Ashworth and Zedner, *Preventive Justice* (n 2) 104.

⁸² Raz (n 72) 414.

⁸³ Husak, *Overcriminalization* (n 2) ch 3.

⁸⁴ *ibid* 121.

⁸⁵ Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (HUP 2012) 139. For discussion of Husak’s internal constraints, see Stuart P Green, ‘Is There Too Much Criminal Law?’ (2009) 6 *Ohio State J Crim L* 737.

proportionate criminal law response.⁸⁶ Husak argues that these external justifications are required because of the costs involved to citizens in supporting a criminal justice system. These costs include the heavy financial implications of criminalization—resources which could be deployed to good effect elsewhere in the economy—as well as the costs of wrongful convictions and abuse of power by officials.⁸⁷ The starting point, then, is that criminal censure by the state is ‘extraordinarily difficult to justify from the perspective of citizens’.⁸⁸

We can briefly consider the scope of several ‘external constraints’ here, identifying at an abstract level the sorts of arguments which may need to be considered. A first concern—that there must be substantial state interest in enacting the law—is informed by political theory.⁸⁹ For example, we examined the claims of liberalism and civic republicanism in chapter 1 of this thesis. We argued that liberalism and republican political theories supply two independent normative bases for state action using criminal law in targeting wrongful interpersonal exploitation.⁹⁰ On the second point—that there is a clear trajectory toward achieving this purpose—the best support will be found in the existence of empirical evidence. In other words, the effectiveness of criminalization must be proven. Effectiveness focuses our attention upon deterrence and harm reduction. Criminalization ‘must actually reduce the incidence of, or damage done’ by conduct.⁹¹ For example, Husak has argued that criminalizing the possession

⁸⁶ Husak, ‘Why Criminal Law?’ (n 8) 108; Husak, *Overcriminalization* (n 2) 159.

⁸⁷ Husak, ‘Why Criminal Law?’ (n 8) 109.

⁸⁸ *ibid* 109.

⁸⁹ *ibid* 135.

⁹⁰ s 1.4.2.

⁹¹ James Edwards and AP Simester, ‘Wrongfulness and Prohibitions’ (2014) 8 *Crim L and Philosophy* 171, 178.

of drugs does not effectively *deter* individuals from drug use.⁹² There is clear evidence that criminalizing this conduct may drive the activity underground, and so criminalization ends up being counter-productive in preventing harm.⁹³ More subtly, criminalization may lead to modest harm reduction (by tackling the harm caused by this particular conduct), but may not lead to harm reduction generally (because other forms of conduct remain uncriminalized). Despite practical difficulties involved in collecting empirical data, any evidence that criminalization will not lead to harm reduction will undercut a criminalization argument.

Finally, a proposal must constitute a *proportionate* criminal law response. The costs of criminalization must not be disproportionate to the wrongful harm (or harm prevention) targeted by the criminal law. For example, criminal sanctions must be proportionate so that they do not involve excessive costs.⁹⁴ Also of importance is that criminalization does not come at the expense of important values and rights such as ‘the rule of law or other values such as personal liberty’.⁹⁵ This links back to our initial discussion of alternatives to criminalization. Civil law measures and/or regulatory measures should be implemented unaccompanied by criminal law measures if they are less disruptive to liberal ideals and/or individual rights, and if they are just as effective as criminal law measures.

We have seen that a robust body of jurisprudence has developed, which demonstrates how those who propose new criminal law legislation ought to seek to

⁹² Douglas Husak, ‘Four Points about Drug Decriminalization’ (2003) 22 *Criminal Justice Ethics* 21, 25.

⁹³ Stanton-Ife, ‘What is the Harm Principle For?’ (n 12) 8.

⁹⁴ For discussion of proportionality, see Ashworth, ‘Is the Criminal Law a Lost Cause?’ (n 78) 244.

⁹⁵ Stanton-Ife, ‘What is the Harm Principle For?’ (n 12) 8.

justify their proposal. There may only be grounds for civil and/or regulatory measures, with no supplementary criminal law measures. The criminal law ought only to be used to penalize serious public wrongdoing which is undertaken with fault, and which causes harm or the risk of harm to others. Further constraints, grounded in political theory, effectiveness, and a proportionality enquiry, must be satisfied for a criminal offence to be justifiable. This discussion has sketched the broad contours of the current criminalization debate.⁹⁶

5.3 How should these principles be interpreted in relation to acquisitive exploitation?

We have seen that there must be strong justification for criminal law measures. How should these principles and norms be navigated in relation to acquisitive exploitation? Is there a *prima facie* case for criminalization, leaving aside for now the type and level of criminalization in question? Recall the strong account of acquisitive exploitation we are working with. An exploiter (D) wrongfully uses another person if he: (i) dishonestly targets an objectively vulnerable person (V) (ii) intending, by the targeting, to open up opportunities provided by V in order (iii) to pursue his own goals. D (iv) accordingly opens up opportunities by (v) engaging in predatory conduct. The answer to this initial criminalization question will turn on the way in which we interpret thresholds to criminalization and core criminal law norms identified in section 5.2 above.

We utilize two theoretical perspectives in this section to demonstrate the range of possible answers. The perspectives used here are hardly novel, having been coined

⁹⁶ It is, however, far from exhaustive. For example, Lacey, 'Historicising Criminalisation' (n 32) 942, argues that 'the concept of criminalization is hugely encompassing' and that we need to also analyze the social and political aspects of criminalization.

and used by criminal law commentators in various other contexts.⁹⁷ One view prioritizes the importance of opportunism and personal autonomy—we will call it the libertarian view. Central to this line of thinking is the focus on maximizing ‘individual liberty, so as to allow each individual to pursue a conception of the good life with as few constraints as possible’.⁹⁸ This view is rooted in the efficacy of the free market. For instance, we can envisage that a strong libertarian view would steer away from using criminal law measures to censure a crafty business operator who seeks to put his rival out of business by engaging in acquisitive exploitation. On libertarian reasoning, an individual ought to have the freedom to engage in his business—even practices constituting very strong attacks on his competitors—so long as he does not breach the civil law or cause physical harm to others. Robust justificatory arguments for criminalization on the libertarian view will depend upon the worst instances of wrongful and harmful conduct. For example, a ruthless and exploitative family member *may* be distinguished from the crafty business operator, given the strong breach of trust and evidence of significant harm caused to a vulnerable person. We will use a strong libertarian view in this section in order to exaggerate the extreme results of using this interpretative lens to scrutinize the criminalization question in relation to acquisitive exploitation.

An alternative perspective prioritizes ‘collective goals’, to use Ashworth and Horder’s term.⁹⁹ The gist of a collective position is to seek to protect and promote collective goals, whatever they may be. Quite plausibly a collective goal might be to protect the most vulnerable in society from serious harm, and we adopt this reading for

⁹⁷ Ashworth and Horder (n 11) ch 2.

⁹⁸ Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 105 LQR 424, 427.

⁹⁹ Ashworth and Horder (n 11) 26.

the purposes of this section. Clearly acquisitive exploitation challenges this collective goal, given that the dishonest targeting of already vulnerable persons is key to our strong account. The gist of the wrong is scrupulous exploiters preying on society's most vulnerable. While there is no necessary link between the violation of collective goals and criminalization we can conjecture that there is a strong case for criminalization where key collective goals are put in doubt.

In seeking to analyze criminalization principles and norms using these perspectives, we should be clear that there is no bright-line delineation of perspectives in practice. These perspectives are of course a matter of degree.¹⁰⁰ Moreover, we have just argued that application of either perspective will not produce blunt answers to the criminalization question. For example, a libertarian interpretation could produce a more subtle view than a straightforward negative answer to the criminalization question. This will depend upon whether a strong or weak libertarian perspective is utilized. It is useful for our purposes to consider how strong theoretical perspectives will make sense of this initial question: is there a *prima facie* case for criminalizing acquisitive exploitation, leaving aside for now the type and level of criminalization in question?

Presumably both perspectives will take similar approaches to initial thresholds to criminalization, articulating that thresholds of harm and serious wrongfulness have in principle been crossed. For example, we saw in section 5.2 above that a harm principle is a minimal threshold to criminalization. Both libertarian and collective arguments

¹⁰⁰ Ashworth and Horder (n 11) 27, argue that this fact 'should not lead to a vague notion of "balancing" the two principles. Rather, it should lead to the development of ways of prioritizing some rights, and of the structuring of public interest arguments so as to ensure that they meet criteria such as urgency, unavoidability, effectiveness, and so forth'.

may hold that acquisitive exploitation causes harm to already vulnerable persons, and that a necessary condition for criminalization is therefore satisfied by acquisitive exploitation. A collective argument may emphasize the scope within a harm principle to penalize the *risk* of harm, specifically in this context the risk of harm to vulnerable persons' property interests. However, it is much less clear why the state may be justified in penalizing the risk of harm. Andrew Ashworth and Lucia Zedner note that both modest and bold claims have been made in political theory for such a preventive function.¹⁰¹ Regarding acquisitive exploitation, it may be preferable to have empirical evidence about actual harm to vulnerable persons or the risk of harm to property interests, but that does not undermine the in principle argument.¹⁰² We saw in section 5.2 that a harm principle is surprisingly modest, and that it is a further issue whether the state has a substantial interest in penalizing such conduct (a matter which a libertarian reading may cast doubt upon).

In fact, we saw in section 5.2 above that it is also important to determine whether the state has a *substantial interest* in penalizing acquisitive exploitation. The answer to this question will be informed by whichever political theory is used to supplement a harm threshold. We argued in chapter 1 of this thesis that two arguments in political theory lend weight to the state having a foundational duty to penalize wrongful interpersonal exploitation generally.¹⁰³ A strong libertarian interpretation can be aligned with a liberal concern to protect the security of citizens. It was argued in chapter 1 that even a narrow interpretation of a right to security is likely to require the state to protect vulnerable persons from serious interpersonal exploitation. Is

¹⁰¹ Ashworth and Zedner, *Preventive Justice* (n 2) 7-10.

¹⁰² Ashworth and Horder (n 11) 40-41.

¹⁰³ s 1.4.2.

acquisitive exploitation a sufficiently serious type of wrongful interpersonal exploitation to merit state action? Arguably the in principle case for criminalizing acquisitive exploitation is strong. Our normative account of the exploitative wrong involves parties who are not evenly weighted; harm and the real risk of serious harm to vulnerable persons; and an exploiter who has a high level of culpability.

Next, it is clear that using either a libertarian or a collective perspective a serious wrongfulness threshold to criminalization has been crossed. We identified the contours of an account of *serious* acquisitive exploitation in chapters 3 and 4 of this thesis. It is a method of using vulnerable persons, under the cover of dishonesty. It constitutes a strong attack upon society's most vulnerable members. The argument is that one ought not to dishonestly target objectively vulnerable persons, by predatory conduct, opening opportunities to further one's own goals.

Further norms identified in section 5.2 above require careful handling and most obviously lead to different answers to the criminalization question. First, a libertarian perspective is most likely to emphasize the existence of *credible alternatives* to criminalization as a constraint to positive arguments about criminalizing acquisitive exploitation. In other words, there is a case for civil and/or regulatory measures being used *without* supporting criminal law measures. This argument may be put forward on the basis that there is adequate protection for objectively vulnerable persons in the civil law. Those who are subjected to unconscionable or seriously inequitable conduct are protected in certain circumstances by contract law. Rick Bigwood notes that while 'manipulative capacity is to be tolerated for the most part in contractual dealings.... the law becomes more vigilant when the disparities in relative contracting power are

extreme'.¹⁰⁴ The position adopted in contract law is not that all disparities between contracting parties need be eliminated and this is clearly defensible. In fact, the ability to engage in manipulative conduct can be useful. Manipulation can produce 'desirable results: people enter into bargains, and this produces flow on effects for the benefit of society as a whole'.¹⁰⁵ However, contract law measures can vitiate a contract where an exploiter's conduct is sufficiently serious (for example, where there is evidence of undue influence, a misrepresentation, or inequitable or unconscionable conduct). Indeed, these vitiating doctrines can be strongly associated with tackling wrongful exploitation, though the contours of anti-exploitation arguments are under-theorized in contract law.¹⁰⁶ There may also be an avenue for redress for an exploitee where there is a fiduciary relationship. In principle, an exploitee can point to the set of strict fiduciary rules in trusts law which seek to ensure principals' loyalty to their agents.¹⁰⁷ Where these rules are breached, a trustee will have a duty to 'account', which will require 'them to rectify the consequences of the breach'.¹⁰⁸ It is *not* necessarily the case that there are procedural advantages to be gained by using civil law measures to target acquisitive exploitation. On some occasions, civil law measures may require that acquisitive exploitation (targeted via a particular civil law doctrine) is proven to the civil law standard of proof, whereas in some criminal cases the prosecution's case may need to be proven beyond all reasonable doubt. Where civil law measures apply, and the standard of proof is on the balance of probabilities, this may influence the level of

¹⁰⁴ Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16 OJLS 503, 507.

¹⁰⁵ *ibid* 507.

¹⁰⁶ Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 OJLS 65, 69.

¹⁰⁷ Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) chs 1, 11.

¹⁰⁸ *ibid* 206.

success in legal intervention with acquisitive exploitation. Clearly this is an important concern given low rates of prosecution of some types of interpersonal exploitation in the criminal law.¹⁰⁹ However, it is important to note that the standard of proof in criminal law can vary in serious cases. The seminal decision is that of the European Court of Human Rights in *Salabiaku v France*.¹¹⁰ The Strasbourg court held that Article 6(2) of the ECHR simply ‘requires States to confine [presumptions and exceptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’.¹¹¹ In principle this means that states can vary the standard of proof through exceptions, whilst still ensuring compatibility with the presumption of innocence.

Nevertheless, acquisitive exploitation may merit *both* a civil law *and* a criminal law response. We saw in section 5.2 that criminal law measures may supplement civil law and/or regulatory measures. One obvious concern is that there will be gaps in protecting vulnerable persons from acquisitive exploitation if civil law measures are the only means of redress. While the civil law may be used to target the worst instances of interpersonal exploitation in fiduciary relationships and in contract law, it is quite conceivable that a vulnerable person will have no leverage in the civil law. Relevant civil law doctrines will only apply where the circumstances of a particular case warrant a contract or a trust, for example. Moreover, particular doctrines of the civil law which may in principle be used to target ‘exploitation’ may not apply in the circumstances of

¹⁰⁹ For example, the low number of criminal prosecutions in the area of sexual exploitation. See ‘Sexual Offences Guideline Consultation’, Sentencing Guidelines Council (2013) 105; House of Commons Home Affairs Select Committee, ‘Child Sexual Exploitation and the Response to Localised Grooming’ (2nd report 2013-14) 32-33.

¹¹⁰ (1988) 13 EHRR 379.

¹¹¹ *ibid* [28].

core cases of acquisitive exploitation.

Even if civil law measures and/or doctrines can in principle *and* practice target acquisitive exploitation this does not mean that criminal law measures are ruled out. The case for state censure of acquisitive exploitation is strong given that the wrong constitutes a strong attack upon already vulnerable persons. The gist of the wrong is not the risk of harm to vulnerable persons' property interests. It is the strong attack upon already vulnerable persons involving dishonest targeting, the opening up of opportunities, and the use of predatory conduct. In this respect, acquisitive exploitation is a 'non-pure' as opposed to a 'pure' property offence.¹¹² It has links to the violation of property interests but it also involves attacks upon other rights (such as the right to bodily integrity). There is surely an argument *for* criminal law measures to supplement the civil law response given that the wrong is not primarily property-based, and despite the fact that it has dishonesty as a core fault requirement.¹¹³

A collective perspective is likely to put emphasis on the important communicative function immanent in criminal law measures. We saw in section 5.2 above that positive arguments for criminalization depend upon there being a serious public wrong which the community is responsible for censuring. This provides a basis for arguing that civil law or regulatory measures are an insufficient response to acquisitive exploitation. We argued in chapter 3 that it constitutes a very strong attack upon already vulnerable persons. This argument for public censure will be heightened if a collective perspective is employed, and if protecting vulnerable persons from harm

¹¹² See Andrew Ashworth, 'What if Imprisonment Were Abolished for Property Offences?' (The Howard League for Penal Reform 2013) 3.

¹¹³ Ashworth and Horder (n 11) 371-72, 'Civil law has a far greater involvement in offences of dishonesty than in violent or sexual offences.'

is a collective goal.

A libertarian reading of our initial question presents another ‘block’ to an in principle criminalization argument. The relevant concerns are the high costs of criminalization and low prospects of it effectively censuring and deterring acquisitive exploitation. On the effectiveness point, there is a problem that important rule of law values, such as the value of legal certainty, could be undermined if the wrong of acquisitive exploitation cannot be readily defined at law. Such an offence would also be flawed if judges were unable to adjudicate on the true nature of the exploitative wrong because the offence was drafted too broadly.¹¹⁴

Assumptions that the costs of criminalization are too high and that criminalization will be ineffective are difficult to rebut using a collective perspective. We do not know if criminalizing acquisitive exploitation would prove too expensive in relation to the legislation’s aims. And we certainly cannot make this decision until we know the scope and limits of any proposed criminal law legislation. It follows that an in principle argument for criminalization will only be truly persuasive if the real impact on the criminal justice system can be ascertained. While we do not undertake to carry out that empirical work here, we can note that the criminal justice system in England and Wales is not generally hostile to criminalizing other types of wrongful interpersonal exploitation. Indeed, we examined categories of criminal law legislation targeting interpersonal exploitation in chapter 1 of this thesis.¹¹⁵ There is therefore a tentative argument that the financial costs of criminalization are not automatically insurmountable in relation to acquisitive exploitation. While this cannot be read as a

¹¹⁴ James Edwards, ‘Justice Denied: The Criminal Law and the Ouster of the Courts’ (2010) 30 OJLS 725.

¹¹⁵ s 1.5.

compelling positive argument for criminalization, it does challenge the use of high costs of criminalization as a trump card as if this represents the logical end of the matter.

Would an in principle argument for criminalizing acquisitive exploitation undermine personal rights? It is difficult to see why a dishonest attack upon vulnerable persons is key to an exploiter's personal rights, and why an in principle argument for criminalization should fail on this basis. However, an individual's freedom of action will need to be carefully considered when we come to examine the contours of a proposed criminal law measure. With regard to exploitees, it has been argued that singling out vulnerable persons for special criminal law protection entrenches public perceptions of certain groups of vulnerable persons as weak. Moreover, by publicly censuring exploitation of certain groups of persons (in our account of acquisitive exploitation, objectively vulnerable persons) there is also the concern that this could imply that protecting other persons from exploitation matters less.¹¹⁶ On the first point we can respond that we adopted a careful approach to identifying vulnerable persons in chapter 3, seeking to identify categories of seriously vulnerable persons.¹¹⁷ Certainly the classification of who is a vulnerable person should not be thrown wide open. Regarding protection being extended to some groups and not others, we ought to avoid 'reading into' public concern for one group of persons an absence of concern for another group. It is possible, for example, that non-criminal law measures could be used to increase protection for the latter.

¹¹⁶ See John Stanton-Ife, 'Extending the Aggravated Offences to Include Disability, Sexual Orientation and Transgender Identity: Theoretical Arguments' 31, 49-53
<http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf>
accessed 29 June 2014.

¹¹⁷ s 3.4.

The rule of law argument, also advanced on a strong libertarian reading of the criminalization question, is daunting given its conceptual appeal. However, I argued in chapter 3 that there is no conclusive argument to say that acquisitive exploitation cannot be identified in practice. We spent considerable time seeking to elucidate the contours of a strong account. It is clear that a concern about legal certainty has informed the criminal law's response to other forms of interpersonal exploitation. For example, we noted in chapter 3 the International Labour Organisation's set of indicators of forced labour as a tool for identifying labour exploitation.¹¹⁸ In fact, we showed how a similar analysis may be implemented in relation to acquisitive exploitation.¹¹⁹ We will discuss the legal certainty point in section 5.5 below when considering particular characterizations of a substantive offence. Although the rule of law challenge is significant, there are ways in which legal certainty can be upheld and prioritized.

What conclusions can be drawn? Is an in principle case for criminalization convincing? On the one hand, we have seen that conclusions reached using a strong libertarian perspective are subject to challenge. There are convincing reasons to assign value to protecting vulnerable persons from acquisitive exploitation as an important collective goal, which may require the use of the criminal law. On the face of it, our account of acquisitive exploitation appears to merit criminal law censure on this basis. It is plain to see, however, that our study so far has been marked by uncertainty surrounding our methodology (which theoretical perspective to adopt?) and the conclusions reached (no doubt a number of differing conclusions can be given). There is lingering doubt that the conclusions reached are the application of arbitrary

¹¹⁸ International Labour Organization, 'Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement' (Geneva 2005) 32.

¹¹⁹ See s 3.7.

preferences. Is there a firmer conceptual basis for saying that there is an in principle case for criminalization?

5.4 An emerging anti-exploitation norm?

A more radical line of argument should also be explored. This thesis has focused on one (under-explored) type of exploitation (acquisitive exploitation), but when addressing this chapter's criminalization question it is useful to reflect upon the wider exploitation 'picture'. In chapter 1 we explored the fact that 'wrongful interpersonal exploitation' is a strikingly complex phenomenon, and is an umbrella term for a number of distinct exploitative wrongs. Exploiters target a wide range of persons using a wide range of predatory conduct. The purposes for which individuals exploit vary. We argued that while the problems of interpersonal exploitation are not unique to contemporary life, exploitation is now more acutely seen as conduct to which the criminal law must respond. There is strong political pressure upon governments to be seen to be 'dealing with' exploitation. There are also important legal obligations upon states which were explored in chapter 1.¹²⁰ For example, we saw that one strong pressure point comes from important human rights developments. In response, the criminal law has evolved piecemeal solutions to various types of exploitation—penalizing the 'better known' varieties of sexual exploitation, labour exploitation, and human trafficking for exploitation. Nothing in this section is intended to detract from the importance of these obligations in tackling interpersonal exploitation—they can be found in EU law, European human rights law, and various international documents, and I do not propose to repeat chapter 1's analysis of them here. However, we must be

¹²⁰ Particularly s 1.4.1.

aware that there is not an immediately relevant set of obligations which apply to acquisitive exploitation. For example, while Article 1 of Protocol 1 of the ECHR sets out a qualified right to the peaceful enjoyment of one's possessions, the paradigm account of acquisitive exploitation does not hinge upon harm to property interests. Moreover, we saw in section 5.3 above that an in principle case for criminalization is compelling but is far from watertight. Our conclusions rest upon whichever interpretation is given to thresholds, and particularly norms of the criminal law. Are there further justifications or norms, independent of a particular interpretative approach such as libertarianism or collectivism, which push us over the line to saying that there is an in principle case for criminalization?

In this section we explore several examples where doctrinal arguments have been bypassed or modified in order to insulate persons who have been exploited from legal consequences. These are uncharted waters, but we tentatively suggest that there is an emerging anti-exploitation norm in the civil law which is sensitive to the oppression caused by various types of interpersonal exploitation. This is a line of argument which criminal law theorists interested in exploitation must be vigilant to rather than dismissive of. If an anti-exploitation norm is convincing in civil law, is it similarly relevant to criminal law theory? Is there support for crystallizing a substantive *common law* anti-exploitation norm or principle? What would this require in the context of the criminal law in response to acquisitive exploitation? The aim of this section is to suggest that such a norm may provide a clearer basis for arguing that acquisitive exploitation should *in principle* be criminalized, with the scope and the limits of such a principle to be worked through. This section explores this hitherto under-developed line of argument.

There are important examples where the application of doctrinal arguments in the civil law has led to serious disadvantage for victims of interpersonal exploitation. We can illustrate this with a contemporary problem found in labour law in England and Wales. Anne Davies has argued that one ‘profoundly worrying’ trend is labour law’s responsibility ‘for the creation of “winners” and “losers” in the labour market’.¹²¹ Davies’ point is that labour law does not protect every worker’s rights adequately, but rather creates and supports ‘a “labour elite” to the disadvantage of those who fall outside the privileged group’—a type of ‘distributional unfairness’.¹²² One manifestation of this problem involves employers inserting sham terms in personal employment contracts. Alan Bogg notes that this involves vulnerable workers being:

[G]iven comprehensive written contracts to sign on a take-it-or-leave-it basis. Often, these written contracts contain standard form clauses that specify terms inconsistent with employee or worker status. For example, the written contract might permit the ‘self-employed’ person to designate a substitute at his or her discretion (a ‘substitution’ clause). It might also specify that the employer is under no obligation to offer work, and the ‘self-employed’ person is under no obligation to accept any offer of work (a ‘no mutuality’ clause). The individual working under such a contract then alleges that the reality of the relationship is one of employment.¹²³

Bogg argues that several contractual rules seriously compromise the legal protection offered to vulnerable persons who hold contracts with inserted ‘sham’ terms.¹²⁴ In the absence of fraud or misrepresentation, contractees are bound to the terms of their contract once it has been signed. This is known as the ‘signature rule’.¹²⁵ According to

¹²¹ Anne Davies, ‘Identifying “Exploitative Compromises”: The Role of Labour Law in Resolving Disputes Between Workers’ (2012) 65 CLP 269, 273.

¹²² *ibid* 273.

¹²³ Alan Bogg, ‘Sham Self-employment in the Supreme Court’ (2012) 41 ILJ 328, 328-29. There are some similarities here with concerns about the use of artificial conduct to reduce tax bills, see Judith Freedman, ‘GAAR as a Process and the Process of Discussing the GAAR’ [2012] BTR 22.

¹²⁴ Bogg (n 123) 333.

¹²⁵ See *L’Estrange v F Graucob Ltd* [1934] 2 KB 394.

Treitel, it is a principle of contract law that ‘where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e. on evidence not contained in the document’.¹²⁶ This has been termed the ‘parol evidence rule’ which is especially important to ensure objective contract interpretation. It can be rebutted in certain limited circumstances, but any agreement in writing creates an extra hurdle to rebutting this presumption of conclusiveness.

The facts in *Autoclenz Limited v Belcher and Others (Autoclenz)* involved ‘sham’ terms.¹²⁷ Autoclenz’s car valeters had signed comprehensive personal employment contracts which set out their employment status as ‘self-employed’. This classification of their contracts limited their statutory rights. Since their contracts represented the full agreement between employer and employee, standard contract law doctrines applied—i.e. the signature rule and the parol evidence rule outlined above. The problem was that these rules overlooked the harsh reality of the 20 respondent valeters’ situations. Each of their respective employment statuses was highly precarious. The Employment Tribunal had noted that ‘if the valeters had not signed the revised contract, they would not have been offered further work’, and that ‘the valeters had no input into the negotiation of the terms’.¹²⁸ Moreover, Smith LJ noted that the valeters’ employer was aware that his workers were mistaken as to the terms of their contract and the rights afforded to them.¹²⁹ Admittedly, the facts could have been even more characteristic of strong labour exploitation, such as by involving slavery or

¹²⁶ Edwin Peel, *Treitel on The Law of Contract* (13th edn, Sweet and Maxwell 2011) 212, referred to at Bogg (n 114) 335.

¹²⁷ [2011] UKSC 41.

¹²⁸ *ibid* [11].

¹²⁹ [2009] EWCA Civ 1046 [61].

servitude. However, it is important to note Bogg's argument that many such 'sham' personal employment contracts involve 'vulnerable migrant workers with limited language skills [who] are being discouraged from exercising the most basic entitlements as the right to join a trade union'.¹³⁰

The significance of the Supreme Court's decision for our purposes is the apparent *push against* applying settled contract law doctrines where there is evidence of wrongful interpersonal exploitation. On the facts of *Autoclenz* this was in relation to labour exploitation. Lord Clarke articulated the following rule:

[T]he relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represents what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.¹³¹

The Supreme Court was cognizant of exploitative circumstances in the labour market, looking beyond the terms of the valeters' contract. Bogg's argument is that the Supreme Court's decision in *Autoclenz* powerfully challenges the paradigm of the personal employment contract as 'commercialist or mercantilist, essentially committed to the values and techniques of private law in a narrow sense'.¹³² Indeed, some commentators have argued that this reasoning should be taken further in the employment context, but we will not explore the details of this line of argument here.¹³³

¹³⁰ Bogg (n 123) 345.

¹³¹ *Autoclenz* (n 127) [35].

¹³² Mark Freedland, *The Personal Employment Contract* (OUP 2005) 521, quoted at Bogg (n 123) 345.

¹³³ Bogg (n 123) 345, 'We might even go further and suggest there should be a *presumption* of employee/worker status that can be rebutted only by clear evidence to the contrary. This presumption in favour of employee/worker status might be especially strong when what is being claimed is a fundamental social right such as the right not to be discriminated against on trade union grounds...A strong purposive approach is necessary to ensure that those individuals most in need of protection can exercise fundamental social rights effectively.'

Another powerful push against interpersonal exploitation is demonstrated in the Supreme Court's decision in *Hounga v Allen*.¹³⁴ Ms Hounga came to the United Kingdom illegally from Nigeria in January 2008 to work as an au pair for the Allen family. She was described by the Court of Appeal as a 'young, illiterate person of uncertain age although with a good command of English'.¹³⁵ Her 'employment' bore several of the ILO's hallmarks of forced labour: her wages were withheld; she was subject to serious physical abuse; she was isolated due to fears about exposing her illegal status; and the Allens had power and control over her.¹³⁶ Ms Hounga brought claims against the Allens in July 2008 for unfair dismissal, breach of contract, unlawful deductions from her wages and holiday pay, and dismissal on racially discriminatory grounds. The dismissal discrimination claim is of interest to us here. Overturning the Court of Appeal, the Supreme Court held that a 'prominent strain of current public policy against trafficking' requires protection of victims of human trafficking, and this might on occasion require that the illegality doctrine is itself bypassed.¹³⁷ As was noted in chapter 1, this is significant given that public policy usually operates to block a discrimination claim in tort or contract law. While the Court of Appeal treated the doctrine of illegality as a peremptory vitiating factor, irrespective of other interests, the Supreme Court modified the application of illegality in order to protect against a form of interpersonal exploitation. I posed the following question in chapter 1: what other common law doctrines, besides illegality, are open to being scrutinized on the 'public

¹³⁴ [2014] UKSC 47.

¹³⁵ [2012] EWCA Civ 609 [34].

¹³⁶ See (n 118) above for ILO hallmarks of forced labour. Forced labour is a violation of Article 4 of the ECHR, see *Siliadin v France* (2006) 43 EHRR 287.

¹³⁷ *Hounga* (n 125) [52].

policy’ basis of protecting persons against human trafficking for exploitation and/or other core examples of interpersonal exploitation?¹³⁸

Our objective has been to demonstrate signs that anti-exploitation arguments have been used to apply pressure to orthodox doctrinal arguments where there is evidence of serious exploitation. The argument has been inevitably selective. We could, for example, explore the use of implied terms in order to ensure good faith in contractual relations. Hugh Collins has argued that courts are ‘typically venturing beyond the terms expressed by the parties, even taking into account the possibility of expansive readings of the contract informed by context and commercial common sense’.¹³⁹ Links with wrongful exploitation seem clear here, with courts utilizing implied terms where a ‘standard of unconscionability has been breached’ and where there is evidence of ‘deliberate opportunism’.¹⁴⁰ Collins argues that such applications are justifiable on the basis that ‘[I]mplied terms lie on the point of friction between the basic disposition of the common law to respect freedom of contract and the regulatory impulse to prevent the worst instances of market exploitation and opportunism’.¹⁴¹

If anti-exploitation reasoning is persuasive it is clear that it does not always require the same legal response in circumstances where it applies. For example, it might apply in some contexts and not in others; it might require the least restrictive amendment of a particular legal doctrine or something more extensive; it may only apply where there is evidence of very serious exploitation (thus excluding some less

¹³⁸ s 1.1.

¹³⁹ Hugh Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 CLP 1, 15.

¹⁴⁰ *ibid* 23.

¹⁴¹ *ibid* 1.

serious exploitative wrongs). In other words, it will not mean that there is *carte blanche* to modify doctrines of the civil law. English law has not yet produced clear jurisprudence on these issues, especially as to how important rights-balancing judgments are to be made. Endorsing a nascent anti-exploitation norm is not to say that the civil law ought to respond to every exploitative relationship or exchange, nor is it to say that any single legal response is justifiable.

The argument here is that these civil law developments ought to act as a spur to closer study of an anti-exploitation norm in criminal law theory. Certainly there is no developed principle within civil law jurisprudence. The following questions merit close study. First, should an anti-exploitation norm carry weight in the criminal law? Secondly, would such a norm apply to the type of exploitation explored in this thesis? In other words, is there an in principle argument for criminalizing acquisitive exploitation because it falls within the scope of an anti-exploitation norm which is immanent in the criminal law?

Turning to the first question, rationalizing an anti-exploitation norm as key to the criminal law is complex. We are not discussing a threshold to criminalization (such as that represented in a harm principle), but a norm. Quite naturally exploitation or the risk of exploitation will not feature in every criminalization debate so it makes little sense to refer to it as a *necessary* threshold to criminalization. An anti-exploitation 'norm' is worth debating as key to liberal criminal law theory. Used alongside other thresholds and norms, such a norm could provide a basis for justifying criminal law censure. This is quite different from how we saw such a norm operating in the civil law: in *Hounga* this reasoning was used as a basis for modifying or creating civil law doctrine so as to avoid further disadvantage to those who have been exploited. The

significant implications of criminalization, considered in section 5.2, ought to be reemphasized. Is it possible to say that there is a norm that the community is responsible for censuring exploiters who *strongly* target and attack vulnerable persons using the criminal law—the most convincing characterization of the norm? Is seriously exploitative conduct especially reprehensible, so that ‘the machinery of the state [in principle] needs to be mobilized against it’?¹⁴²

An anti-exploitation norm within criminal law is plausible since it closely aligns with the purposes of the criminal law which have been explicated in recent years. We examined in chapter 1 of this thesis the increase in substantive ‘exploitation’ offences in England and Wales.¹⁴³ But we also argued that various forms of interpersonal exploitation are being penalized indirectly using existing (often broad) offences. We will examine in section 5.6 below offences in other jurisdictions which more explicitly penalize wrongful exploitation. Indeed the starting point of this thesis was that if the criminal law is being used in this way to penalize acquisitive exploitation, it is high time that criminal law theorists sought to justify this position with careful exposition.

Arguably there is a wider task of theorizing anti-exploitation reasoning in the criminal law. There are difficult questions which require thorough debate. For example, is an anti-exploitation norm applicable in relation to some forms of wrongful interpersonal exploitation, but not in relation to others? If an anti-exploitation norm has a strong claim to be part of criminal law theory, what does it require? An anti-exploitation norm may require that the criminal law penalizes the worst instances of interpersonal exploitation *ex post facto*. More radically, it may require criminal

¹⁴² Lamond, ‘What Is a Crime?’ (n 28) 610.

¹⁴³ s 1.5.2.

offences to penalize exploitative conduct *ex ante*.¹⁴⁴ Conduct which carries the real risk of exploitation of vulnerable persons, such as human trafficking for exploitation, may fall into the latter category. It would also be interesting to consider whether there are in fact *similarities* in purpose between the civil law and the criminal law in targeting wrongful exploitation, say because of a concern to respect European and international human rights law. Is there a little-explored unitary feature of both strands of the common law?

These complex questions cannot be fully answered here, but we can sketch some tentative implications for our own criminalization enquiry. On a revisionist view, even a libertarian reading of a criminalization question will need to take into account an anti-exploitation norm. The point is that if anti-exploitation reasoning *is* a norm of criminalization it is another ‘external constraint’, to use Husak’s language.¹⁴⁵ The state has a substantial and legitimate interest in penalizing serious forms of interpersonal exploitation. The general approach would then be to justify why acquisitive exploitation triggers this norm of the criminal justice system. Arguably the strong account of acquisitive exploitation presented in chapters 3 and 4 of this thesis falls within the ambit of such a principle, with the element of seriousness pushing us into this territory. By contrast, those who are uncomfortable with such a *norm* can reason their way to a similar conclusion by specifying targeting serious exploitation as a *collective goal*, which may then in principle require criminalization.¹⁴⁶ The latter is the modest reading. On both views, theorists will still need to show what specific criminalization argument is being made, and to justify criminalization in that form with accompanying

¹⁴⁴ See s 5.6 below for discussion.

¹⁴⁵ Husak, *Overcriminalization* (n 2) ch 3.

¹⁴⁶ See s 5.3 above.

sentencing proposals. Why, then, does it matter which view we adopt? After all, an anti-exploitation norm is *not* an easier route to finding an in principle argument for criminalizing acquisitive exploitation. It is certainly possible to draft an in principle argument for criminalization by interpreting accepted thresholds and norms to criminalization, as we did in section 5.3 above. The point is that if a nascent anti-exploitation norm is convincing, it must be applied whichever theoretical perspective is adopted. The exploratory argument here is that an anti-exploitation norm, which endorses criminal law censure for *serious* types of interpersonal exploitation, is itself a robust norm of criminalization. On the basis of arguments in sections 5.3 and 5.4 we have drafted the first part of our opening bid: there is a credible in principle case to say that acquisitive exploitation should be criminalized.

5.5 Recapping objections to the response to acquisitive exploitation in English criminal law

Our concern in this chapter is to reappraise the criminal law response to acquisitive exploitation in England and Wales. So far we have argued that there is an in principle case for criminalization. The need for this study was articulated in chapter 2 of this thesis in which we unravelled the current criminal law response to an amorphous idea of ‘exploitation’.¹⁴⁷ The most glaring example in point was the little work put into elucidating the contours and limits of the wrong of exploitation referred to by commentators in the context of property offences. Clearly considering what constitutes principled criminalization of the wrong could not be tackled until a critical conception of acquisitive exploitation was defended. Now, with this account in hand, it is useful to

¹⁴⁷ s 2.2.

briefly recap our objections to the current criminal law response to acquisitive exploitation.

First, existing broad property offences leave too much discretion to prosecutors and judges to use them to penalize acquisitive exploitation. The conspiracy to defraud offence is the easiest case in point: an unprincipled offence cannot be salvaged by stating that it can be put to use to target acquisitive exploitation. But we also argued that there is scope to use the English fraud offence found in section 1 of the Fraud Act 2006 and the theft offence found in section 1 of the Theft Act 1968, to penalize acquisitive exploitation. However, it was noted that both of these offences are drafted in broad terms, placing much weight on an imprecise ‘dishonesty’ fault requirement. The concern is that a broad fraud offence drafted in inchoate form, and a broad theft offence interpreted as an inchoate offence, respectively cannot be used to fairly penalize the nature of the wrong of acquisitive exploitation. Such broad offences infringe the need for maximum certainty in criminal law, thereby infringing rule of law ideals.

Second, penalizing acquisitive exploitation using broad property offences is problematic in constitutional terms. This is because there has not been critical analysis of the wrong of acquisitive exploitation by a ‘representative authority’, nor debate about whether it is serious enough to merit criminal censure.¹⁴⁸ The effect of this is to leave decisions whether to penalize acquisitive exploitation to the courts rather than with elected Parliament and the legislature. This is an example of ‘ousting’ of democratic

¹⁴⁸ AP Simester and Andreas von Hirsch, ‘Regulating Offensive Conduct Through Two-Step Prohibitions’ in AP Simester and Andreas von Hirsch, *Incivilities: Regulating Offensive Behaviour* (Hart 2006) 173.

processes and scrutiny.¹⁴⁹

A third objection is that penalizing acquisitive exploitation using broad property offences infringes ‘fair labelling’—a principle identified by Andrew Ashworth as key to criminal law theory.¹⁵⁰ According to Ashworth, fair labelling requires that ‘[W]idely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that the offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.’¹⁵¹ One reason fair labelling is important is to ensure appropriate sentencing of defendants ‘in proportion to their wrongdoing.’¹⁵² James Chalmers and Fiona Leverick note that, ‘In fairness both to offenders and to others with a relevant interest, there is a need for offence labels to convey sufficient information to criminal justice professionals to enable them to make fair and sensible decisions.’¹⁵³ Another key reason for its importance is that the principle of fair labelling aims to reflect key moral differences held by citizens of a state within offence definitions in the criminal law.¹⁵⁴ Victor Tadros argues that this is important in order to show respect for citizens as ‘autonomous agents’, by respecting and promoting citizens’ core interests within a body of criminal law.¹⁵⁵ Tadros further

¹⁴⁹ To use James Edwards’ language in (n 114) 725, which he uses to describe the ousting of *courts* when criminal law legislation is drafted broadly.

¹⁵⁰ Andrew Ashworth, ‘The Elasticity of *Mens Rea*’ in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 45, 53.

¹⁵¹ Andrew Ashworth and Jeremy Horder (n 11) 77.

¹⁵² *ibid* 77.

¹⁵³ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *MLR* 217, 234.

¹⁵⁴ Ashworth and Horder (n 11) 77.

¹⁵⁵ Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 72. See also Paul H Robinson and John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Westview Press 1995).

notes that reflecting key moral differences within the criminal law helps to secure public confidence in the criminal law to the extent that it ensures ‘a just set of rules’.¹⁵⁶ Securing sufficient fair labelling in English criminal law is not straightforward. The need for fair labelling must be balanced against concerns that the law becomes increasingly complex as labelling increases. This makes it more difficult for criminal justice professionals and juries to apply the law in practice.¹⁵⁷ We will return to this point in section 5.6 below. However, in chapter 2 we argued that now is the time to reappraise whether existing property offences fairly demonstrate that they can in principle penalize the strong wrong of acquisitive exploitation. Citizens may have committed the conduct and fault elements of either the fraud or theft offence, but still remain unsure as to whether they are being publicly censured for acquisitive exploitation.

Fourth, we argued that existing property offences do not penalize the gist of wrongful acquisitive exploitation and therefore criminalize acquisitive exploitation haphazardly. For example, the section 1 fraud offence is under-inclusive in cases of acquisitive exploitation. We argued in chapter 2 of this thesis that it may be sheer coincidence whether there is a relevant position of trust to safeguard financial interests held by an exploiter in a case of acquisitive exploitation. Some core cases of acquisitive exploitation *cannot* be aligned with an expectation to safeguard, or not to act against, another person’s financial interests, and will fall outside of section 1(2)(c) of the Fraud Act 2006 on this basis. There will be exploitees who will be ‘worked on’ over a period of time (as in *Hinks*) where a position of trust has been established, but for

¹⁵⁶ Tadros (n 155) 74.

¹⁵⁷ A point made by Rebecca Williams, ‘Voluntary Intoxication – A Lost Cause?’ (2013) 126 LQR 264.

others the interaction will be much more transitory. It is difficult to argue that a door-to-door salesman who employs exploitative tactics is expected to safeguard a homeowner's financial interests.¹⁵⁸ That would be to interpret even an admittedly vague idea of 'position' to the point of absurdity. Similarly, it would be illogical to argue that a door-to-door salesman has a duty not to act against a homeowner's financial interests given that they are strangers. On these grounds an exploiter may not come within section 1(2)(c) of the Fraud Act 2006.

Furthermore, an exploiter may be crafty enough to know that they should not make a false or misleading representation. This has been the *modus operandi* in cases of 'landbanking'. In 'landbanking' cases land is aggressively sold to vulnerable persons on the basis of limited information, but no relevant misrepresentation is expressly or impliedly made.¹⁵⁹ Again, an exploiter may not come within section 1(2)(a) of the Fraud Act 2006.

Moreover, part of the gist of serious acquisitive exploitation is *not just* that an exploiter has acted fraudulently in relation to an otherwise robust person. The earlier 'targeting' behaviour also bears on the seriousness of the exploitative wrong, and thus should be taken into account in the criminal law response. By penalizing the making of a false representation, the criminal law glosses over this earlier 'targeting' aspect of exploitation. Occupation of a position of trust within the meaning of section 1(2)(c) may present a 'ready-made' opportunity for unfair advantage-taking of vulnerable persons. This may explain why criminal law commentators are drawn to fraud by abuse

¹⁵⁸ cf *Tomney* [2012] EWCA Crim 2545 [84], who was convicted of fraud by abuse of position against an elderly and vulnerable woman whom he had just met.

¹⁵⁹ For example, the facts of *R v Crawley and Others* [2014] EWCA Crim 1028, though note that there was a basis for civil law proceedings and regulatory actions in this case.

of position as a means of penalizing acquisitive exploitation. But this is not to say that the earlier targeting conduct ought not to be penalized. The current criminal law response does not address the strong targeting aspect which is key to acquisitive exploitation.

We cannot expect an existing criminal law offence to have an exact fit with the contours of the wrong, but it is reasonable to ask whether these current measures sufficiently penalize wrongful conduct of exploiters. Acknowledging the diversity of exploitative techniques may require a more specific criminal law response than that provided by either the English theft offence or section 1 of the Fraud Act, and one which marks out the particular blameworthiness of exploitative wrongdoing.

5.6 Alternative criminal law responses

Given these objections it is high time that the criminal law response to acquisitive exploitation is reappraised. We have seen that there are in principle arguments for criminalizing acquisitive exploitation, but the force of these arguments can only be assessed when we consider the type and level of criminalization in question.¹⁶⁰ We rely upon the account of acquisitive exploitation presented and defended in chapters 3 and 4 of this thesis. It involves an exploiter (D) (i) dishonestly targeting an objectively vulnerable person (V), (ii) intending, by the targeting, to open up opportunities provided by V in order (iii) to pursue his own goals. D (iv) accordingly opens up opportunities by (v) engaging in predatory conduct. This is one way in which a person can be wrongfully used and constitutes the wrong of acquisitive exploitation. No

¹⁶⁰ Andrew Ashworth, 'Criminalizing Omissions' in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 31, 69.

distinction is drawn in this thesis between the primary wrong of acquisitive exploitation and its secondary wrong. For example, it could be argued that the primary wrong is acquisitive exploitation and the secondary wrong is humiliation of the victim, such that the centre of gravity of the wrong would fall into offences against the person. Likewise a similar argument could be used so as to say that the primary wrong of acquisitive exploitation is accompanied by the secondary wrong of an attack upon property interests. As is argued in section 5.6.1 below, wrongful acquisitive exploitation itself constitutes both an attack upon a vulnerable person and an attack upon property interests. It is argued here that both aspects can be incorporated into a strong normative account of the wrong, and therefore no distinction is drawn between acquisitive exploitation's primary and secondary wrong.

This section examines whether the current criminal law response can be improved upon. At the outset we note that the arguments made in this section are deeply contestable, but it marks out progress to present cogent arguments on this neglected topic. For example, it could be argued that this thesis' normative account of acquisitive exploitation is relevant to offences criminalizing drug dealing. However, such offences are exempted from the scope of this thesis. This is because, as Douglas Husak argues, there are no convincing normative reasons for criminalizing the distribution of or use of drugs in the first place.¹⁶¹ For example, Husaks notes that concerns about decriminalization leading to increasing drug use have not been substantiated empirically or normatively.¹⁶²

Two broad avenues for development are explored in this section. First, we

¹⁶¹ See Husak (n 92) 21.

¹⁶² *ibid* 29.

consider whether acquisitive exploitation might be used to more fairly label property offences of fraud and theft. Secondly, we assess the justifications for a substantive acquisitive exploitation offence.

5.6.1 Refining property offences

The first view explored is that property offences can be more fairly labelled, with acquisitive exploitation providing additional labelling. This puts the issue of wrongful acquisitive exploitation firmly within the sphere of property offences. This reasoning is compelling if the gist of wrongful acquisitive exploitation is clearly still to do with an attack upon property interests *as well as* an attack upon an objectively vulnerable person. In principle, ‘non-pure’ property offences can accommodate attacks upon property interests *and* attacks upon other interests (such as bodily integrity and an individual’s wellbeing). But it could also be argued that this reasoning is convincing only if the exploitative wrong does not overshadow the attack on property interests.¹⁶³ Acquisitive exploitation poses a risk of harm to property interests. But the strong analytical account of acquisitive exploitation defended in chapter 3 of this thesis did *not* require substantial or significant risk of harm to property interests. Does this undercut the strength of penalizing acquisitive exploitation through a fairly labelled property offence? Surely it does not. There is no firm normative basis that harm (or the risk of harm) to property interests must outweigh harm to other interests in ‘non-pure’ property offences. It is also significant that recent research highlights the importance of fair

¹⁶³ A possibility raised in Stuart P Green, ‘Property Offenses’ in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) ch 34, s IV(5), ‘[W]e could ask which aspect of a given offense is more important, and classify the offense as such. For example, if it turns out that the risk posed by the robber to the victim’s safety is more significant than the risk to his property, then we should classify robbery as an offense against the person rather than as an offense against property.’

labelling of property offences.¹⁶⁴ Acquisitive exploitation must not be overlooked in its potential to bring greater clarity to property offences in England and Wales.

(A) A fairly labelled fraud offence

The first alternative is to propose a fairly labelled fraud offence. Our principal objection to using section 1 of the Fraud Act 2006 to penalize acquisitive exploitation was that it haphazardly penalizes exploitative wrongdoing.¹⁶⁵ It is a matter of luck whether a case of acquisitive exploitation comes within the wrongful conduct set out in sections 2-4 of the Fraud Act 2006. Moreover, the section 1 offence does not address the strong targeting aspect which is key to acquisitive exploitation. We argued that it is high time that a targeted fraud offence, tailored to penalizing acquisitive exploitation, is interrogated.

There are already good grounds to reevaluate the section 1 fraud offence on the basis of fair labelling. The eight deception offences which the Fraud Act replaced were overly-technical and difficult for prosecutors to use.¹⁶⁶ But they have been replaced by an overly broad fraud offence found in section 1 of the 2006 Act.¹⁶⁷ The breadth of the offence was outlined and criticized in chapter 2 of this thesis. Section 1 is an inchoate offence which penalizes dishonest conduct. Accordingly, each form of the offence is

¹⁶⁴ For example, Andrew Ashworth, 'Robbery Reassessed' [2002] Crim LR 851; Green, *Thirteen Ways* (n 85).

¹⁶⁵ See s 2.4.2(A).

¹⁶⁶ Theft Act 1968, ss 15, 15A, 16, 20(2); Theft Act 1978, ss 1, 2(1)(a)-(c). The seminal case of *Preddy* [1996] AC 815, highlighted the difficulties encountered by prosecutors in applying s 15. For analysis, see Law Commission, *Legislating the Criminal Code: Fraud and Deception* (Law Com CP No 155, 1999) 2.

¹⁶⁷ A general fraud offence was supported by Sullivan in *GR Sullivan*, 'Framing an Acceptable General Offence of Fraud' (1989) 53 J Crim L 92.

‘complete on the accused’s acts irrespective of any result’.¹⁶⁸ Commentators have emphasized that the broad scope of fraudulent conduct in section 1 expands the reach of the criminal law beyond the previous deception offences.¹⁶⁹ David Ormerod argues that fraud by false representation ‘appears to criminalise lying’.¹⁷⁰ An employee’s poor work ethic may be enough to amount to abuse of a position to safeguard, or not to act against, the financial interests of another person.¹⁷¹ As is the case in the English theft offence, legal certainty is undermined by the significance given to ‘dishonesty’ as the salient fault requirement.

What remains unclear in English law is whether fraud by false representation, by failure to disclose information, or by abuse of position capture sufficiently clearly core fraudulent conduct. Certainly there is no indication in sections 1-4 of the Fraud Act that any one form of fraudulent conduct is more serious than another. Each form of the offence attracts a maximum penalty of ten years’ imprisonment. There is an important opportunity to reappraise the contours of the section 1 offence in relation to acquisitive exploitation. In enacting a broad fraud offence based on dishonest conduct, English law takes account of the fact that the idea of ‘fraud’ has varied moral content.¹⁷² Green notes that the moral content of a fraud offence not limited to deceptive conduct,

¹⁶⁸ David Ormerod, ‘The Fraud Act 2006 - Criminalising Lying?’ [2007] Crim LR 193.

¹⁶⁹ Ashworth and Horder (n 11) 413, ‘The Fraud Act may be a much-needed modernization of the law, but it is also a significant extension of the criminal law. No efforts have been made to remove many of the lesser appropriations, frauds, and handlings from the criminal law.’

¹⁷⁰ Ormerod (n 168) 196.

¹⁷¹ David Ormerod and David Williams, *Smith’s Law of Theft* (9th edn, OUP 2007) 133.

¹⁷² This is true in U.S. law too, see Stuart P Green, ‘A Normative Approach to White-Collar Crime’ in Henry Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer 2007) 230, quoting *Blachly v US* (380 F.2d 665, 671 (5th Cir. 1967)), ‘[A] wrongful act of almost any sort—a violation of “moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society,” an act that is “discreditable as being at variance with straightforward or honorable dealings”.’

and which is based on dishonest conduct, includes ‘cheating, exploitation, disloyalty, or promise-breaking’.¹⁷³ On this view, there is nothing particularly novel about the idea of engaging in fraud by exploitation. It is also important to remember that commentators have tethered a state response to a vague idea of ‘exploitation’ to the section 1 offence, albeit with little supporting analysis.¹⁷⁴ Is increasing labelling of the section 1 offence using acquisitive exploitation defensible?

First, if this type of exploitative wrongdoing is to be marked out within the section 1 fraud offence, its conduct requirements must be sufficiently serious and clearly identifiable. Acquisitive exploitation involves an exploiter (D’s) dishonest targeting of an objectively vulnerable person (V), and D’s opening up opportunities provided by V by engaging in predatory conduct. Predatory conduct could involve coercive conduct (including conduct which threatens, pressurizes or intimidates); deceptive practices; manipulative techniques; and abuse of position of trust. Our analysis of predatory conduct in chapter 3 of this thesis provides an approach for interpretation. We have seen already in this thesis that identifying objectively vulnerable persons and targeting is not straightforward. This is to some extent inevitable. However, this does not render the task of identifying conduct core to acquisitive exploitation impossible. For example, by including a more general discussion of what makes persons vulnerable (impaired decision-making capacity, being under another persons’ power etc.), we sought to identify underlying principles which guide the identification of vulnerable persons.

¹⁷³ Stuart P Green, *Lying, Cheating, Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 150.

¹⁷⁴ For example, AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart 2010) 618-19.

Are the means by which acquisitive exploitation is committed sufficiently serious? There is no easy answer to this question. Acquisitive exploitation involves a wrongful method of targeting objectively vulnerable persons. It focuses on using targeting of vulnerable persons and predatory conduct. We have been candid throughout this thesis that our analytical account of the wrong is intended to be of interest to criminal law theorists, and that it has been drafted as a strong account accordingly.¹⁷⁵ It is important to highlight that concerns about predatory targeting of the vulnerable are reflected in sentencing decisions on property offences.¹⁷⁶ It may be much clearer to reflect this concern within the present definition of the section 1 fraud offence. Labelling ‘fraud by acquisitive exploitation’ as a form of fraudulent conduct sets out the content of the wrong clearly, which in turn provides a clearer basis for identifying proportionate sentences for fraudulent conduct. A sentencing range in relation to fraud by acquisitive exploitation could be articulated, thus conveying in a principled way the diversity of fraudulent conduct. Specific property offences regarding targeting the vulnerable have developed in other jurisdictions. Article 223-15-2 of the French Penal Code contains an offence of:

[F]raudulently abusing the ignorance or state of weakness of a minor, or of a person whose particular vulnerability due to age, sickness [or] infirmity...is apparent or known to the offender...in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him.

And we will see in section 5.6.3 below that a focus on targeting vulnerable persons has developed in relation to theft offences in other jurisdictions. I would argue that there is a strong case for marking out strong targeting accompanied by predatory conduct within the section 1 fraud offence.

¹⁷⁵ See s 3.1.

¹⁷⁶ For example, *R v Cash (Patrick)* [2012] EWCA Crim 1583. See s 3.2 fn 29.

A second issue is whether the fault requirements which are key to our strong account of acquisitive exploitation require adjustment. We argued that an exploiter's intent to further his own goals is key to the exploitative wrong. Unlike the section 1 offence, acquisitive exploitation does not require an exploiter to intend, by acquisitive exploitation, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. However, our account of the exploitative wrong could be amended in order to achieve consistency with section 1. Benefit via profit or gain is likely to be a *main* goal in cases of acquisitive exploitation where an individual engages in exploitative conduct in order to attack a vulnerable person's property interests. This is a clear example of adapting the account of acquisitive exploitation to ensure consistency with the section 1 offence.

A further adjustment would also be required. An analytical account of acquisitive exploitation relies heavily on the concept of 'dishonesty'. Commentators have strongly criticized the over-reliance of English property offences on dishonesty, and we have emphasized these arguments at several points in this thesis. For example, the Law Commission argued against a general fraud offence based on dishonest conduct in their consultation paper on fraud in 1999.¹⁷⁷ This was on the grounds that it 'would criminalise conduct which is otherwise part of everyday commercial life (namely the obtaining of financial advantages at the expense of others) whenever fact-finders consider that conduct to be dishonest'.¹⁷⁸ According to the Law Commission, this is incompatible with Article 7 ECHR, but a declaration of incompatibility has not yet been

¹⁷⁷ Law Commission, *Legislating the Criminal Code: Fraud and Deception* (n 166) 35.

¹⁷⁸ *ibid* 35.

made.¹⁷⁹ An additional knowledge requirement is necessary to ensure fair warning for citizens. We propose the addition of an exploiter dishonestly targeting an objectively vulnerable person, *knowing* that he is a vulnerable person.

It is plausible that fraud by acquisitive exploitation could be identified as another means of committing the section 1 fraud offence. This form of fraud would be committed if a person:

- (a) dishonestly targets an objectively vulnerable person, knowing that he is a vulnerable person, and
- (b) intends, by the targeting, to open up opportunities provided by V—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to the risk of loss.
- (c) D accordingly opens up opportunities provided by V by engaging in predatory conduct.

Such an approach would make clear that a fraud offence can be used to target a form of wrongful interpersonal exploitation which is conceptually distinct from abuse of a position of trust or a false representation. It is difficult to argue that this would lead to ‘over-labelling’ of the section 1 fraud offence, given the latitude which is already found in section 1. Current academic consensus cursorily asserts that the section 1 offence can be used to penalize an under-explored wrong of ‘exploitation’. The strength of this fairly-labelled proposal lies in the fact that we have first excavated the contours and limits of the exploitative wrong in question. Now the debate must turn to whether the idea of dishonestly *and* knowingly targeting objectively vulnerable persons by predatory conduct ought to be considered core to the section 1 offence. Certainly there

¹⁷⁹ *Norris v United States of America* [2008] UKHL 16.

is no limitation in the idea of ‘dishonest fraud’ itself which defeats this proposal.

(B) An aggravated theft offence

A second alternative is that acquisitive exploitation could mark out the wrongful means by which theft is committed. We explained in chapter 2 that, despite recent steers towards section 1 of the Fraud Act 2006, the link between the English theft offence and exploitation remains strong in practice.¹⁸⁰ Section 1 of the Theft Act 1968 has been interpreted as an offence turning almost entirely on fault elements of dishonesty and intention to permanently deprive another person of their property interests.¹⁸¹ This gives scope to use the offence of theft to penalize acquisitive exploitation. Since it is likely that ‘appropriation’ is easily satisfied in cases of acquisitive exploitation (*any* assumption of the rights of an owner is the relevant threshold), dishonesty can be extended and interpreted to cover exploitation.

But this legal position is far from ideal. An exploiter can be convicted of theft so long as an exploitee’s property rights are minimally interfered with via appropriation and the relevant fault elements of the theft offence are met. But it does not matter *how* an exploitee’s property rights have been interfered with or to what extent. For example, there is nothing in the offence of theft which requires strong targeting or predatory conduct associated with strong acquisitive exploitation. It is intellectually frustrating to bury a serious exploitative wrong within a broad conduct requirement, with only

¹⁸⁰ s 2.4.3.

¹⁸¹ Ashworth and Horder (n 11) 368, ‘D’s conduct does not have to amount to a potential destruction of V’s ability to use the property or to act as owner: on the contrary, the courts have held that the merest interference with any right of an owner may suffice, so long as it is accompanied by dishonesty and an intention permanently to deprive.’

dishonesty drawing the limits of the offence. It underscores the fact that the English theft offence lacks certainty and therefore fair warning for citizens.

The first question to ask is whether there is value in reappraising this broad offence of theft in England and Wales. Recent academic work supports the view that Anglo-American theft offences should be labelled more fairly.¹⁸² Stuart Green has strongly criticized what he views as the consolidation and homogenization of theft offences in the United States, Canada, England and Wales and Australia in the twentieth century.¹⁸³ While more modest than consolidation of the U.S. Model Penal Code, the recommendations of the Criminal Law Revision Committee which were taken on in the Theft Act 1968 ‘eliminated supposedly archaic distinctions such as those between larceny, embezzlement, and false pretenses, and replaced them with a more or less consolidated offense of “theft”’.¹⁸⁴ We noted in section 5.5 above that fair labelling is important to show respect for citizens as ‘autonomous agents’, by respecting and promoting citizens’ core interests within a body of criminal law.¹⁸⁵ Green’s hypothesis is that the English theft offence, which does not differentiate between the means used to commit theft, jars with ‘community perceptions’ of theft.¹⁸⁶ A small-scale study involving 72 individuals who were asked to rank a series of scenarios according to ‘blameworthiness’ lends some support to this intuition.¹⁸⁷ On any view, it

¹⁸² Green, *Thirteen Ways* (n 85).

¹⁸³ *ibid* 40.

¹⁸⁴ Green, ‘Property Offences’ (n 163) ch 34, s IV(1)(b). See Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences*, Cmnd 2977 (1967), who reevaluated the Larceny Acts 1861 and 1916.

¹⁸⁵ Tadros, ‘Fair Labelling and Social Solidarity’ (n 155) 72.

¹⁸⁶ Green, *Thirteen Ways* (n 85) 54.

¹⁸⁷ For description of the method, see Green, *Thirteen Ways* (n 85) 57-58.

is not difficult to accept that the English theft offence fails to represent intuitions that taking someone else's property is quite different from doing something to property that only an owner can do. That is to do with the significance and meaning given to 'appropriation'. But Green's argument goes a step further. It is an argument in favour of identifying the *way* in which an interference with property interests occurs.¹⁸⁸ What the current offence of theft omits to convey is the significance of the wrongful method by which theft occurs. This bears similarity to Ashworth's argument in relation to the offence of robbery. Ashworth states that:

[T]he offence of robbery is objectionable because it fails to mark in a public way the distinction between a mere push and serious violence, and because the label 'robbery' is therefore too vague and too liable to stereotypical interpretations—some may assume that serious violence, or a weapon, was involved when this was not necessarily the case.¹⁸⁹

Like robbery, the English theft offence is a ripe candidate for fairer labelling. A differentiated approach to the offence of theft has been adopted in several other European criminal law codes.¹⁹⁰ There is a broader question about which methods of committing theft ought to be marked out, and there is now an emerging body of scholarship on this topic.¹⁹¹ We are concerned here only with the narrow and neglected question of whether there is an argument in favour of marking out acquisitive exploitation within the section 1 theft offence. Certainly theft by exploitation has not been given significance in recent scholarship. This may be linked to the propensity of theorists to neglect to disaggregate 'wrongful interpersonal exploitation', and to instead

¹⁸⁸ Green, *Thirteen Ways* (n 85) 115, 'Theft's secondary wrongs involve not the deprivation of property rights per se, but rather the wrongful means by which such deprivation is carried out.'

¹⁸⁹ Ashworth, 'Robbery Re-assessed' (n 164) 856.

¹⁹⁰ Ashworth and Horder (n 11) 414-15.

¹⁹¹ Green, *Thirteen Ways* (n 85) chs 2-3.

crystallize Feinberg's interpretation of interpersonal exploitation as fixed.¹⁹²

Theft by exploitation has been given significance in several civil law countries. Stealing 'by exploiting the helplessness of another person' is one means of committing aggravated theft in section 243(1)(6) of the German Criminal Code. Unlike the English theft offence, section 242(1) requires the taking away of property belonging to another.¹⁹³ An aggravated theft offence attracts a maximum sentence of ten years' imprisonment.¹⁹⁴ Similarly, the French Penal Code contains a basic offence of theft and a number of aggravated theft offences.¹⁹⁵ An aggravated theft offence is committed where 'it is facilitated by the state of a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator', and attracts a five year maximum sentence and a monetary fine.¹⁹⁶ The penalty is further increased if at least one other factor identified in Article 311-4 is fulfilled. Thirdly, New York penal law penalizes financial exploitation of the elderly or disabled within the crime of larceny. Section 155.05(F)(1) states that:

A person obtains property by financial exploitation of the elderly or disabled, when being a person in a position of trust, he or she compels or induces an elderly or disabled person to deliver such property to himself or herself or to a third person by means of fraud, false promise, extortion or intimidation.

¹⁹² See s 2.2 of this thesis.

¹⁹³ s 242(1).

¹⁹⁴ s 243(2) states that '[A]n especially serious case shall be excluded if the property is of minor value.' Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 216, notes that the examples in section 243 are 'typified examples (...) of sentencing factors that make a theft into an aggravated case. Nevertheless, they are treated similarly to offence elements as far as the knowledge of the offender is concerned; this is a function of the general principle of blameworthiness (...) that would forbid punishing D with an increased sentence unless he or she was aware of the factors that made his or her conduct more serious than the average case.'

¹⁹⁵ French Penal Code, Articles 311-1 to 311-6.

¹⁹⁶ Article 311-6(5).

It is important not to overstate the significance of this final example since it is common to identify fraud as part of a wider category of theft in many U.S. states.¹⁹⁷ However, the point stands that the focus of this offence is not solely upon fraudulent conduct. We can identify that a theft offence is used to focus upon penalizing the targeting of the vulnerable, via conduct which is likely to come within this thesis' account of predatory conduct. In turn, this suggests that marking out theft by exploitation holds potential for censuring those who attack the vulnerable.

Is there a plausible case for marking out the English theft offence with an idea of theft by *acquisitive* exploitation? It is argued that it is most convincing to analyze the exploitative element as *aggravating* the basic theft offence. It is well-known that the existing theft offence fails to distinguish between small thefts and substantial violation of another person's property rights via strong attacks.¹⁹⁸ Identifying serious acquisitive exploitation as an aggravating factor paves the way for clearer labelling of the section 1 offence. A careful doctrinal approach requires us to begin with the analytical account of acquisitive exploitation advanced in this thesis so that we can ensure legal certainty. Some modest adjustment of the account would be required. First, for the reasons given in section 5.6.1(A) above, it is suggested that a knowledge requirement be added. In other words, an exploiter dishonestly targets an objectively vulnerable person, *knowing* that he is a vulnerable person. Second, our core account of acquisitive exploitation required an exploiter to intend, by the targeting, to open up opportunities provided by V in order to pursue his own goals. But it is difficult to accept that an aggravated offence of theft by acquisitive exploitation would require this

¹⁹⁷ Green, 'Property Offences' (n 163) s 1.

¹⁹⁸ Ashworth and Horder (n 11) 415.

element to be marked out. In practical terms, there is the concern that this would make an aggravated theft offence too complicated and the law overly technical to apply. In principle, it could be argued that the element of intention to permanently deprive another person of their property interests required by the basic theft offence can act as the means of identifying an exploiter's intentions. It is an imperfect compromise, given that an exploiter's goals could be wider than this, but it is a necessary adjustment so as to avoid too much complexity.

To summarize, an aggravated form of theft could be committed if an individual (D) commits the basic theft offence, plus:

- (a) dishonestly targets an objectively vulnerable person (V), knowing that he is a vulnerable person, and
- (b) accordingly opens up opportunities provided by V by engaging in predatory conduct.

Assuming that such an approach is compelling, the question then turns to the appropriate sentence. Ashworth has recently argued that imprisonment should not be used for pure property offences, with an exception for 'extraordinarily serious' cases which produce 'exceptional circumstances'.¹⁹⁹ One exceptional example identified is that of 'a theft or fraud targeting an elderly or disabled victim, the exploitative element—combined with the theft or fraud of a significant sum or item—taking the offence above the usual combination of factors'.²⁰⁰ Even if Ashworth's argument is attractive, there would be no need to identify 'exceptional circumstances' in relation to theft aggravated by acquisitive exploitation in order to justify a term of imprisonment.

¹⁹⁹ Ashworth, 'What if Imprisonment Were Abolished for Property Offences?' (n 112) 13.

²⁰⁰ *ibid* 13.

Labelling the exploitative wrong as part of an aggravated offence paves the way for clearer sentencing without needing to resort to ‘exceptional circumstances’ reasoning.

One final question remains. Even if it is possible to differentiate the English theft offence using acquisitive exploitation, there is a question mark around whether a fairly labelled aggravated theft offence is the right tool to penalize acquisitive exploitation. Currently the English theft offence requires only minimal interference with an exploitee’s property interests via appropriation. On this approach ‘what matters most in law is that D’s conduct manifests a dishonest acquisitive intention’.²⁰¹ But we cannot overlook the fact that theft’s ‘primary wrong’ appears to lie with a dishonest attack upon property interests.²⁰² The idea of ‘appropriation’ still places significance on the fact that an exploitee’s property right has been interfered with, even though this requirement is routinely satisfied. Moreover, the theft offence requires intent to deprive another person of their property interests. The offence of theft still draws intellectual coherence from dishonest attacks upon property interests. But of course the difficulty with acquisitive exploitation is *not just* that it constitutes a dishonest attack upon property interests. Rather, it constitutes a strong attack upon a vulnerable person and is troubling not simply because it may lead to an exploitee’s property rights being violated. In chapter 3 we argued that it is natural to say that a person has exploited a vulnerable person where there is *no* violation of property interests at all, and we explore this argument below.²⁰³ On these grounds, a substantive exploitation offence might be more robust and ought also to be considered.

²⁰¹ Ashworth and Horder (n 11) 368.

²⁰² To use Green’s language in *Thirteen Ways* (n 85) 91.

²⁰³ Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 163, notes that ‘The offence of burglary itself seems almost to be overshadowed by the focus on the targeting of the vulnerable victim (aggravated culpability) and the effects on such victims (aggravated harm).’

5.6.2 A substantive acquisitive exploitation offence

Third, it is appropriate to consider a substantive exploitation offence. On this view, acquisitive exploitation, rather than an attack upon property interests, can be characterized as the *principal* wrong penalized. In other words, acquisitive exploitation is regarded as a freestanding wrong. This is to acknowledge that there is something distinctive about acquisitive exploitation which justifies criminalization. We argue below that the case for criminalization is likely to be stronger if harm to property interests is also part of a proposed offence, i.e. that acquisitive exploitation ought not to be penalized as a freestanding wrong. In fact, a substantive offence which requires significant or substantial harm to property interests would be narrower in scope than existing property offences of theft and fraud in England and Wales. This additional requirement can easily be accommodated by requiring a certain level of harm to property interests as part of a substantive offence.

It is more difficult to justify a new criminal offence than to argue in favour of using acquisitive exploitation to more fairly label an existing property offence. For the reasons identified in section 5.1 of this chapter, *alternatives* to criminalization must first be considered. We worked through this problem in relation to acquisitive exploitation in sections 5.3 and 5.4 above, so we are now in a position to state that there is in principle case for using criminal law sanctions (as well as civil law and/or regulatory measures) to penalize acquisitive exploitation. We argued that a serious concern with using only civil law measures is that there will be gaps in protecting objectively vulnerable persons from acquisitive exploitation. While the civil law may be used to target the worst instances of interpersonal exploitation in fiduciary relationships and in contract law, it is quite conceivable that a vulnerable person will have no leverage in the

civil law. Furthermore, even if civil law measures and/or doctrines can in principle and practice target acquisitive exploitation this does not mean that criminal law measures are ruled out. The case for state censure of acquisitive exploitation is weighty given that the wrong constitutes a strong attack upon an already vulnerable person. Finally, penalizing acquisitive exploitation only at the sentencing stage where an existing property offence applies devalues the seriousness of the exploitative wrong.²⁰⁴ Consideration of a substantive exploitation offence is justified by the principle of fair labelling, which requires that ‘widely felt moral differences between criminal offenses should be respected and signaled *by the law itself*’.²⁰⁵

Criminal law theorists must take this line of argument seriously. We explored the state’s obligations to penalize ‘wrongful interpersonal exploitation’ in chapter 1 of this thesis. European human rights law places strong pressure upon states in this regard. For example, there is real uncertainty as to *which* ECHR rights will be engaged in cases of serious exploitation, and there remains scope for development on this issue. Moreover, it is evident that positive duties have been imposed upon states to ensure *effective* criminal law measures to penalize exploitation.²⁰⁶ We argued in chapter 1 that a state may need to improve upon current statutory provision by enacting new criminal law measures where current measures are considered insufficient.²⁰⁷ As we have

²⁰⁴ For example, Sentencing Guidelines, *Overarching Principles: Seriousness* (2004) 6, refers to ‘the deliberate targeting of vulnerable victims’, ‘abuse of power’, and ‘abuse of a position of trust’ as factors indicating higher culpability.

²⁰⁵ Green, *Thirteen Ways* (n 85) 33 [emphasis added]. Green, *Thirteen Ways* 33, ‘The clearest, most transparent, and most consistent way to do this is through legislation. Even if judges or prosecutors were to correct for the overly broad classification system in some individual cases, the basic problem would remain unresolved.’

²⁰⁶ *Siliadin v France* (n 136) [89].

²⁰⁷ s 1.4.1.

already indicated, there are several exploitation offences in England and Wales.²⁰⁸ It is not a stretch to say that politicians and policy makers will seek to advance a new substantive criminal law offence on the basis of acquisitive exploitation. For example, there has been much legislative activity in the United States regarding financial exploitation of the elderly—a wrong which we can conjecture bears similarities to acquisitive exploitation (for example, because we would expect similar predatory conduct to be involved).²⁰⁹ Criminal law theorists must be considering whether criminal law in England and Wales needs to be more sensitized to the serious wrong of acquisitive exploitation.

We saw in chapter 2 that the property offences which commentators *assume* can penalize ‘exploitation’ are themselves hopelessly broad, attracting significant maximum sentences. It is not altogether certain that fair labelling of existing property offences of theft and fraud resolves these underlying difficulties. It is timely to consider whether a targeted exploitation offence, with penalties proportionate to the seriousness of the wrong, is to be preferred. Two characterizations are now considered.

(A) Acquisitive exploitation plus intention to violate a vulnerable person’s property interests

We take as our starting point a substantive offence drafted using this thesis’ account of acquisitive exploitation *and* intention to violate a vulnerable person’s property interests. Two specific additions are canvassed here. First, for the reasons given in section 5.6.1 above, it is suggested that we add to the account of acquisitive exploitation that D

²⁰⁸ s 1.5.2.

²⁰⁹ For discussion, see U.S. Government Accountability Office, *Elder Justice: Federal Government Has Taken Some Steps but Could Do More to Combat Elder Financial Exploitation* (16 May 2013) <www.gao.gov/assets/660/654663.pdf> accessed 29 March 2015.

dishonestly targets a vulnerable person *knowing* that he is a vulnerable person. Second, specifying an intention to violate a vulnerable person's property interests enables us to connect the offence with an attack upon property interests as well as an attack upon a vulnerable person. It was argued in chapter 3 of this thesis that a strong account of acquisitive exploitation requires an exploiter to intend, by his targeting, to open up opportunities to pursue *his own goals*. The point was made that these goals may not be linked with an intention to gain or to cause loss to another person. While an intention to violate a vulnerable person's property interests is likely to be present in many cases of acquisitive exploitation, it is best to make this requirement explicit for the purposes of a substantive offence.

It is argued that thresholds to criminalization in the form of harm and serious wrongfulness meriting public censure are satisfied. This argument has been made in relation to our core account of acquisitive exploitation in sections 5.3 and 5.4 above. Now that a knowledge requirement *and* an intentional attack upon a vulnerable person's property interests have been added to this account, harm and wrongfulness thresholds are even more clearly satisfied. However, Husak's 'external constraints' are still open for debate.²¹⁰ The scope and limits of an offence must be consistent with a principle of minimum criminalization. Husak argues that the right not to be punished will only be outweighed by a need for criminal censure where a criminal offence requires: a substantial and legitimate 'governmental interest in enacting the law'; a clear trajectory towards achieving this purpose; and a proportionate criminal law response.²¹¹

The first difficult normative question is whether the state has a *substantial*

²¹⁰ Husak, *Overcriminalization* (n 2) 132.

²¹¹ Husak, 'Why Criminal Law?' (n 8) 108; Husak, *Overcriminalization* (n 2) 159.

interest in penalizing the harm caused or harm risked by acquisitive exploitation. This enquiry is likely to be connected to arguments in political theory. We argued in chapter 1 that both liberalism and republican political theories supply two independent normative bases for state action using criminal law in targeting wrongful interpersonal exploitation.²¹² Can further detail be established now that we have carefully probed the contours of the wrong? Is there a substantial and legitimate state interest in penalizing harm caused or risked by acquisitive exploitation?

It is reasonable to suggest that acquisitive exploitation will cause psychological and emotional harm to victims *and* harm to the wider community. There is significant harm caused to victims of acquisitive exploitation by way of humiliation and insecurity as a result of their being targeted. There are likely to be negative effects on well-being when vulnerable persons realize that they have been duped and exploited.²¹³ But there is also a wider effect upon the community by way of citizens' fear of being targeted by predatory individuals. Does this harm merit a substantive exploitation offence drafted in this form? Protection is most commonly offered to vulnerable persons from the risk of serious sexual harm. Lesser harms to the self, or risk to financial or property interests, may be less convincing as justifications.²¹⁴

Arguably, liberal states have a substantial interest in protecting vulnerable

²¹² s 1.4.2.

²¹³ Observations have been made in various sentencing decisions, assessing the deleterious impact of fraudulent conduct upon vulnerable victims. *Tomney* (n 158) [85], 'One wonders if any of the appellants have the slightest idea of the effect [of fraud] upon an elderly person of being cheated in this way, sometimes of their entire life savings. Once the elderly person realizes what happens, even if they are suffering from dementia, it can be humiliating for them. It can destroy their sense of dignity and their confidence. It can often lead to a significant deterioration in their mental health. Those who prey on the elderly and the vulnerable can expect little mercy from this court.'

²¹⁴ Acquisitive exploitation does not depend upon harm to property interests. The most that can be said is that there is a serious *risk* of harm to property offences every time an exploiter engages in acquisitive exploitation.

persons from the risk of serious harm caused by acquisitive exploitation. In chapter 3 we argued that targeting objectively vulnerable persons is problematic because the objectively vulnerable are less able to protect their own interests. We also emphasized that the predatory conduct used in relation to vulnerable persons might provide a further basis for criminalization. While coercion and deception are independent grounds for property offences, it might be that the manipulation of the vulnerable is problematic because the objectively vulnerable are unable to self-protect against manipulation.

By targeting objectively vulnerable persons, using predatory conduct, an exploiter breaches a moral duty not to press for advantage against objectively vulnerable persons. The wrong encapsulates a particularly serious form of cheating, given that an exploitee is targeted for the reason that he is a vulnerable person. It is not as objectionable to open up opportunities provided by non-vulnerable persons using predatory conduct, as it is to open up opportunities provided by objectively vulnerable persons (such as a young child or a mentally disordered person) using predatory conduct. We also argued that exploiters are less likely to be held to account for their treatment of the vulnerable since the vulnerable are less likely to complain, and it is more difficult in practice to establish a case based on the testimony and evidence of the vulnerable. This creates a type of ‘double’ or ‘heightened’ vulnerability of the already-vulnerable. Arguably for both of these reasons the state has strong obligations towards its most vulnerable members. In turn, this provides a substantial and legitimate state interest in criminalization. Enacting a substantive acquisitive exploitation offence serves an important communicative function. Criminal censure has a strong communicative role to play in articulating the state’s disapproval of exploitative wrongdoing against its most vulnerable members.

Second, there must be a clear trajectory to achieving this purpose via a substantive exploitation offence. In other words, the effectiveness of criminalization in deterring acquisitive exploitation must be proven. The best support for effectiveness will be found in the existence of empirical evidence. Would a substantive exploitation offence drafted in this form directly advance these state interests? There are two possible aspects to an effectiveness enquiry. On the one hand, we could evaluate whether an offence would be effective in deterring individuals from engaging in acquisitive exploitation. This is to focus upon deterrence and harm reduction. Persuasive empirical evidence of deterrence effects of using exploitation offences in other jurisdictions might be one way of supporting this argument. It could also be considered whether a substantive exploitation offence would be effective in communicating society's condemnation of acquisitive exploitation. It is of course fiendishly difficult to secure the argument about communicative gains. The Law Commission has recently argued that it will always be 'a matter of speculation' as to what communicative gains would be achieved via a new criminal offence.²¹⁵ Surely the seriousness of the exploitative wrong at issue in acquisitive exploitation lessens the speculative element?

Finally, a substantive exploitation offence must constitute a *proportionate* criminal law response. Since there are always costs involved in criminalization, it must be the case that the costs of criminalization are not disproportionate to the wrongful harm (or harm prevention) penalized by the criminal law. Also important is that criminalization does not come at the expense of important values and rights such as 'the

²¹⁵ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014) para 4.86.

rule of law or other values such as personal liberty'.²¹⁶ For example, there is a concern that a substantive offence drafted in these terms would infringe too greatly upon freedom of action. There is a fine line between acquisitive exploitation and acceptable 'sharp' behaviour. There are only limited grounds on which to argue that important rights would be infringed if a substantive offence were drafted in these terms. The element of dishonesty of targeting a vulnerable person, knowing that they are vulnerable, ensures that a crafty business operator is not penalized.²¹⁷ A crafty business operator is unlikely to be dishonest according to 'the current standards of ordinary reasonable people'. His conduct seems 'normal', given the prevalence of sharp behaviour in competitive business scenarios. Additionally, it is unlikely that a business competitor is to be considered an objectively vulnerable person under our open category of vulnerable persons set out in section 3.4.2 of this thesis. In this example there is no concern with seriously unequal contest.

The principal issue with a substantive offence drafted in these terms is the challenge it presents for legal certainty. Our analytical account of acquisitive exploitation is an improvement on references to exploitation as 'taking unfair advantage' in the property offences context. However, concepts of targeting, of vulnerable persons, of opening up opportunities and of predatory conduct, are all malleable. On the one hand this is to be expected. It is inevitable that there will be dispute about the precise boundaries of these concepts. Indeed, any substantive criminal offence carries the potential for ambiguity in the concepts it uses. That does not mean that the terms key to this thesis' account of acquisitive exploitation cannot

²¹⁶ Stanton-Ife, 'What is the Harm Principle For?' (n 12) 8.

²¹⁷ See s 5.3 above.

satisfy legal certainty requirements. My own preferred solution was to provide practical detail in chapter 3 as to the meaning of ‘predatory conduct’, and in relation to ‘categories’ of objectively vulnerable persons.²¹⁸ No doubt the account of exploitation in chapters 3 and 4 can be finessed further. Indicators to acquisitive exploitation also provide a route to identifying acquisitive exploitation, and this effect will be heightened if a substantive exploitation offence is supplemented with coherent and transparent prosecutorial policies.²¹⁹ It is imperative that citizens are able to direct their conduct on the basis that they have no doubt that they are infringing the criminal law.²²⁰ This supplies a clear reason for including a knowledge requirement.

The issue of sentencing is open for debate, and we will turn to consider it once we have the most convincing characterization of a substantive exploitation offence in hand.

(B) Acquisitive exploitation plus harm to an exploitee’s property interests

Alternatively, is a substantive exploitation offence more persuasive if an exploitee’s property interests are also harmed? And would this merit a higher custodial sentence? We would expect requiring harm to an exploitee’s property interests, combined with the exploitative wrong, to further load the case in favour of the state having a substantial interest in preventing acquisitive exploitation.²²¹

²¹⁸ s 3.6.

²¹⁹ And would members of the public be required to be involved in this task, such as via a duty to report offence?

²²⁰ For discussion, see HLA Hart (n 15) 152-53.

²²¹ By ‘property interests’ we rely upon Tony Honoré’s description of eleven key rights of ownership, AM Honoré, ‘Ownership’ in Anthony G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961) 107, 111, as ‘rights to possess, use, manage, and to the income of a thing; to capital, security, transmissibility, the absence of term; a duty to prevent harm, liability to execution and the incident of residuary’.

First, this would be because harm is caused to a vulnerable person's property interests, but also because the conduct penalized by the exploitation offence attacks the system of property interests more generally. Notably an attack upon a regime of property interests is not necessarily linked to the fraud and theft offences examined above.²²² Harm to property interests is not required by the section 1 fraud offence. And 'appropriation' in the offence of theft has been interpreted as a very minimal requirement.

Second, this characterization of a substantive offence may increase the chances of an exploitation offence being a proportionate criminal law response. It avoids engaging the costly machinery of the criminal justice system apart from in cases of serious wrongdoing with harm. Here the salient harm extends beyond harm to vulnerable persons and harm of insecurity caused to citizens generally. There is also harm to victims' property interests and the regime of property interests as a whole. It follows that the results of a consequentialist cost analysis may be improved with the addition of harm to an exploitee's property interests. In other words, there is justification for criminal law measures where *two serious wrongs* (which are closely linked) can be tackled at once.²²³

But perhaps this argument is only convincing if there is a certain level of harm to property interests. Need harm to an exploitee's property interests be of a *sufficiently serious* level in order to provide stronger justification for a substantive exploitation offence? Green notes that '[T]he idea that a crime is *de minimis* can be traced to the

²²² cf AP Simester and GR Sullivan, 'On the Nature and Rationale of Property Offences' in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005).

²²³ Recall that the paradigm account of acquisitive exploitation does not hinge upon harm to property interests.

traditional common law maxim of *de minimis non curat lex*: the law does not concern itself with trifling matters.²²⁴ While there is no such equivalent in English property offences, section 212 of the U.S. Model Penal Code enacts a *de minimis* defence. It is apparent that a *de minimis* defence operates in some civil law jurisdictions. An individual commits an aggravated theft offence under section 243 of the German Criminal Code if he exploits ‘the helplessness of another person’. However, section 243(2) states that cases which fall within section 243(1) will be ‘excluded if the property is of minor value’. It is also relevant that decisions about whether to prosecute are influenced by the expected penalties imposed. Prosecutors in England and Wales are advised that if a nominal penalty is likely to be imposed by a court, this is a factor against bringing a prosecution.²²⁵ The logic is that the more serious the harm to property interests in the first place, the greater the likelihood that a prosecutor will proceed to prosecute.

It is not clear, however, that a *de minimis* defence provides a stronger justification for a substantive ‘exploitation’ offence. One practical issue is whether such a defence can be successfully drafted and implemented. For example, Green has highlighted the incoherent approach to such a defence in the U.S. Penal Code, ‘Of [section 2.12’s] three subsections, only one expressly involves the subject of *de minimis* infractions.’²²⁶ While this problem is not insurmountable, it should be noted that the defence has rarely been used, ‘[T]he [*de minimis*] defense has been adopted in only five

²²⁴ Green, *Thirteen Ways* (n 85) 157-58. For discussion, see Max Veech and Charles Moon, ‘De Minimis Non Curat Lex’ (1947) 45 Michigan Law Review 537; Douglas Husak, ‘The *De Minimis* “Defense” to Criminal Liability’ in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 328.

²²⁵ Crown Prosecution Service, ‘The Decision to Prosecute’ <www.cps.gov.uk/victims_witnesses/resources/prosecution.html#a03> accessed 29 March 2015.

²²⁶ Green *Thirteen Ways* (n 85) 159.

jurisdictions—Guam, Hawaii, Maine, New Jersey and Pennsylvania—and several of these have watered down its effect by making the exception permissive rather than mandatory.²²⁷ It is interesting to note that Green is aware of only two reported U.S. decisions where a *de minimis* defence was successfully invoked in relation to a theft offence.²²⁸ Therefore the practical success of a *de minimis* defence depends upon whether these practical reservations can be overcome. Moreover, the firm intuition remains that concern with the *value* of harm to property interests is less important where there is also harm caused to vulnerable persons by acquisitive exploitation. An offence criminalizing serious acquisitive exploitation, which also causes (even minimal) harm to an exploitee's property interests, surely performs an important communicative function about acquisitive exploitation. Recognizing this important communicative function in turn requires a strong account of serious acquisitive exploitation—an argument we have made at various points in this thesis. On these grounds, a *de minimis* defence seems perfunctory.

A requirement of harm to property interests might also produce useful practical effects, thus increasing the effectiveness of the criminal sanction. Harm to an exploitee's property interests may be a means of identifying wrongful exploitation *ex post facto*. We have argued throughout this thesis that it may be very difficult to identify acquisitive exploitation *without* harm to property interests.²²⁹ But this is defensible reasoning only if harm to an exploitee's property interests also 'makes a significant difference to the character and seriousness of the wrong committed', as we

²²⁷ *ibid* 160.

²²⁸ *ibid* 162.

²²⁹ The argument in s 3.3 was that it may be difficult to identify acquisitive exploitation without gain to an exploiter or loss to an exploitee.

have argued it does.²³⁰ Arguably harm to an exploitee's property interests creates a stronger justification for a substantive exploitation offence than that considered in section 5.6.2(A) above.

This leads on to the issue of sentencing. What would be the 'least restrictive approach' to criminalization?²³¹ The legislature must impose punishment in proportion to the seriousness of the wrong and the harm caused. It is only possible to make some general points here, given that questions about totality will affect applicable maximum sentences in specific cases. A financial penalty would seem to be insufficient for either characterization of an acquisitive exploitation offence, given the strong nature of the exploitative wrong and the harm thereby caused to vulnerable persons. What penalty is appropriate given the seriousness of acquisitive exploitation, coupled with harm (of any level) to an exploitee's property interests, i.e. characterization (B)? Again, there is a strong case for a custodial sentence, but this time set at a slightly higher level than characterization (A) because harm to property interests has materialized. Maximum sentences should not exceed the already high limit set on the English fraud offence of ten years' imprisonment. What could be suggested is that characterization (A) in this subsection could attract a maximum 6 years' imprisonment, and characterization (B) a maximum of 8 years, thus reflecting the slight increase in harm.

5.7 An opening bid summarized

Academic commentators have tended to assume that the criminal law has responded

²³⁰ RA Duff, 'Criminalizing Endangerment' in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 56.

²³¹ Ashworth and Zedner, *Preventive Justice* (n 2) 109.

appropriately to an emerging type of interpersonal exploitation used by exploiters who attack property interests. Now, with an analytical account of acquisitive exploitation in hand, we have gone back to our starting point of property offences in England and Wales to consider whether clearer links can be drawn with wrongful acquisitive exploitation. What is the best opening bid regarding this criminalization question?

First, in section 5.3 we argued that there is no straightforward answer as to how thresholds and norms to criminalization apply in relation to acquisitive exploitation. There are convincing reasons to assign value to protecting vulnerable persons from acquisitive exploitation as an important collective goal, which may require the use of the criminal law. But it is also possible to take a more restrictive view regarding the use of criminal law measures if a libertarian perspective is employed. One argument advanced in section 5.4 to move beyond this stalemate is based on anti-exploitation reasoning in the common law. What this has meant in the civil law context is that doctrinal arguments need to be bypassed or modified in order to insulate persons who have been exploited from legal consequences. It is an open question what might be required to move against serious interpersonal exploitation in the criminal law. This merits further study. It was canvassed that such a norm provides another basis for arguing that acquisitive exploitation should *in principle* be criminalized, with the scope and the limits of such a norm to be worked through.

Having developed an in principle argument for criminalization, we refocused in section 5.5 on the reasons why the criminal law response to acquisitive exploitation in England and Wales is woefully inadequate. In order to address its deficiencies, we examined alternative criminal law responses in section 5.6. What emerged was that two broad criminal law approaches could, if the account of acquisitive exploitation used is

supplemented with a knowledge requirement, constitute the least restrictive means of penalizing acquisitive exploitation.

Chapter 6

Conclusions

In this short chapter we identify several major themes that run throughout this thesis. The purpose for doing so is to consider the likely implications of this thesis' study of acquisitive exploitation and criminal law, and to look ahead to issues ripe for future analysis.

6.1 Questioning assumptions about exploitation

This thesis began by asking when and how the criminal law ought to be used to penalize exploitation of persons. There is considerable public and political concern surrounding interpersonal exploitation in England and Wales. Several legal developments have put pressure upon the government to use coercive measures to tackle serious exploitation. The Supreme Court decision in *Hounga v Allen* was cited as an example of the civil law making significant strides in protecting vulnerable victims of human trafficking.¹ But we also noted that the European Convention on Human Rights has been read dynamically in relation to interpersonal exploitation. The Strasbourg court was willing in *Rantsev v Cyprus and Russia* to read into Article 4 ECHR a right not to be subjected to human trafficking.² Certainly this pressure has not been without effect in the criminal law of England and Wales. One response has been to create new criminal law

¹ [2014] UKSC 47.

² (2010) 51 EHRR 1 [282].

measures to penalize exploitation with heavy penalties. For example, in March 2015 the Modern Slavery Act 2015 was enacted, with offences penalizing slavery, servitude and forced or compulsory labour, and human trafficking.³ Criminal lawyers must scrutinize whether imposing a maximum sentence of imprisonment for life for both offences is defensible. Indeed, any new criminal law measure implemented to penalize exploitation must be carefully scrutinized. However, we argued in chapter 1 that ‘wrongful interpersonal exploitation’ is not a unitary idea and so the principled relationship between specific types of interpersonal exploitation and criminal law must be explored. To demonstrate the real life complexity of wrongful interpersonal exploitation we identified several exploitative wrongs, which included sexual exploitation, labour exploitation and trafficking for exploitation. Certainly several of these wrongs have received significant political and media coverage in recent years. Sexual exploitation of children and young adults is one such example given the glut of recent convictions for grooming of young girls in English cities.⁴ However, I argued that the contours of apparently ‘settled’ categories of wrongful interpersonal exploitation, such as sexual exploitation, are open to debate. Much more ought to be said about these other forms of wrongful interpersonal exploitation, as well as acquisitive exploitation, and we identified in chapter 1 ways in which our understanding of these wrongs needs to be developed. Equally, there has not yet been systematic mapping of the relationship between various types of wrongful interpersonal exploitation and criminal law, and this area is ripe for future study.

³ ss 1, 2.

⁴ s 1.3.1.

But there is another aspect to this wider mapping task on which this thesis has focused. In some areas of the criminal law in England and Wales it is taken for granted, without debate, that the criminal law as it stands adequately penalizes interpersonal exploitation. Bold claims that existing criminal law measures penalize exploitation are unconvincing if they are not supported with rigorous analysis. The following questions must be addressed. What is the type of wrongful interpersonal exploitation in question? Are certain criminal offences adequate means of penalizing this type of exploitation? Hasty *assumptions* that existing criminal law measures penalize serious exploitation are no less a challenge to principled criminal law theory and must also be carefully scrutinized.

The purpose of this thesis has been to expose and reappraise unsupported assumptions about exploitation in the context of property offences. It is commonplace to read claims that exploitation can be penalized using existing property offences and sentencing guidelines. But in chapter 2 I argued that this reasoning is woefully undeveloped. The contours of the exploitative wrong in question—which we have identified as acquisitive exploitation—have not been identified with precision.⁵ Nor is it convincing to assume that existing property offences can adequately penalize acquisitive exploitation. The current legal position in England and Wales is open to challenge on the following grounds: it leaves too much discretion to prosecutors and judges; it bypasses debate about acquisitive exploitation by a democratic legislative body; it infringes fair labelling; and it fails to penalize the gist of wrongful acquisitive exploitation. Assumptions about the relationship between acquisitive exploitation and

⁵ Recall that we are using the term ‘acquisitive exploitation’ as short-hand for ‘acquisitive intent exploitation’. In the result, an exploitee may not actually violate an exploitee’s property interests, see s 2.3.

criminal law must be confronted head-on, and this has been the focus of this thesis. But this study addresses what is unlikely to be the only example of this phenomenon. The question remains: what other assumptions about other forms of wrongful interpersonal exploitation exist in criminal law? Can these assumptions be replaced with principled reasoning?

Key to this argument for reappraisal of acquisitive exploitation is a strong challenge to another assumption. It is that the idea of interpersonal exploitation does not need to be disaggregated into individual wrongs. It may be the case that reliance on Feinberg's seminal work on exploitation has hampered progress on disaggregating wrongful interpersonal exploitation.⁶ But we argued in chapter 2 that this should not be the effect since careful study of Feinberg's work reveals his intention to provoke debate, rather than to settle the matter.⁷ While exploitation as 'taking unfair advantage of another person' expresses an important idea, exploitation's wrongfulness can and should be made specific. This point flows quite naturally from the normal meaning of what it is to exploit another person. There will be distinctively sexual exploitation which is different in nature from labour exploitation. Fault and conduct elements are likely to be different. This means that a state's duty to prevent or penalize exploitation must be reviewed in relation to a specific type of exploitation. In arguing for an approach of disaggregating the real life complexity of 'wrongful interpersonal exploitation' we have made a useful contribution to liberal writings on interpersonal exploitation. In pinpointing and elucidating acquisitive exploitation, we have identified

⁶ Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP 1988) 179.

⁷ s 2.2.

a wrong which sits on the margins of what is already known about wrongful interpersonal exploitation.

A possible challenge to this approach ought to be addressed. Some might argue that it is more interesting to identify unifying features of wrongful interpersonal exploitation. In other words, how, and to what extent, are exploitative wrongs linked? And does this lead to the conclusion that exploitative wrongs are not so different after all? Certainly there are ways in which exploitative wrongs identified in chapter 1 will be intertwined. For example, similar predatory conduct may be used or they may all similarly constitute hidden wrongs. We also argued in this thesis that Joel Feinberg's work on interpersonal exploitation is a useful starting point for any account of exploitation. Feinberg identifies how an exploiter uses an exploitee, what it is about an exploitee that is used, and how the process of exploitation redistributes gains and losses.⁸ While it is possible to provide a general account of wrongfulness spanning sexual, labour and financial exploitation, this approach passes over important conceptual distinctions as well as skirting over the real life complexity of interpersonal exploitation. One obvious conceptual difference is that sexual exploitation may involve lack of consent whereas we have argued that this is not core to wrongful acquisitive exploitation. Nevertheless, there is still a need to identify similarities between exploitative wrongs. For example, we conjectured in chapter 1 of this thesis that there are likely to be similarities between acquisitive exploitation and financial exploitation, and this line of argument should be further explored. Indeed, further work is needed both in identifying the contours of certain types of wrongful interpersonal exploitation, but also in exploring overlap between these wrongs.

⁸ Feinberg (n 6) 179.

6.2 Legal certainty

Our study of acquisitive exploitation and criminal law carries implications for legal certainty. One of the reasons for the study is that legal certainty is currently compromised by the use of broad property offences to penalize acquisitive exploitation in England and Wales. These claims are supported with little conceptual work in identifying the contours and limits of the exploitative wrong in question. The current legal response also brings to the fore familiar issues with legal certainty in the definition of several property offences in England and Wales. Clearly there is much that is flawed about using the conspiracy to defraud offence to penalize acquisitive exploitation, and we have provided another specific example as to why it is deficient in rule of law terms. We have argued that the offence should be jettisoned from criminal law theory and practice. But important questions also arise as to whether English fraud and theft offences are adequately labelled in English law. Our critique of the current legal position in relation to acquisitive exploitation lends further impetus to reappraising these overly broad offences.

Having exposed this unstable reasoning about exploitation and property offences in chapter 2, at the core of this thesis is an analytical account of the wrong of acquisitive exploitation. The aim is to identify a strong normative account of the wrong which can be used to invigorate debate about acquisitive exploitation and property offences in England and Wales. Thus, we have set out to improve legal certainty when discussing exploitation, moving beyond an explanation of exploitation as ‘taking unfair advantage of another person’. A clear statement of the wrong in question is a contribution to legal certainty, given that the criminal law is already penalizing exploitation using broad property offences. Nevertheless, this account of acquisitive

exploitation is open for debate. Another aim of this thesis' work is to stimulate such debate about this serious wrong.

The next question is whether legal certainty can be improved in the current legal position. When and how can acquisitive exploitation be used to achieve this? In brief terms, we have argued that (i) a fairly labelled fraud offence; (ii) an aggravated theft offence; (iii) a substantive acquisitive exploitation offence which may require harm to property interests, might all be candidates for providing the least restrictive means of penalizing acquisitive exploitation. However, there is potential to dispute whether the account of acquisitive exploitation defended in this thesis, together with a supplementary knowledge requirement, is sufficiently clear. There are large questions about what criminal law responses to acquisitive exploitation might be justified. We have highlighted a credible opening bid, without seeking to provide answers to all of these complex questions.

Questions remain about how such a wrong might be identified in practice. In chapter 3 we identified possible indicators of acquisitive exploitation. A relevant set of indicators could include: significant elements of planning (which may suggest deliberate targeting); the identification of vulnerable persons, including persons who have been trafficked (who may be identified as easy bait by exploiters); a person withdrawing from friends and family (indicating that they may have some other person exerting influence over them); a person losing access to their bank cards, or giving personal information to another person (indicating that their gullibility, kindness etc. has been used by another); visibly coercive, deceptive or manipulative techniques, possibly used in an aggressive way (indicating predatory conduct); groups of persons engaging in these types of conduct (suggesting deliberate targeting). As was noted in

relation to a substantive acquisitive exploitation offence, the exploitative wrong will be easier to identify where there is accompanying harm to property interests. But we could also posit that professionals must be adequately trained in identifying acquisitive exploitation. This ties into a wider criminal justice point. Whether or not adjustments are accepted in relation to substantive criminal law and acquisitive exploitation, there also needs to be consideration as to how the criminal justice system responds to acquisitive exploitation. For example, in chapter 1 we noted the need for greater scrutiny of investigations and decisions to prosecute in cases of exploitation, and ways in which exploitative wrongdoing may require adjustment to existing trial processes.

6.3 Anti-exploitation reasoning and criminal law

We have also confronted throughout this thesis the role of the state in penalizing interpersonal exploitation. In chapter 1 we argued that without a foundational duty upon the state to penalize exploitation, any specific criminalization argument is undercut from the outset. We saw that an emerging body of European human rights jurisprudence has interpreted Article 4 ECHR creatively to improve protection of vulnerable persons from forced labour, slavery, servitude, *and* from human trafficking for exploitation. We noted that this raises the question as to which other ECHR rights will be engaged in cases of serious exploitation. For example, it is persuasive that there is scope for development of the Article 5 ECHR right to liberty and security of person. But there is also a new focus on positive obligations upon states to ensure effective protection of a right which is engaged. Any positive obligations must be clearly justified but, where they are, they place greater onus upon the state to protect vulnerable persons from serious exploitation. The second strand of reasoning was to refer to arguments in political theory as together providing another normative reason for state

action against exploitation using criminal law. But the more radical line of argument explored in chapter 5 was to raise a question mark around an anti-exploitation norm in liberal criminal law theory. There are several notable examples where doctrinal arguments have been bypassed or modified in the civil law in order to insulate persons who have been exploited from legal consequences. Notably, there is now a counterpart in English criminal law. Section 45 of the Modern Slavery Act 2015 provides a defence for slavery or trafficking victims who commit an offence. But what level of creative norm-making in relation to exploitation is possible in criminal law? This is a rapidly developing area in other branches of the common law. We queried whether there is support for crystallizing a substantive anti-exploitation norm in criminal law. At several points in this thesis we have noted concerns in the criminal law to *protect* vulnerable persons. A crucial normative question about wrongful interpersonal exploitation and criminal law now needs to be tackled head-on. What responsibility should be placed on the state to protect the vulnerable from serious exploitation? And where should the limits of the norm be drawn? Certainly the state's duties in relation to vulnerable persons and property interests is of key significance when considering acquisitive exploitation. But there also needs to be radical rethinking of the state's obligations in relation to various types of wrongful interpersonal exploitation and criminal law.

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