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**Exploitation through the lens of structural injustice: re-visiting global commercial
surrogacy**

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(Chapter accepted for publication in forthcoming book on exploitation)

In this paper, I use the context of commercial surrogacy in India to revisit the claim that global commercial surrogates are being exploited. I argue, that in order to achieve a better understanding of exploitation, we must consider structural injustices more seriously than we currently do. Using Iris Marion Young's approach to structural justice, I partially move away from the liberal tradition, which tends to focus on the contractual arrangements of an interaction, without discarding it altogether. The central claim is that it is not just the unfair terms of a transaction, but also the unfairness arising from the deeper inequalities embedded in the social-structural processes, that substantiate the moral truth of the exploitation claim. These include cultural, legal, political and economic aspects, and moral failure on the part of various agents and at various levels. As long as deep structural inequalities and injustices exist, many arrangements made under such conditions, which other actors directly profit from, can be considered instances of exploitation, regardless of the terms of the transaction. The upshot of this approach is that an exploitative arrangement can have both transactional and structural components, either of which might be sufficient in rendering an arrangement exploitative.

a. Commercial surrogacy in India

Until very recently, commercial surrogacy was a thriving business in India, both at the national and international levels. While commercial surrogacy remains illegal in most countries,

India, a global hub for medical tourism, had also come to be known as the surrogacy ‘outsourcing’ capital of the world¹. In the few other jurisdictions where commercial surrogacy is legal, it continues to be expensive, often prohibitively so for many prospective parents—costing anywhere between \$50,000 to \$120,000². India on the other hand, is yet to fully regulate this \$445 million dollar industry³. Late in 2015, the government passed a ban restricting access to surrogacy to Indian nationals and their spouses⁴. The Assisted Reproductive Technology (Regulation) Bill or ART(R) Bill—the central piece of legislation intended to regulate the surrogacy sector, periodically considered by parliament over the years before being repeatedly shelved—is currently out in its latest iteration (which includes this restriction) and is yet to be considered by parliament⁵,

For international commissioning parents, India has been a particularly attractive destination, due to its large pool of potential surrogates; skilled English-speaking medical staff, hospitals with good infrastructure; and the fact few surrogates have the resources, legal or financial, to claim the baby post-birth.⁶ The lack of comprehensive regulation so far has also meant that contracting parties—usually prospective parents and their agents on the one hand, and Indian clinics on the other—are left to make their own private arrangements as to the terms of the contract. Surrogates are reportedly paid between \$2,500 to \$7,000, and the total cost to prospective parents range between \$10,000 and \$35,000.⁷

There are reportedly over 3000 surrogacy clinics operating across India⁸. Although many of the empirical studies have been conducted in Gujarat⁹ such clinics are now sprouting in many of the major cities, and that poorer women are often targeted for recruitment.¹⁰ Indeed, most potential surrogates live around, or below the poverty line, and there is little doubt that the primary motivation for entering a surrogacy arrangement is financial.¹¹ The money surrogates receive would otherwise take them and their families years to earn, in the best of cases. Paid surrogacy arrangements are taken on by women in an effort to pay off

family debts, contribute to the children's education, or to household expenditures. In some cases potential surrogates are the main, or sole earners in the family¹².

While primary consideration for agreeing to act as a surrogate may be of financial nature, grouping these concerns under the label of poverty is misleading. Women lack employment options not only because there is a lack of stable, well-paid employment opportunities. Opportunities are also scarce because few women have access to formal education.¹³ Alternative work can only be found in the unregulated sector, and involves work that is poorly paid, exhausting and often dangerous.¹⁴ Women suffer from wage discrimination in every employment sector, regardless of their educational background. Work in the field or on construction sites is gruelling; lacks access to adequate sanitary facilities, and protection against violence and sexual harassment. Safety and lack of sanitation are also among the main reasons many young girls drop out of primary education, leaving them with very little opportunity for future employment.

These factors however, are simpler to pin point. India is culturally pro-natal¹⁵, but also deeply patriarchal. Much importance is given to the male biological offspring, and as a result reproduction becomes central most women's lives and status. Preference for the male child is reinforced not just socially, but also indirectly by political and economic factors¹⁶. By the same token, the social status of female infants, young girls, and women remains subject to a strong web of class, caste and gender-discrimination. Inheritance, to a great extent, remains culturally patrilineal, and marriages are patrilocal (requiring the bride to leave her ancestral home or village to live with her husband's family) and often hypergamous (allowing the bride's family to marry 'higher up' in the caste and class hierarchy, by offering a large dowry and organizing an expensive wedding). Social rigidity around sexual purity and family honor means that most women are married young, while still considered 'pure', and therefore further reducing their educational and employment opportunities. According to a recent

UNICEF report, over 18% of girls are married by the age of 15 and a staggering 47% by the age of 18, making India the global leader in child brides¹⁷. India also fares low in terms of reproductive and maternal health, as well as infant mortality. In other words, commercial surrogacy flourishes in a context of deep inequality; where girls are given fewer opportunities in terms of health, education and employment; where they are married young, away from their families; and left with little other than their own reproductive assets, the very capabilities that make surrogacy so compelling.

Beyond social inequalities, there is also injustice enabled by failures of various institutions, and institutional actors. India has a plethora of law in place intended to protect women's interest, including rights to education and inheritance, laws against sex-selection, dowry, caste-discrimination and early marriage. However, the country also suffers from widespread corruption and laxity at all levels of governance and law-enforcement, medical and legal institutions, creating a situation where women and girls are largely at the mercy of their fate, families and communities.

While it may be tempting to portray surrogacy means to escape a myriad of inequalities, it is important to note that discrimination or unfairness is sometimes reproduced in within the context of surrogacy itself. Surrogacy is often considered work akin to prostitution in the popular mind and surrogates often have to resort to various methods of deception in order to escape the stigma they and their families might face from their communities.¹⁸ Patriarchal, paternalistic and discriminatory norms are widespread even within the best clinics. Skin colour and caste apparently play a central role in the surrogate's power to negotiate the terms of agreement, and fairness, light hair and eyes, as well as high IQ is greatly in demand, also by Indian couples.¹⁹ Women are often required to reside in supervised hostels where their freedom and movements are heavily curtailed for the sake of a healthy pregnancy and a successful transaction.²⁰

Finally, commercial surrogacy in India is flourishing under a pro-business, political and economic atmosphere, in a country that is keen on attracting private investment to its health sector.²¹ Regardless of whether commercial surrogacy as such commodifies reproductive labour²², potential surrogates are choosing this work in a context where several factors have already taught them to devote their lives and identities to the service of procreation and childcare. This aligns itself well with the aspirations²³ of the current Indian surrogacy industry, set to become a leader in the region. Ethnographic findings suggest that many surrogacy arrangements are set up in a way as to further reinforce the ‘transient role and disposability of the women, not just as workers but also as mothers’²⁴, and merely represent a further step towards establishing the women’s reproductive capacities as skills for business, leading to the creation of what ethnographer Amrita Pande calls the perfect mother-worker.²⁵ While there are popular reports of brokers scouring city slums, looking for potential surrogates, recent empirical studies show that surrogates are most often recruited by other women from within their own communities, often themselves former surrogates.²⁶ The loci of negotiations in these cases rest on relations and exchanges that operate ‘extra-legally’ and are very much dependent on the existing societal relationship. Formal contracts and their terms are established well after surrogates have accepted to enter the arrangements.²⁷ And so the business thrives on existing social connections, understanding and trust.

My main purpose in devoting some time towards illustrating the Indian context is to establish the background considerations that I believe are crucial components of the exploitation claim. Using the example of national and international commercial surrogacy in India, I revisit the claim that global commercial surrogacy is exploitative. Given the stark socio-structural inequalities most surrogates face, many in fact, are being exploited. Following Iris Marion Young’s approach to structural justice, I suggest that a proper account

of exploitation should take into consideration structural fairness (as well as transactional fairness), and so the exploitation claim will necessarily be heavily context-dependent.

b. Parameters of the exploitation claim

I begin with the position that exploitation, in its moralized sense, broadly involves '*taking wrongful advantage*'²⁸, that is, it describes a situation where one or more person(s) benefit(s) at the expense of others, in a manner that can be described as morally wrong. I do not consider here whether we need to, or indeed can, achieve a unified account of exploitation,²⁹

While the concept of exploitation has largely evolved away from its historical economic roots,³⁰ one predominant view, most famously developed by Alan Wertheimer,³¹ closely associates exploitation with the unfair distribution of benefits and burdens in an exchange. Given that my line of argument also focuses on fairness, it is worth outline the ways in which such an account resembles, and departs from Wertheimer's own account.

According to Wertheimer, 'A exploits B when A takes unfair advantage of B'³². As stated, this can refer to other a defect in the process (when for example consent is coerced or manipulated), or to the unfairness in the outcome of the exchange (if for example A benefits excessively compared to B). In Wertheimer's view the harm in non-consensual exchanges is easier to pinpoint and theoretically less interesting, since a defect in consent is a form of wrong in itself, independent to the exploitation claim.³³ A moral defect in the outcome, however, is 'both necessary and sufficient to constitute exploitation.'³⁴

First, Wertheimer's account relates to the fairness of the *terms* of an agreement, and this focuses our attention to the micro-fairness³⁵ aspects, polarizing the debate around (financial) terms, at the expense of the broader picture. Such an approach fails to portray some of the problematic features of global commercial surrogacy, such as the ones described in the context of India, and which should be pertinent to the exploitation claim. A structural

account of inequality and justice, I argue, can also consider fairness, but unlike Wertheimer's approach, it steers our attention to broader, but pertinent considerations. This does not mean we should discard the transactional account of exploitation. On the contrary, as far as concerns a fairness-based account of exploitation, we should consider both transactional and structural components.

Second, if commercial surrogacy in India is correctly labelled as exploitative, it is fair to assume that it is usually the kind of exploitation that Wertheimer describes as mutually advantageous:³⁶ an arrangement that relevant parties (exploiter and exploited) benefit from *ex ante*. In such cases, all parties involved are expected to be better off from entering the arrangement than otherwise, as long as surrogates are compensated for their service.

Third, I agree with Wertheimer, that it is important to separate two aspects of the exploitation claim: its *moral truth*, that is, whether an arrangement is correctly labelled as exploitative, and its *moral force*, that is, developing the normative implications arising from such a label, for example imposing legal restrictions on such arrangements. It is not because an arrangement is correctly described as exploitative, that it should necessarily be banned. I am mostly concerned here with the moral truth of the exploitation claim, although I do consider some of its moral force and practical implications in the latter part of the discussion. This distinction is helpful because otherwise the apparent strength of the moral imperative and its practical implications for regulation often obscure the nuances and concerns that prompt the discussion in the first place.

Clearly from the analogy that Wertheimer uses however, I would argue that characterizing an exploitative arrangement as one involving two parties, A and B, is highly problematic. As David Resnik argues in the context of global clinical trials, the often-used symbolic transaction between A and B may in fact involve many people³⁷, each with their own agendas and interests, relationships and position of power³⁸. Focusing on two parties, A

and B, unhelpfully ushers us back micro-fairness approach to exploitation, and away from other morally relevant contextual details, factors and actors.

c. Structural inequality as a foundation for the exploitation claim

The essence of my claim is that taking advantage of injustice can be considered a component of exploitation, and not merely, for example a form complicity with injustice³⁹ or another kind of wrong, and that this can be true regardless of whether the terms of the agreement are fair. This approach connects the fairness component of the exploitation claim to an account of structural injustice. Iris Marion Young argues that:

‘Structural injustice exists when social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities’.⁴⁰

This is precisely the context in which commercial surrogacy flourishes in India, where many surrogates find themselves at the receiving end of injustice, not all of which can be clearly attributed to individual fault or a specific unfair policy⁴¹, but that still positions them in a web of inequality that makes surrogacy work so compelling. Young argues ‘[t]hat the issue of social justice raised by the operation of social structures is whether these differences in the kinds and range of options made available to individual by these structures are fair’⁴². The many social and structural constraints that give rise to inequality in the Indian context—from cultural rigidity, to poverty, to corruption, among others—mean that surrogates are not only in a difficult bargaining position when it comes to the terms of the arrangement, but that they face a severely restricted and unfair range of options when it comes to making the choice to

undertake surrogacy work in the first place. It is only when the gender-based inequalities become apparent that the moral wrong of exploitation becomes salient in this context. In Young's words: 'one important purpose for taking a large-scale point of view on a society and locating positions in a structural field is to identify broad structural inequalities that are far-reaching in their implications for people's life courses and that persist over time, often over generations.'⁴³ A comprehensive view of exploitation also requires us, in certain cases, to take such a broad view. Restricting our lens in the manner suggested by Wertheimer may be enough in characterizing exploitation in certain contexts. However, that picture is incomplete in the case of global surrogacy generally, and in the Indian context in particular. There, the deeper moral wrong of exploitation arises from the social and structural inequalities that position women, in various positions of injustice. Ruth Sample has argued that 'exploitation is not simply a feature of a particular transaction but derives its badness from preexisting social institutions that underwrite and encourage the transaction'.⁴⁴ Differing slightly from Sample, who identifies exploitation and an instance of degradation, I would argue however, that the conditions described above, lead us to consider exploitation as arising from unfairness and systematic cultural, legal and political injustice, rather than a form of disrespect.

It is therefore important to characterize exploitation, not just as the feature of an arrangement between A and B, but as several actors *taking advantage of* an unjust situation that some of them have contributed to, or which they continue to *reinforce* through such practices, in order to satisfy their own goals, needs and desires. As long as the injustices exist, and as long as certain actors and institutions continue to benefit from them through, for example the establishment of surrogacy transactions and industries, the arrangements made

under such conditions—however fair the terms of transaction may be—can be rightfully considered exploitative.

Wertheimer considers exploitation a transactional or interactional norm⁴⁵. The relevant parties have to enter into an arrangement or exchange that can then be characterized as exploitative or not. An arrangement can have both transactional and structural components of exploitation, and indeed I would argue that many arrangements that can be correctly described as exploitative probably have an element of both, as do many global commercial surrogacy arrangements. Either component can be sufficient for the exploitation claim. In other words, it could be that the background injustices are so egregious as to render any arrangements and exchanges in those contexts exploitative, in a way that no compensation resulting from the arrangement could alleviate. Alternatively, it could be equally plausible that the structural concerns are all but minimal, so much so that exploitation remains only a feature of the particular contractual terms. As I discuss later, it could also be that in certain cases the structural component of the claim can be overridden by achieving fairer terms, but I remain unconvinced that is the case for global commercial surrogacy.

A proper characterization of exploitation requires some attention to the question of moral responsibility. In this case, the morally responsible actors are many. In the first instance, Vida Panitch has rightly argued that we should put a significant amount of moral blame onto the Indian state.⁴⁶ The State has failed to protect the rights, agency and interests of girls by failing to enforce the institutional, legal, educational, cultural processes and equal opportunities that would allow girls and women to lead flourishing lives. I would further argue that the State is also implicated in exploitation because it derives direct benefits from, and continues to encourage an industry that heavily relies on existing injustices, some of which the it has enabled (for example, but not coming down more heavily on illegal marriage practices, among other things). Second, the physicians, brokers and other persons directly

involved in the surrogacy industry are not just complicit to injustice, but are also involved in exploitation, as far as their professional and financial gains also depend on the existing structural injustices.⁴⁷ Last but not least, let's turn our attention to prospective parents. The discussion regarding moral blameworthiness in global commercial surrogacy has often concentrated on non-Indian couples, commissioning surrogacy as medical tourists from high-income countries. Parry's recent work however suggests that many of the commissioning parents within the Indian surrogacy industry are in fact Indians, residing in India.⁴⁸ Prospective parents taking advantage of structural injustice include, individuals from other countries, non-resident Indians and Indian residents themselves, many of whom also⁴⁹ seem to perpetuate existing race- or caste-based discrimination. Evidence from Parry's work also suggests that we should move away from the traditional narrative of the North-South divide, of surrogacy as violence perpetrated by the white body on the brown body⁵⁰, and rather concentrate on the many inequalities: relational, social, structural that come into play at the local, national and global levels. Moral responsibility for exploitation should therefore be assigned to several actors, who either profit from existing injustices, from injustices that they have enabled or caused; or from injustices that they further reinforce by perpetuating unfair practices and norms.

The inevitable question then arises as to the normative implications, or moral force of this type of exploitation. According to Wertheimer, we have good reasons to allow mutually advantageous exploitation to take place, as long as consent is valid,⁵¹ especially if both parties, in particular the exploited party, would be worse off otherwise. The normative and regulatory implications of the exploitation claim require far more in-depth discussion than I am able to explore here. To allow mutually advantageous exploitation will depend on how severe either components of the exploitation claim are: for example how deep the inequalities, how bad the terms or how egregious the wrong is in relation to the inequalities

or deprivation the exploited individual otherwise faces, and to the extent to which the practice further reinforces injustice. Such moral force could take the form of restrictions to the exploitative arrangements, and/or the form of positive obligations to address the inequalities or needs the individual faces. All of these considerations should be, to some extent, context-dependent, and exposed to further moral scrutiny and argumentation. In the context of Indian commercial surrogacy, I am not convinced that achieving fairer contractual terms would erase gender-based inequalities, and not further entrench them. On the other hand, it is impossible to ignore the fact that imposing a ban or restriction will deprive individual women of a real change to improve their well-being and that of their families. Nor does a ban or restriction in itself hardly advances the interest of women, unless significant progress is made in terms of addressing various existing inequalities. With exploitation, moral responsibility and moral force described this way, it is also become questionable whether the 2015 ban by the Indian government on non-Indian nationals commissioning surrogacy, which was reportedly motivated by a concern to prevent further exploitation of poor Indian women⁵², really does serve this purpose. If the deeper worry really is that of injustice and inequality, then Indian commissioning parents are equally involved in exploitative arrangements as are non-Indians. By adopting a normative position, which seems to suggest that only global commercial surrogacy is exploitative, the state disregards exploitation that occurs within its borders and brushes off its own moral responsibility with regards to exploitation.

d. Objections and Limits to a Structural Injustice lens

In the last section of this paper, I would like to consider two potential objections and limitations to a structural approach to exploitation. The first relates to consent and agency, the second concern relates to the scope of the structural approach.

It could be argued that a structural injustices, as I have described them really result in the agency of potential surrogates being eroded or compromised, and that in fact, what appears to be freely given consent, is in fact defective Stephen Wilkinson has argued that the exploitation necessarily involves a defect in consent and this worry is certainly not easily set aside in the current context⁵³. A recent study by Tanderup and colleagues in New Delhi suggests that information given to potential surrogates may in fact be inadequate, and that there is rampant paternalism on the part of the doctors around the decision-making procedure of surrogates.⁵⁴ If consent is inadequate or missing, we are certainly dealing with a wrong, one that involves a lack of respect for autonomy, whether or not it also involves exploitation. It may well be, however, that women entering the surrogacy arrangement have considerable understanding of the risks and discomfort associated with pregnancy and giving birth, even if they are unaware of those specifically associated with surrogacy. More importantly however, I am willing to assume, that consent given in such situations can be both meaningful and valid. In fact, it is quite plausible that women choose to enter such arrangements despite fully understanding the risks, demands and discomforts. Given their alternatives, commercial surrogacy may in fact be a perfectly rational and reasonable choice, even when it is a difficult one. In other words, describing an arrangement as exploitative need not necessarily undermine the rationality or agency of the exploited party.

This question, I believe, is also at the heart of some of the clashes between the ethnographic and the normative discourses around global commercial surrogacy, and it is worth addressing here what has come to be known as the 'ethnographic turn' in the discourse around commercial surrogacy in India, a claim that finds its way various forms in many discussions pertaining to transnational, or transcultural ethics. Several ethnographers have suggested that the claim of exploitation, used as a moral lens, is a tool that Occidentalizes commercial surrogacy, fails to capture the realities of the practice, and treats the surrogates as

victims who need to be rescued.⁵⁵ The danger of victimizing surrogates and effacing their agency in the process of ensuring that they are protected, is one the reasons I have chosen to avoid using the term ‘vulnerability’ in my discussion of structural injustices, even though it is a term preferred by many scholars in their characterization of exploitation.⁵⁶ While it may be true that the wrong of exploitation lies in taking advantage of a vulnerability, it then requires us to further define vulnerability to justify which kinds we think are relevant to exploitation.

Current ethnographic work suggests that while many surrogates feel compelled to take on surrogacy work, these are not necessarily examples of coercion or severe erosion of agency, although it is possible that some women are, or feel coerced into accepting surrogacy work. I would rather argue that what is described as ‘*majboori*’, by one of the surrogates in Pande’s interviews, is compulsion in the face of the multitudes of injustices one faces⁵⁷, where the choice to enter surrogacy seems to be an obvious way out of financial hardship, at least temporarily.

Coming back to the concern raised by ethnographers: Pande begins one of her accounts by suggesting that the realities of surrogacy in India requires us to move away from an ethics and moral lens⁵⁸. This is particularly surprising as the remainder of her paper is in fact filled with value-laden language when describing the desperate conditions potential surrogates face, as well as the injustices to which they are exposed. As Alison Bailey argues, while the ‘Western’ view may mistakenly put too much emphasis on reproductive autonomy or commodification, the alternative approach is certainly not the ‘moral absenteeism’ that that the ethnographers seems to encourage⁵⁹. If the moral lens has the wrong target, it may certainly gain from being redirected by the ethnographers’ lens, but it doesn’t follow that such a lens is unnecessary. Rather, the ethnographic turn seems to be couched in a critique of liberal view of the moral agent, where consent and rationality reign and where an appeal to exploitation might signal powerlessness or lack of agency. A fairness approach to

exploitation, whether structural, transactional, or a combination of both, does not necessarily depend on the erosion of agency (although it can co-exist with such an account as well). As Young notes, the fact that structures and processes constrain ‘does not mean that they eliminate freedom: rather social-structural processes produce differentials in the kinds of range of options that individuals have for their choices’, they do not ‘constrain in the form of direct coercion of some individuals over others’. Rather, Young goes on to suggest that the central worry is ‘whether these differences in the kinds and range of options made available to an individual by these structures are fair’⁶⁰ I have argued so far that they are not, in fact, fair.

Alison Bailey has noted that ‘extending Western moral frameworks to Indian surrogacy work raises the specter of discursive colonialism along with concerns about how Western intellectual traditions distort, erase, and misread non-Western subjects’ lived experiences’. While context-sensitivity is particularly relevant in this case, we would do well not let the ‘spectre of discursive colonialism’⁶¹ push us towards either an ethics of relativism, or towards libertarian/anti-paternalist ethics, that might let consent do all the moral work. An relevant consideration in this exercise is the concern of *adaptive preference*, that is the situation in which an individual’s preferences are shaped to accord with the (frequently narrow) set of opportunities she actually has.⁶² In other words, being brought up to believe that education and employment are not meant for women, while child-bearing, child-rearing and various concerns around the households are, contribute to shaping the choice women make in these contexts, whether they in fact have as narrow set of choices in the first place, or whether they only believe this to be the case⁶³. When Pande talks of ‘desperate’ women, or argues that commercial surrogacy work requires the perfect work ethic while tapping, as part of recruiting techniques, into the nurturing role women are expected to embody⁶⁴, she also implicitly assumes a normative framework, but one that remains largely unacknowledged.

Considering relevant moral framework, as we are doing when examining whether global commercial surrogacy is exploitative, does not require us to either efface the agency of the surrogates or disregard their lived-experiences. Condemning a certain practice as exploitative, or unjust does not mean that women at the heart of such practices are unable to navigate ‘their own way to social change’⁶⁵. In fact, the local movements of resistance (for example surrogates negotiating terms of their residence with wardens) that are described in Pande’s work can also be construed within normative approaches as particular instances of self-determination, agency, and pragmatism, in the way ‘Western’ ethics, if there is such a thing, might also define them.

Ignoring how much structures and processes shape individual choices however, might lead to problematic measures against exploitation. For example, one possible measure to minimize exploitation, as suggested by James Kirby, is to ensure that consent is informed and voluntary, by asking ‘members of the disadvantaged individual’s social group/community, including those who have had similar transactional experiences, to deliberate together to determine whether this condition is met’⁶⁶. Such members would include other former surrogates, potential surrogates or members of the women’s communities. This is unlikely to entirely solve the concern of exploitation, even at a micro-fairness level because, as Panitch rightly suggests, even ‘the surrogates social group might not know what a fair distribution of benefit would be’⁶⁷. Moreover, a consideration of adaptive preference might suggest that most of the women within the community have been shaped by the same kinds of restriction as the surrogate herself. As such, a contextually-dependent standard of fair terms, even one developed in consultation with other women in the community, does very little to establish what is fair in this context, and even less so towards providing a complete picture of exploitation.

The second set of objections to a structural approach asks firstly, whether the scope of a structural component is too broad, rendering an interaction under conditions of less than perfect equality exploitative, thereby entirely diluting the moral strength of the exploitation claim. If this is not the case, and if exploitation is a feature of discrete interactions, then we may be forced to acknowledge that achieving fairer or best practices, could alleviate, if not entirely erase concerns of exploitation, also of the structural kind. After all, if surrogacy can become a tool of empowerment, why not?

On the first objection, I would argue that indeed, there is a fair chance that many arrangements under deep conditions of structural injustice would be considered exploitative. But this would partly depend on where the individual stands in relation to social structures and processes. For example, the interaction between an Indian luxury hotel owner and her high-income clients is unlikely to be one of exploitation, although the one between a badly paid busboy at the hotel and its owner or with the clients might well be. In the case of the busboy however, establishing better terms of exchange may well quench all concerns of exploitation, if truly the only structural issue here is one of economic inequality.

Can this not be the case for surrogacy? If women can use one of the few assets they have as a tool of empowerment, however weak, perhaps the ethically sound response is to support the practice and ensure that surrogacy labour is carried out under fair conditions and fair contractual terms. Panitch has suggested that we must look at global inter-contractual comparisons in order to examine the fairness of existing arrangements. Such a comparison would include not only financial terms but other benefits, such as the freedom to pursue other interest during the contract, legal representation, etc. Benefits enjoyed by surrogates elsewhere, particularly in the United States⁶⁸. She has also suggested making a series of comparative analyses across contracts, in order to help establish the standards Indian surrogates are entitled to. However, I remain suspicious of measures, be they inter-

contractual comparisons (local or global), or a fair trade approaches,⁶⁹ that would only make commercial surrogacy a more compelling, thereby further entrenching gender inequalities without signification additional measure to address background injustices.

It seems that certain aspects of what makes the arrangement exploitative in this case cannot truly be addressed solely by terms, unlike with the case of the busboy. This is related to the fact that surrogacy work is gender-specific, the very characteristic that places women in positions of deep inequality in the first place.

Let us take another example of exploitative labour: paid household work in India. Household work is a largely unregulated sector in India, often, but not exclusively performed by women and children. Pay tends to be minimal and conditions less than ideal. Workers usually have no access to formal labour law protection. Much of the working conditions are harsh and demeaning. Workers are often allowed to use the home toilets, sit anywhere other than the floor, use the same crockery as the rest of the family, take adequate breaks or time-off work. Such conditions can be described as exploitative, both from the transactional and structural perspectives. As in the case of the busboy, these wrongs be alleviated by establishing better working condition. Not so for all types of household work. Usually, home toilets are cleaned by a different class of workers, who 'specialize' in cleaning both household and public toilets. A great many of these workers might not have chosen to enter such profession, but have been handed this work down through the generation, by virtue of belonging to the lowest caste, formerly referred to as the 'untouchables', historically and currently still one of the most deprived and oppressed communities in India. Despite the fact that both caste discrimination, and a large part of the work that these workers do, such as manual scavenging and the cleaning of dry latrines, has been banned in India, both practices are still prevalent. Children belonging to these castes often find themselves cleaning latrines for their classmates. While further institutional provision can be taken to further eliminate

the degrading and inhumane conditions of such work, the moral wrong cannot be entirely eliminated until and unless individuals and communities find themselves completely free of caste and other social discrimination. This is not to suggest that surrogacy work shared any of the degrading and inhumane characteristics of latrine cleaning in India. However, this analogy does suggest that where the inequalities and injustices arise from more than material inequality, it is unlikely that solely focusing on the conditions of the work will erase all concerns of exploitation. Unless, such terms can be established in ways that are truly, sustainably empower, and eventually allowing women to achieve true equality. This, I believe can only be achieved by taking significant and urgent steps towards redressing structural injustice, in a manner that takes precedence over establishing fair terms of agreement.

e. Conclusion

Neither then two prevalent notions of exploitation, a liberal account, as developed by Wertheimer or respect-based approach that focuses on degradation, can fully account for why cases of global commercial surrogacy should be rightly described as exploitative. Although I start from a position that retains the concept of fairness as the central feature of the exploitation claim, I have moved away from a typically Wertheimerian approach, that focuses on the terms of an exchange, and described exploitation as a feature of structural inequalities and injustice. The upshot of this approach is a hybrid: an account of exploitation that has both a transactional and structural component, each of which may account for exploitation, to a greater or less extent, depending on the specific context of the exchange, and the socio-structural positions of the actors involved. While I remain agnostic as to whether current instances of commercial surrogacy should be severely restricted, or even banned in an effort to minimize or eliminate exploitation, the normative implication of this

approach is that addressing structural injustice is just as important, if not more crucial in addressing exploitation than is achieving fairer terms.

¹ Jyotsnya Agnihotri Gupta “Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility Market”, *IJFAB* 5(2012):25.

² Karen Busby and Vun Delaney, “Revisiting the Handmaid’s Take: Feminist Theory meets Empirical Research on Surrogate Mothers” *Canadian Journal of Family Law* 26 (2010): 13-93, as cited by Vida Panitch, “Global Surrogacy: Exploitation to Empowerment, *Journal of Global Ethics* 9 (2013): 3.

³ Vida Panitch, “Surrogate Tourism and Reproductive Rights,” *Hypatia* 28 (2013): 277.

⁴ The currently proposed ART(R) Bill also allows access to holders of either an OCI (Overseas Citizenship of India) card or a POI (Person of Indian Origin) card, proving their ancestry and close ties to India.

⁵ Government of India, “The Assisted Reproductive Technology (Regulation) Bill (2014). [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf) (Last Accessed 08.08.16)

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⁷ Centre for Social Research, “Surrogate Motherhood: Ethical or Commercial” (2013): 23 <http://www.womenleadership.in/Csr/SurrogacyReport.pdf> (Last Accessed 08.08.16)

⁸ Doshi Vidhi “We Pray That This Clinic Stays Open: India’s Surrogates Fear Hardship from Embryo Ban”, *The Guardian*, March 1, 2016 <https://www.theguardian.com/world/2016/jan/03/india-surrogate-embryo-ban-hardship-gujarat-fertility-clinic> (Last Accessed 08.08.16).

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¹⁰ Raksha Kumar, “ Trying To Tame the Wild West of Surrogacy in India”, *Al Jazeera* , January 14, 2015. <http://america.aljazeera.com/articles/2015/1/14/the-wild-west-of-surrogacy.html> (Last Accessed 08.08.2016)

¹¹ Alison Bailey, “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy” *Hypatia* 26 (2011): 719.

¹² Ibid. 719-721.

¹³ Ibid.

¹⁴ Casey Humbyrd, “Fair Trade International Surrogacy” *Developing World Bioethics* 9 (2009): 112.

¹⁵ Bailey, “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy”, 719.

¹⁶ Rajeshwari Sunder Rajan, *The Scandal of the State: Women Law and Citizenship in Postcolonial India* (Durham and London: Duke University Press, 2003), 184.

¹⁷ Unicef, ‘The State of the World’s Children’ Executive Summary, http://www.unicef.org/publications/files/SOWC_2015_Summary_and_Tables.pdf (Last Accessed 08.08.2016).

¹⁸ Pande “ Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker”, 975.

¹⁹ Bailey, “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy”, 720.

²⁰ Pande “ Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker”, 981.

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- ²¹ Bronwyn Parry, 'Narratives of neoliberalism: 'clinical labour' in context', *Medical Humanity* 0(2015), 5.
- ²² Panitch, "Surrogate Tourism and Reproductive Rights",
- ²³ Parry, 'Narratives of neoliberalism: 'clinical labour' in context', 5.
- ²⁴ Pande "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker", 980.
- ²⁵ *Ibid*, 976
- ²⁶ Parry, 'Narratives of neoliberalism: 'clinical labour' in context', 3-4
- ²⁷ *Ibid*, 5
- ²⁸ Tea Logar "Exploitation as Wrongful Use: Beyond Taking Advantage of Vulnerability", *Acta Anal* 25(2010): 333.
- ²⁹ *Ibid*, 332.
- ³⁰ *Ibid*, 330.
- ³¹ Alan Wertheimer, *Exploitation* (New Jersey: Princeton University Press, 1999)
- ³² Alan Wertheimer, *Rethinking the Ethics of Clinical Research: Widening the Lens*, New York: Oxford University Press 2010), 198.
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- ⁴³ Ibid, 58.
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- ⁴⁵ Wertheimer, *Rethinking the Ethics of Clinical Research*, 203.
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