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Socially Constructed Luck and Exploitation

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Abstract

This thesis shows that exploitation can arise from a just background, via just steps, when we exercise our moral rights. The theory rests on the idea that exploitation can arise via a special category of luck, which I call '*socially constructed luck*'. By taking into account what John Rawls calls 'background justice' and what G.A. Cohen refers to as an 'accumulation problem', I argue that socially constructed luck is brought about through a cumulative process of people freely exercising their moral rights in the pursuit of their own conception of the good life. Unless the negative effects of this type of luck are offset, exploitative interactions can arise where people have no reasonable alternative but to enter a particular transaction. Socially constructed luck can play a direct role in privileging some individuals at the expense of others and allows for the extraction of surplus benefits. Importantly, by showing that luck egalitarianism should be understood within a conception of exploitation, the thesis not only provides a deeper understanding of how the luck egalitarian and relational egalitarian views align, but also justifies the introduction of a basic right to a reasonable alternative.

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To Matthen, Alexandra and Joshua

...without whom this thesis would have been finished ten years earlier.

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Introduction

1.1 What is exploitation?

What is exploitation? And how does it come about? Despite the fact that we intuitively recognise that certain transactions are exploitative, the concept of exploitation is notoriously complex. To see this, consider a current example of an exploitation claim: wealthy Western couples using an Indian surrogate to carry a pregnancy. For over a decade, Westerners seeking surrogates have increasingly turned to fertility clinics in India. In November 2015, the Indian government banned foreign couples from hiring Indian surrogates, arguing that the proliferation of commercial surrogacy in Indian women is exploitative.¹ A consultation process for the ‘Assisted Reproduction Technology (Regulation) Bill 2014’ recommended the ban based on the findings of a study by the Centre for Social Research (CSR).² The study found that Indian surrogates are in desperate need of money: the majority are said to be uneducated and live in slum areas with inadequate housing facilities. Moreover, fertility agencies admit that they recruit potential surrogates on this basis.³

¹ The Indian government states that it does not support the hiring of Indian surrogates by foreign couples. This is on the grounds that Indian surrogates from poor and lower-middle-class households are exploited. As stated in October 2015, when the government filed an affidavit to the Indian Supreme Court. See Ministry of Health and Family Welfare, ‘The Assisted Reproductive Technology (Regulation) Bill – 2014,’ (New Delhi: Government of India, 2014). See also, Abby Rabinowitz, ‘The Trouble with Renting a Womb,’ *The Guardian* (24 April, 2016).

² The Centre for Social Research study (CSR) made recommendations to the Indian government, the Ministry of Law and the Indian Council of Medical Research and the National Commission for Women. The study took place in the high prevalence areas of Delhi and Mumbai. The sample size consisted of one hundred surrogate mothers, fifty commissioning parents and interviews with surrogate husbands, embryologists, agents and shelter home supervisors. See Ranjana Kumari, ‘Surrogate Motherhood – Ethical or Commercial’ (New Delhi: *Centre for Social Research*, 2012), p.83.

³ Kumari, ‘Surrogate Motherhood – Ethical or Commercial’ pp.28-29.

Writing in the *New York Times*, Amelia Gentleman states that, ‘it is clear that an exchange between rich and poor is underway. On some contracts the thumbprint of an illiterate surrogate stands out against the clients’ signatures’.⁴ Further reports claim that the women have been detained in hostels and used without any safeguards for their health and wellbeing.⁵ Amrita Pande’s account of the living conditions at a maternity clinic in Anand is considered typical of these kind of surrogacy contracts.

Surrogates must live in the clinic’s facilities where the women are kept under constant surveillance during pregnancy. In the clinic the surrogates live in groups of eight to a room. The rooms are lined with single iron beds with barely enough space to walk in between... The women have nothing to do the whole day except pace back and forth on the same floor, share their woes and experiences with the other surrogates, and wait for the next injection.⁶

Accounts like this are common, and the abject poverty faced by the surrogates is familiar to many couples purchasing these kind of reproductive services. Yet, surrogates earn between 300,000 and 400,000 rupees, which is significantly higher than the average national wage and would otherwise take a potential surrogate many years to make.⁷ Consequently, many surrogates are struggling to understand why these contracts are impermissible.⁸ What seems particularly puzzling is the exclusive application of the ban

⁴ Amelia Gentleman, ‘India Nurtures Business of Surrogate Motherhood’ *The New York Times* (10 March, 2008).

⁵ See for example, Vidhi Doshi, ‘We Pray the Clinic Stays Open: India’s Surrogates Fear Hardship from Embryo Ban’ *The Guardian* (3 January, 2016) and also Kumari, ‘Surrogate Motherhood - Ethical or Commercial’ p.53.

⁶ Amrita Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ *Journal of Women in Culture and Society* 35 (2010), pp.973-974.

⁷ Kumari, ‘Surrogate Motherhood – Ethical or Commercial’ pp.28-29, p.152. This is said to be the equivalent of 10 years’ salary. See also Francoise Baylis ‘Transnational Commercial Contract Pregnancy in India’ in F. Baylis and C. McLeod (eds.) *Family-Making: Contemporary Ethical Challenges* (Oxford: Oxford University Press, 2014), p.265; Stephen Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’ *Journal of Applied Philosophy* 33 (2016), p.129.

⁸ See, Nayma Patel, ‘Is Surrogacy a Legitimate Way Out of Poverty?’ *New Internationalist* (1 November, 2014) and Yogita Limaye, ‘Despair Over Ban in India’s Surrogacy Hub’ *BBC News* (22 November, 2015).

to foreign couples. If the ban is a response to exploitation, then why does surrogacy remain legal for heterosexual Indian couples? A ban would presumably lower the price that Indian clients would have to pay to secure surrogacy services since those clients would be insulated from foreign competitors. It follows that surrogates would receive far less money when entering into such agreements.

These issues have given rise to mass protests.⁹ It is vigorously argued by surrogate mothers and their representatives that the surrogacy ban reinforces the subordination of poverty stricken women. So rather than help women overcome poverty, critics complain that the ban compounds it. As one surrogate asks, 'What are we going to do if they stop this? It's better to do this than immoral things,' (implying prostitution) 'so that I can eat my bread with dignity'.¹⁰ Another argues, 'What the government is doing is wrong. Are they going to come to our home to ask us about our problems and to feed us if we are starving?'¹¹

Although commercial surrogacy seems to offer women a life-line and a chance to build an economic foundation, in implementing the ban, the Indian government is acting on a judgement that there is something deeply problematic with a state allowing its poorest citizens to be exploited.¹² But what does it mean to say that someone's behaviour or a situation is exploitative? It seems that in order to assess whether a state is right to forbid an exploitative contract, we have to ask a fundamental question: what exactly is exploitation and what makes it so wrong?

⁹ There have been numerous reports focusing on the protests. See for example, Raksha Kumar, 'India's Surrogacy Tourism Takes a Hit' *Foreign Affairs* (11 December, 2015); Limaye, 'Despair Over Ban in India's Surrogacy Hub'; Philip Sherwell 'India's Surrogacy Ban Dismays British Couples,' *The Guardian* (18 November, 2015); Doshi, 'We Pray the Clinic Stays Open: India's Surrogates Fear Hardship from Embryo Ban'; Abby Rabinowitz 'The Trouble with Renting a Womb.'

¹⁰ Doshi, 'We Pray the Clinic Stays Open: India's Surrogates Fear Hardship from Embryo Ban'

¹¹ Limaye, 'Despair Over Ban in India's Surrogacy Hub'

¹² See Ministry of Health and Family Welfare, 'The Assisted Reproductive Technology (Regulation) Bill - 2014' (New Delhi: Government of India, 2014).

1.2 The Structure of Exploitation

First, at the core of exploitation is the idea that it arises when an exchange of some kind takes place. It occurs when people are involved in a bilateral process of transferring goods or services. Second, an exploitative exchange is mutually beneficial. It secures a Pareto improvement insofar as it is perceived by each party to the transaction to make him or her better off than if the transaction had not occurred. Third, an exploitative exchange is consensual. This can be partly explained by the fact that people enter into this type of exchange with the belief that it will improve their situation to some degree. And because the improvement is something that people want, the choice to enter the arrangement is considered voluntary.

It might be thought that exploitation necessarily involves coercion. One explanation for such thinking is that coercion forms part of the Marxist conception of exploitation. In particular, Marx holds that labourers are exploited when they are forced to work for capitalists who have a monopoly on the means of production, but further reflection shows serious flaws in thinking about exploitation purely in terms of coercion. Acts can be exploitative without coercion. For example, when exploiting friends, family and loved ones, we do not necessarily force them to do anything.¹³ Even though the connection between exploitation and coercion is considered strong in Marxist analysis, there is nothing in the Marxist account that provides grounds for thinking that exploitation must be coercive. It does not follow that labour relationships cannot be exploitative and consensual. It is entirely possible for capitalist labour to be exploited and coerced without it necessarily being the case that labour must be coerced in order to be exploitative.¹⁴ Bob Goodin argues that the analysis of exploitation-as-coercion is deficient because it

¹³ Robert Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve eds., *Modern Theories on Exploitation* (London: Sage, 1987), p.174.

¹⁴ Alan Wertheimer, *Exploitation* (Princeton, N.J.: Princeton University Press, 1996), pp.248-249.

assimilates the notion of exploitation to that of theft. Exploitation, says Goodin, implies some measure of cooperation on the part of the exploited. Extortionists, blackmailers, and con artists enlist the support of their victim in some way and this is why we feel more comfortable in saying that they exploit their victims than we would be in saying the same about thieves.¹⁵

It might also be thought that exploitation necessarily involves harming or worsening the situation of another, but there are important instances of exploitation where this condition does not hold true. Imagine a person gets into difficulty whilst swimming in deep water and the only passer-by demands an enormous sum to assist with the rescue. If the offer is accepted, then the interaction with the exploiter improves the situation of the swimmer. A paradigmatic example concerns sweatshop labour contracts. These contracts also improve peoples' relative situation insofar as they move workers out of starvation. In such cases, many workers feel that sweatshop employment is better than other forms of paid work or no employment at all.¹⁶

When conceptualising exploitation, I think it is especially useful to consider Robert Nozick's framework for distinguishing threats from offers. Nozick maintains that threats consist in coercion and offers do not. What is important is that the structure of an exploitative interaction closely resembles what Nozick describes as a restricted offer. For Nozick, a proposal is an offer if a person would rationally choose to move from the pre-offer situation to the offer situation. This can be contrasted with a threat where people do not prefer to make this move – if I were to force you to hand over your wallet at the point of a gun, then I would be moving you from a status quo to another situation in

¹⁵ Goodin, 'Exploiting a Situation and Exploiting a Person' pp.174-175. See also Hillel Steiner, 'A Liberal Theory of Exploitation' *Ethics* 94 (1984), p.227.

¹⁶ It is on these grounds that Matt Zwolinski argues that sweatshops are not exploitative. See Matt Zwolinski, 'Sweatshops, Choice and Exploitation' *Business Ethics Quarterly*, 17 (2007), pp.689-727.

which you would not have chosen to put yourself. The choice is therefore not your own insofar as I have made this decision for you.¹⁷ In the case of an offer, my intervention involves moving you from a status quo to another situation in which you would prefer. For Nozick, the threat/offer distinction is also marked by the fact that compliance with a threat will leave a person worse off than she was in the pre-threat situation. By contrast, accepting an offer makes a person better off than she was in the pre-offer situation. Indeed, bringing about this improvement was part of the person's reason for acting as she did.¹⁸ If we consider Nozick's framework in the context of our rescue and sweatshop examples, we can see that both cases involve a mutually beneficial transaction: the distressed swimmer is rescued and the rescuer receives monetary reward. Likewise, sweatshop workers are relieved of starvation and employers' benefit from labour inputs. We can also note that the swimmer and workers prefer to move from their pre-proposal situation in which their life is threatened, to the proposal situation in which their circumstances are improved. Equally, if we apply this analysis to the Indian surrogacy cases, we can note that these interactions involve a mutually beneficial exchange: surrogates gain financial benefits and couples receive a much desired baby. Importantly, surrogates also choose to enter these contracts, to the extent that they prefer to move from the pre-proposal situation in which they are subjected to dire poverty, to the proposal situation in which they can choose to be spared such hardship.

Thus, exploitation involves a bilateral exchange that is mutually beneficial and consensual. Given that these conditions do not, *prima facie*, fall on the side of the unjust and immoral, it is perhaps tempting to approve of these kinds of interactions. Parties are no worse off than they would have been had these contracts never existed – instead, these contracts promote personal and economic well-being. Parties are not deceived in

¹⁷ See Robert Nozick, 'Coercion' in his *Socratic Puzzles* (Cambridge: Harvard University Press, 1997), p.41.

¹⁸ Ibid.

any way, nor do the terms of the contract contravene a person's expressed wishes. Thus, is there a case for judging these types of contracts as a fair exchange? Many would balk at this suggestion. This is because the intuition that something is wrong runs deep. It seems clear that these types of arrangements are morally defective in some respect and it is this type of normative consideration that is the driving force behind the competing accounts of exploitation. The aim for the exploitation theorist is to identify the defective property that makes a mutually beneficial and consensual exchange exploitative. This provides the exploitee with a moral basis for complaint and the permissibility of the exchange becomes subject to question.¹⁹

Political philosophers tend to presume that only some form of past injustice or wrongdoing can make an exchange morally defective. So the exploitation debate is characterised by attempts to address the normative question: what kind of wrongdoing makes an exchange exploitative? What has emerged from the existing philosophical literature are three general approaches to answering this question. According to the '*Anti-Commodification Approach*', certain exchanges are exploitative because they degrade and commodify an aspect of a person's being that should not be up for sale. The '*Counterfactual Approach*' argues that terms of certain exchanges can be exploitative when compared to a counterfactual benchmark exchange. And the '*Duty-Based Approach*' claims that exploitation arises if an agent violates a moral duty to protect or respect a person.

¹⁹ Hillel Steiner gives an exegesis of the distinctions between different types of transfer in Hillel Steiner, 'A Liberal Theory of Exploitation' *Ethics* 94 (1984), pp.225-241. Theorists that also accept that exploitation involves these four necessary conditions include: Gregory Kavka, 'The Paradox of Future Individuals' *Politics and Public Affairs*, 11 (1982), pp.93-112; Joel Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988), p.176ff; Michael J Gorr, *Coercion, Freedom and Exploitation* (New York: Peter Land, 1989); Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation' *Philosophy and Public Affairs* 21 (1992), pp.132-164; Allen W. Wood, 'Exploitation' *Social Philosophy and Policy* (1999), pp.136-158; Robert Goodin, *Reasons for Welfare* (Princeton: Princeton University Press, 1988); Ruth Sample *Exploitation: What it is and Why it is Wrong* (Oxford: Rowman and Littlefield Publishers, 2003); Benjamin Ferguson, 'The Paradox of Exploitation: A New Solution' Ph.D. thesis, London: LSE (2013); and Rebecca Stone, 'Unconscionability, Exploitation and Hypocrisy' *The Journal of Political Philosophy* 22 (2014), pp.27-47.

The belief that exploitation necessarily involves one of these moral wrongs dominates the literature, but I argue that we should reject it. The theory I am proposing rests on the idea that exploitation can arise via a special category of '*socially constructed luck*'. By taking into account what John Rawls calls 'background justice' and what G.A. Cohen refers to as an 'accumulation problem', I argue that socially constructed luck is brought about through a cumulative process of people freely exercising their moral rights in the pursuit of their own conception of the good life.²⁰ Unless the negative effects of this type of luck are offset, exploitative interactions can arise where people have no reasonable alternative but to enter a particular transaction. Socially constructed luck can therefore play a direct role in privileging some individuals at the expense of others and allows for the extraction of surplus benefits.

Although the thesis is concerned to offer a new account of exploitation, it has philosophical significance that extends beyond the exploitation debate. Socially constructed luck is situated within a luck egalitarian framework. Most political philosophers are familiar with the principal objections that have been raised against luck egalitarianism. This critical scrutiny was first introduced by Elizabeth Anderson who directed three distinct objections against the theory: (1) that it misses the point of equality; (2) that it involves humiliating or shaming the victims of brute luck; and (3) that it abandons those who make prudentially poor, but supererogatory choices.²¹ By developing a theory of socially constructed luck and showing how luck egalitarianism works within a conception of exploitation, I hope to not only rebut Anderson's objections, but also provide a deeper understanding of how the luck egalitarian and relational egalitarian views align.

²⁰ John Rawls, *Political Liberalism* (Cambridge, Mass: Harvard University Press, 1996), pp.265-267; G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), pp.41-50.

²¹ Elizabeth Anderson, 'What is the Point of Equality?' *Ethics* 109 (1999), pp.287-337.

The thesis also presents an important claim directly relating to the work of Rawls and Cohen. On this view, socially constructed luck has important roots in the ideas of both of these theorists. Rawls's argument from background justice involves the idea that an accumulation of individually free and fair transactions and agreements will, over time, causally erode the background conditions that make free and fair transactions and agreements possible. This leads Rawls to argue that special principles are needed to regulate society's basic structure. Similarly, Cohen's accumulation argument maintains that accruals of seemingly innocent actions fail to preserve an initially just situation. This leads Cohen to argue for the imposing of patterned principles of justice. Both are concerned with problems that can arise from an accumulation of individually free transactions and agreements. Both think that distributions may develop whereby some individuals are left with no reasonable alternative but to enter into unfavourable agreements. My thesis not only argues that what Rawls and Cohen have identified is a special category of socially constructed luck, but also that the adverse conditions they are describing cohere with the structure of exploitation i.e. exchanges that are voluntary, mutually beneficial, but nevertheless morally amiss. Thus, an important implication of the argument I present is the idea that Cohen's patterned principles and Rawls's justification for the primacy of the basic structure (and the application of his basic principles) are underpinned by exploitation. The idea that exploitation is the injustice that Rawls and Cohen have been confronting has not been identified in the philosophical literature. But once things are presented in this way, then the problem that Rawls and Cohen are aiming to address must be understood differently. The aim is to understand how we are to respond to exploitation generated by people freely exercising their moral rights.

Before outlining the following chapters, it is important that I make two points with respect to the scope of the thesis. First, though the thesis presents a new theory of exploitation, this is not to be taken as a substitute for the existing approaches. My aim is not to replace the existing accounts. I engage with the exploitation debate in order to demonstrate that the existing accounts are incomplete and therefore miss an important type of exploitation. Second, I do not participate in the dispute that takes place between Rawls and Cohen. Given that Cohen criticises Rawls on the primacy of the basic structure and argues that it does not have fundamental relevance, it might seem a bit confusing that I will proceed by only explaining their agreements and not their disagreements. But Rawls and Cohen's points of dispute are beyond the scope of the thesis. The arguments I pursue are about luck and the problem of exploitation. I will therefore be occupied with showing how the views of Rawls and Cohen align.

1.3 Thesis Structure

The thesis is divided into two parts. Part I considers the existing accounts of exploitation and demonstrates that there are important instances of exploitation that cannot be identified using these approaches. I begin, in Chapter 2, by outlining the main features of the '*Anti-Commodification Approach*' to exploitation, which is put forward by theorists such as Elizabeth Anderson, Carole Pateman, Margaret Jane Radin and Debra Satz.²² The approach claims that certain types of interactions are intrinsically exploitative because they commodify an aspect of a person that should not be up for sale. I note that this

²²See Elizabeth Anderson, 'Is Women's Labour a Commodity?' *Philosophy and Public Affairs* 19 (1990), pp.71-92; Margaret Jane Radin, 'Market-Inalienability' *Harvard Law Review* 100 (1987), pp.1849-1937; Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, MA: Harvard University Press, 1996); Rosalie Ber, 'Ethical Issues in Gestational Surrogacy' *Theoretical Medicine and Bioethics* 21 (2000), pp.153-69; George J. Annas, 'Fairy Tales Surrogate Mother's Tell' *The Journal of Law, Medicine and Bioethics* 16 (1988), pp.27-33. This commodification understanding of exploitation also forms part of Ruth Sample's account. See Sample *Exploitation: What it is and Why it is Wrong*, p.57; Carole Pateman, *The Sexual Contract* (Stanford, California: Stanford University Press, 1988); Debra Satz, 'Markets in Women's Sexual Labor' *Ethics* 106 (1995), pp.63-85.

approach suffers from three serious problems. First, it fails to identify all important instances of exploitation such as sweatshop labour contracts. Second, there is an asymmetry between non-commodifiable labour and human labour more generally. Third, the approach encourages a disrespectful evaluation of people's choices, which is itself a form of degradation. I then consider the '*Counterfactual Approach*', which defines exploitation by considering a counterfactual transaction which persons would have agreed to and this counterfactual forms the benchmark against which an actual exchange is deemed exploitative. So, on the Counterfactual Approach, a person is exploited to the extent of the difference between the value obtained in the actual exchange and the value of the counterfactual benchmark exchange. This approach is deployed by theorists such as Karl Marx, G.A. Cohen, John Roemer, Hillel Steiner and Alan Wertheimer and the difference between these competing accounts is, essentially, a disagreement about the appropriate benchmark against which exploitation can be measured.²³ In the chapter, I show that each of these benchmarks suffer from important deficiencies and cannot assure us that they have correctly identified a necessary defect that makes an exchange exploitative.

Chapter 3 focuses on the '*Duty-Based Approach*' to exploitation, which is explicated by theorists such as Bob Goodin, Ruth Sample, Ben Ferguson, Allen Wood and Nicholas Vrousalis. These accounts hold that exploitation arises if an agent violates a moral duty to protect or respect a person.²⁴ I begin by arguing that Goodin's theory suffers from

²³ See Karl Marx, *Capital: A Critique of Political Economy* (Moscow: Progress Publishers, 1887); G. A. Cohen, *History, Labour and Freedom* (Oxford: Oxford University Press, 1988); John Roemer, *Value, Exploitation and Class* (London: Routledge, 1986); Steiner, 'A Liberal Theory of Exploitation' pp.225-240. See also, Hillel Steiner, 'Exploitation: A Liberal Theory Amended, Defended and Extended' in *Modern Theories of Exploitation* (ed.) A. Reeve, (London & Los Angeles: Sage, 1987), pp.132-148; Hillel Steiner, 'Exploitation takes Time' in *Essays for Ian Steedman* (eds.) P.A Samuelson & J. Vint (London: Routledge, 2009); Hillel Steiner, 'Liberalism, Neutrality and Exploitation' *Politics, Philosophy and Economics* 12 (2013), pp. 335-344; Alan Wertheimer, *Exploitation* (Princeton, N.J.: Princeton University Press, 1996).

²⁴ See Robert Goodin, *Reasons for Welfare*, (Princeton: Princeton University Press, 1988); Sample *Exploitation: What it is and Why it is Wrong?*, Ben Ferguson, '*The Paradox of Exploitation: A New Solution*'

two serious problems. First, it generates very strong moral obligations which places an enormous burden on transactors to help the vulnerable. Second, I claim that Goodin's insistence that exploitation involves a failure to follow 'norms governing certain social interactions' does not appreciate that it is possible for prevailing norms to be exploitative. Sample adopts a hybrid account of exploitation which can be seen as a fusion of the three approaches being considered. Sample's position is problematic, however, because some of the objections raised in relation to Goodin, the Counterfactual Approach and the Anti-Commodification Approach also apply to her framework. Ferguson argues that exploitation involves a transaction whereby one party knowingly takes advantage of a prior injustice committed against another. I challenge Ferguson's theory by showing that his account cannot explain instances of exploitation that can occur without a preceding injustice. I then consider Wood's account which holds that exploitation involves an exchange whereby A wrongly exploits B when he fails to respect B and uses B's vulnerabilities for his own purpose.²⁵ I claim that problem with this approach is that exploitation does not necessarily involve disrespect. Finally, Vrousalis puts forward a similar account to Wood and conceives exploitation as a form of domination for self-enrichment. However, I argue that Vrousalis's account is also subject to difficulty as his exploitation conditions do not necessarily capture exploitation's wrongfulness.

Having made the case that exploitation cannot be *fully* explained by the existing approaches, Part 2 develops and defends the idea that exploitation can arise from a cumulative process of people freely exercising their moral rights. I begin, in Chapter 4, by considering the main challenges that relational egalitarians have pressed against luck

Ph.D. thesis, London: LSE, 2013); Nicholas Vrousalis, 'Exploitation, Vulnerability and Social Domination' *Philosophy and Public Affairs* 41 (2013), pp.131-157.

²⁵ Ibid., pp.150-151.

egalitarianism. I show that these challenges can be avoided if the theory is considered within a conception of exploitation.

In Chapter 5, I begin to connect the work of Rawls and Cohen and show that a special category of '*socially constructed luck*' can arise through a cumulative process of people exercising their moral rights and liberties. I contend that our social positions – whether we have talents, marketable skills, a certain edge or physical appeal – and whether our voluntary choices result in success or failure is a matter of socially constructed luck. It might seem that our fortune or misfortune has come about because of our choices – it was our choice to follow a particular career path, to develop a particular skill – and yet our success or failure is socially constructed: the outcome is a collective reflection of everyone's (permissible) choices operating within a particular social environment or process.

Chapter 6 offers an account of how the adverse effects of socially constructed luck can give rise to an exploitation problem. I argue that when we freely exercise our moral rights, the effects of our innocent choices can compound and set unjust restrictive limits on what others may do. This will leave some people with no reasonable alternative but to enter certain agreements. I show that these various restrictions can privilege some individuals over others and result in exploitation. Specifically, it gives rise to a bilateral exchange that is consensual, mutually beneficial, but nevertheless morally defective. Crucially, the moral defect that is identified occurs through a process of people exercising their moral rights. To overcome this type of exploitation, I go on to defend a basic right to a reasonable alternative.

Part 1

Exploitation

The Anti-Commodification and Counterfactual Approaches to Exploitation

This chapter outlines the *Anti-Commodification* and *Counterfactual Approaches* to exploitation and considers the different types of wrongdoing that these accounts perceive as necessary for exploitation. The purpose is to reveal that neither of these approaches are able to *fully* explain the concept. The chapter has three main sections. Section 2.1 begins with the most influential Anti-Commodification theories and develops three critiques of the approach. Section 2.2 introduces the five main Counterfactual theories and suggests that all five suffer from serious deficiencies. Section 2.3 concludes.

2.1 The Anti-Commodification Approach to Exploitation

The Anti-Commodification Approach suggests that exploitation occurs when people sell certain aspects of their person on the market. In pregnancy contracts, this refers to an expectant mother's reproductive labour, but theorists also characterise pornography and sex as goods or services that should not be up for sale. Importantly, exploitation is not attached to the activities as such. No one thinks that there is anything morally amiss with surrogacy itself or with having sexual relations. Exploitation only occurs when people sell their sexual and reproductive capacities to make an income. Specifically, it is cashing in on these activities that constitutes an intrinsic wrong.

Advocates of the Anti-Commodification Approach diverge, however, in terms of why they think that selling our sexual and reproductive labour is wrong. Carole Pateman, for example, maintains that sexual and reproductive contracts are a kind of moral evil that

involves dehumanising a person. She says, 'When a prostitute contracts out the use of her body she is thus selling herself in a very real sense. Women's selves are involved in prostitution in a different manner from the involvement of self in other occupations'.¹ Margaret Radin argues that such contracts contribute to a certain kind of immoral treatment of people as inferior human beings. This is because they treat people or features of people as interchangeable with other commodities at a market price. She argues that:

Conceiving of persons or of essential attributes of personhood as fungible commodities tends to make us think of ourselves and others as means, not ends. Conceiving persons as a commodity is harmful, in other words, because it undermines the conception of personhood involving the Kantian agent as end-in-itself: the Kantian person cannot be conceived of as a fungible exchangeable object.²

Importantly, Radin perceives the sale of our sexual capacities as having adverse effect on human development and flourishing. Specifically, it damages the nature of intimate relationships and results in people having less fulfilling lives.³

Other versions of the Anti-Commodification Approach focus on disrespect or degradation. Specifically, sexual and reproductive contracts are understood to be morally defective because the individuals who perform the activities are disrespected when these types of labour are commodified.⁴ Elizabeth Anderson, for example, maintains that reproductive contracts replace parental norms with economic norms. The application of these norms to women's labour reduces surrogate mothers from persons worthy of

¹ Carole Pateman, *The Sexual Contract* (Stanford, California: Stanford University Press, 1988) p.207.

² Radin, *Contested Commodities*, p.84.

³ Radin, 'Market-Inalienability' p.1884.

⁴ Anderson, 'Is Women's Labour a Commodity?' p.87. See also, Debra Satz 'Markets in Women's Reproductive Labor' *Philosophy and Public Affairs*, 21 (1992) p.116.

respect and consideration to objects of mere use.⁵ With regards to commercial sex contracts, she argues, prostitutes are not treated as persons and are degraded to the status of a thing.⁶ Such treatment is said to cultivate an attitude of disrespect towards women who are being valued less than is deserved. Ruth Sample similarly argues that there are some transactions in which the nature of the transaction itself degrades a person, and when we enter into such transactions for the sake of advantage, we engage in exploitation.⁷ Sample goes on to say that the commodification of various features of human beings – labour, sexual services, reproductive capacities and bodily organs – constitutes an important class of putative judgements of exploitation claims.⁸

To be clear, these contracts are not understood to be exploitative because a contract's terms are too cheap. The approach specifies *a priori* that the commodification of these forms of women's labour is wrong and should not be exchanged for financial gain. So it really does not matter if one is a high class call girl or if a person earns extraordinary sums for entering into a surrogacy agreement. What the approach is trying to capture is a qualitative difference that exists between goods associated with our person and external goods such as phones, homes or cars. The exchange of our personal goods is more intimate and is central to how we form human relationships. It is the fact that you are receiving money for exchanging these types of intimate goods that is wrong. In particular, it is the intrinsic wrongness connected to personhood, flourishing or degradation that forms the basis of this approach and makes the commodification of our reproductive and sexual capacities exploitative. This, in turn, is thought to give us good reasons to prohibit these transactions and place limits on the things that money can buy.

⁵ Anderson, 'Is Women's Labour a Commodity?' p.80.

⁶ Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, Mass.: Harvard University Press, 1993), p.45.

⁷ Sample *Exploitation: What it is and Why it is Wrong*, p.57.

⁸ Ibid. p.58.

To use Michael Walzer's words, such contracts should be treated as 'blocked exchanges'.⁹

Whilst inappropriate commodification is at the core of many exploitation claims, this interpretation is widely disputed. In particular, it seems that this approach suffers from three serious problems. The first problem is that because the approach is so narrowly formulated it fails to identify all relevant instances of exploitation. It is unable to explain what is morally amiss with consensual and beneficial transactions that do not involve non-commodifiable goods or services. A key instance is sweatshop labour contracts. On the whole, we think that people should be paid a wage for this type of labour. Moreover, it would be counterintuitive to think that there is something intrinsically wrong with making garments or technology products for a living.

A second problem is that the presumed asymmetry between non-commodifiable labour and human labour is unjustified. Critics point to two basic rights in order to explicate this problem. The first is a right to use our body in order to earn a living for ourselves and the second is a right to enter into contractual agreements. If we consider the Indian surrogacy cases discussed earlier, it is possible to see that this asymmetric treatment does not appear tenable. First, gestational surrogacy has been the only type of surrogacy to be legally permitted in India.¹⁰ Gestational surrogacy means that there is no genetic connection between the surrogate and the baby so the child that results is not biologically a surrogate's own. Surrogates are therefore like any other persons who work for a living: they are using their body in order to make an income. It therefore seems arbitrary that they cannot carry and deliver a child and receive money for this service since a midwife can be paid for delivering children into this world.¹¹ Also just as a midwife can enter his

⁹ Michael Walzer, *Spheres of Justice* (New York: Basic books, 1983) p.100ff.

¹⁰ See Indian Council of Medical Research (ICMR), 'The Assisted Reproductive Technologies (Regulation) Bill', *Ministry of Health & Family Welfare, Govt. of India* (2010).

¹¹ See Debra Satz, 'Markets in Women's Reproductive Labor' *Philosophy & Public Affairs* 21 (1992), pp110-116 as does Cecile Fabre, *Whose Body is it Anyway?* (Oxford: Oxford University Press, 2006) pp.186-218.

or her profession out of the altruistic desire to bring babies into this world, so too can the surrogate mother.¹² Thus, if people are allowed to work as midwives, IVF consultants, fertility drug specialists and prenatal sonography technicians, then there seems no good reason to render reproductive contracts impermissible.¹³

A similar argument justifies prostitution and pornography. The fact that we have a moral right to use our bodies in order to make a living is linked to the belief that we have a right to decide whether and how to engage in sexual activity or release images of ourselves. Given that selling our own image or engaging in sexual activity is a way of using our body in order to make a living, it follows that such economic activity is protected by a moral right, although this is on the proviso that we do not violate other people's rights in doing so.¹⁴ As Martha Nussbaum puts it: 'we should begin from the realization that there is nothing per se wrong with taking money for the use of one's body. That is the way most of us live, and formal recognition of that fact through legal contract is usually a good thing for people, protecting their security and their employment conditions'.¹⁵

On the whole, it does not seem clear when considering practices such as gestational surrogacy, prostitution and pornography as an intrinsic wrong why such asymmetrical treatment of bodily labour is justified. It is particularly hard to draw a clear line between earning an income from selling these personal goods and services and earning an income from other professions. This is because many forms of employment can display the same deplorable features emphasised by the Anti-Commodification Approach. Being employed as a military soldier is one such example. Soldiers are often treated as fungible objects (or extensions of mechanical objects) as part of their employment practice. The

See also, Anderson, 'Is Women's Labour a Commodity?' p.83; Martha C. Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' *The Journal of Legal Studies*, 27 (1998) pp.693-723.

¹² Ibid.

¹³ See Fabre, *Whose Body is it Anyway?* pp.186-218.

¹⁴ See Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' pp.693-723.

¹⁵ Ibid. p.723.

job requires people to follow orders (press a particular button/fire a gun in a certain direction) and relinquish control of their mind and body. Thus, soldiers might be considered as a means to particular end. The application of military norms might be thought to reduce soldiers to objects of mere use. In this sense, the nature of the employment transaction itself would be said to degrade a person. Equally, it is not clear that being employed as a soldier would have any less adverse effects on human development and flourishing than those involved with the sale of sexual or reproductive capacities. Specifically, since the job requires that people be away from home for long periods of time, this might damage intimate family relationships. Equally, the constant stress and threat to life might also result in people having less fulfilling lives.

These features are also present in the building trade when labourers are treated as fungible tools (or extensions of construction tools) as part of their working practice. The job requires that people follow the orders of a foreman – lay a brick/hang a door/screw the ironmongery/sweep the floor – and relinquish control of their mind and body. Labourers might also be considered as a means to a particular end; construction norms can reduce labourers to objects of mere use. Again, it is not clear how being employed as a labourer will have less adverse effects on human development and flourishing than those involved with the sale of sexual or reproductive capacities. Specifically, people are required to fulfil monotonous or strenuous tasks, often in dust-filled environments and with the strong possibility of injury, might also result in people having less fulfilling lives. Waiters and waitresses are also treated as fungible tools as part of their working practice. The job requires following the orders of others – writing down menu preferences/transporting plates from kitchen to table/cleaning away waste. Again, waiting staff might be considered as a means to an end insofar as the norms of the food service industry can reduce waiters and waitresses to objects of mere use. It is also not clear how serving other people food results in a fulfilling life. On these grounds, it seems

clear that the deplorable features connected to personhood, flourishing, or degradation are no more intrinsic to sexual and reproductive contracts anymore than they are to other types of professions. This brings the justifiability for taking an asymmetrical attitude toward sexual and reproductive contracts into question.¹⁶

The final objection to be considered concerns the degradation understanding of Anti-Commodification. The degradation view can be disputed on the grounds of internal inconsistency; the view encourages a disrespectful evaluation of people's choices, which is itself a form of degradation. The difficulty is that some may believe that taking money in connection with the use of one's sexual or reproductive capacities is morally degrading and some may not, just as professional opera singing and homosexual and interracial relationships were historically perceived as repugnant and degrading.¹⁷ There are a variety of distinct liberal arguments – appeals to negative liberty, respect for autonomy and the importance of non-paternalism – all of which converge on the judgment that it is problematic to take a position on how people should lead their own life, dictating what norms should govern particular activities and how certain goods should be valued. Making judgements about reproductive and sexual contracts is particularly problematic on paternalism grounds. The Anti-Commodification Approach invokes a negative judgement about a person's innate ability (assuming they have full knowledge of the possible consequences this may have on their life) to form and revise their own conception of value.¹⁸ If individuals are acting within their moral rights and choose to sell their reproductive and sexual services or choose to purchase someone else's

¹⁶ See further Satz, 'Markets in Women's Reproductive Labor' pp.107-131 and Debra Satz, 'Markets in Women's Sexual Labor' *Ethics* 106 (1995), pp.63-85.

¹⁷ For the immorality of opera singing see Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (R.H. Campbell et al ed, 1981) ix,6,25 as cited in Martha C. Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' *Journal of Legal Studies*, 27 (1998), pp.693-698.

¹⁸ For such an account of paternalism, see Jonathan Quong, *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011), p.80; see also Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine and Accommodation' *Philosophy and Public Affairs* Vol. 29 (2000), pp.211-220 and Rebecca Stone, 'Unconscionability, Exploitation and Hypocrisy' pp.27-47.

reproductive and sexual services, then this approach encourages a disrespectful evaluation of people's choices which is itself a form of degradation. It says that the values of people who wish to form sexual or reproductive contracts are not worthy of respect or consideration. This kind of evaluation is inconsistent with the Anti-Commodification Approach's justificatory basis.

In contrast to Sample and Anderson's claims about degradation, Debra Satz argues that the most plausible support for the Anti-Commodification Approach derives from the role that reproductive and sexual contracts play in sustaining a social world in which women are degraded. When we consider prostitution and commercial surrogacy in a wider context (rather than focusing on individual acts), we can see that these contracts instantiate and reinforce the perception of women as socially inferior to men.¹⁹ Satz maintains that women's decisions to enter into reproductive and sexual contracts must be viewed against: (i) a backdrop of unequal life chances and opportunities and (ii) the important and direct contribution these contracts make to gender inequality. With regards to the first of these conditions, Satz maintains that inequalities in income and opportunity form an important backdrop against which prostitution and surrogacy can be viewed. Whilst there are many avenues into this type of employment, the majority of women forming such contracts are poor, young and uneducated. Satz goes on to hold that labour market inequalities will be part of any plausible explanation of why many 'choose' to enter such lines of work. In addition, Satz argues that gender inequality is not confined to women who enter sexual or reproductive transactions. Instead, the negative image of women as surrogates and prostitutes shapes the way women as a whole are seen by themselves and others.²⁰ In particular, she holds that these contracts can mean women are stigmatised, marginalised to less productive roles in society or thought of as less equal

¹⁹ Satz, 'Markets in Women's Sexual Labor' p.64.

²⁰ Ibid. p.68.

to men.

Importantly, Satz's interpretation of degradation provides a way for Anti-Commodification theorists to express what is wrong with sexual and reproductive contracts without invoking a negative judgement about people's decisions to enter into such agreements. Saying that there is something morally wrong with the circumstances in which such contracts are formed or saying that there is something morally wrong with creating deplorable conditions for others does not consist in a negative or paternalistic judgement of people's choices. Satz's degradation account therefore avoids the charge of inconsistency.

The problem for the Anti-Commodification Approach, however, is that whilst this may be an accurate account of why many people enter sexual and reproductive contracts, these are by no means the only types of employment contracts formed by poor, young, or uneducated women. The same concerns can be repeated when considering women becoming maids or housekeepers. Caring for children and the elderly are other prominent examples, but there are others. Satz's account does not tell us why sexual and reproductive employment should be subject to condemnation, but not other types of low-paid, low-skilled occupations.

Second, Satz claims that reproductive and sexual contracts are problematic because they directly contribute to gender inequality, but this complaint is contingent on empirical facts which may or may not hold true. If sexual and reproductive contracts do not produce these kind of negative effects, then these types of commercial transactions will not be morally problematic. Specifically, the wrong involved in gestational surrogacy, pornography, and prostitution, on Satz's view, resides in their propensity to produce degradation. So, these practices do not seem to be wrong apart from the possible consequences that they may or may not have. If it turned out that partaking in

prostitution or surrogacy, or producing sexual imagery did not contribute to gender inequality, then there would be no ground for complaint.

It is not necessarily problematic for a theory to be contingent on empirical conditions, but it does make it difficult for us to understand Satz's argument in terms of anti-commodification, i.e. the intrinsic wrongness of buying and selling personal goods on the market. Suppose that a future society develops in such a way that women who partake in surrogacy contracts become highly valued. In this society, a fatal disease has caused high rates of infertility meaning surrogacy contracts have grown in importance and the status of commercial surrogates is dramatically elevated. Consider a second case. Imagine a future society where only the most beautiful men and women are allowed to operate as prostitutes. In the society, prostitutes are seen as a symbol of godliness and strength; they trade the use of their body at a very high price only to those who are enormously rich. In these two examples, changing circumstances have meant that individuals are not entering into sexual or reproductive contracts due to poverty or poor educational opportunities. Imagine that partaking in these practices also produces beneficial effects – positively shaping the way that women are seen by themselves and others. If circumstances changed so that degradation did not apply, then sexual and reproductive contracts would emerge as perfectly acceptable on Satz's view; however, advocates of Anti-Commodification will find such a conclusion problematic. They will continue to think that intimate personal goods should not be sold on the market. Recall the arguments put forward by Pateman, Radin, and Anderson who maintain that sexual and reproductive contracts are a kind of moral evil that involves dehumanising a person. This is because such contracts are thought to treat people or features of people as interchangeable with other commodities at a market price. The problem for the Anti-Commodification Approach, it seems, is that Satz's view is not appealing to the relevant value that grounds anti-commodification; her view does not allow one to say that receiving money for exchanging intimate personal

goods is intrinsically wrong.

In this section, I hope to have undermined the Anti-Commodification Approach to exploitation. I have claimed that the approach faces three problems. First, it fails to identify all relevant instances of exploitation, such as sweatshop labour contracts. Second, there is an unjustifiable asymmetry between non-commodifiable labour and human labour more generally. Finally, I have claimed that the approach encourages a disrespectful evaluation of people's choices, which is itself a form of degradation. If my arguments are successful, then this considerably diminishes the appeal of the Anti-Commodification Approach.

2.2 The Counterfactual Approach to Exploitation

The Counterfactual Approach grounds exploitation in the idea that a person has been made vulnerable by having been deprived of something to which he or she was entitled. A key feature of this approach is that exploitation is defined using a counterfactual transaction to which persons would have agreed. Furthermore, it is the counterfactual transaction that forms the benchmark against which an actual exchange is deemed exploitative. So, on the Counterfactual Approach, a person is exploited to the extent of the difference between the value obtained in the actual exchange and the value of the counterfactual benchmark exchange. Various Counterfactual views have been put forward and the difference between these competing accounts can essentially be seen as disagreement about the appropriate benchmark against which exploitation can be measured. This ranges from the economic costs of production (Marx), a transaction without the distributive effects of brute luck (Cohen and Roemer), a transaction without a previous moral rights violation (Steiner) and a hypothetical competitive market price (Wertheimer).

In this section, I will first consider Marx's account, which sees exploitation as an unequal transfer of value between the capitalist and the worker. My thesis that exploitation can be brought about through a just process has much in common with Marx's view insofar as he thinks exploitation is hidden beneath the surface of day-to-day transactions; however, I will reject Marx's account of exploitation and explain three fundamental problems that can be raised against the view. I will then outline the accounts of Cohen, Roemer, and Steiner who develop Marx's approach. These accounts make a strong conceptual link between exploitation and distributive justice. Whilst this understanding is intuitively plausible, it cannot account for many instances of exploitation. In particular, it fails to show that many instances of leveraging can be exploitative. Each of the theories is also subject to Derek Parfit's non-identity problem. This means that exploitation resulting from long-standing historical injustice (such as women living in a patriarchal society) cannot be recognised. Finally, I will consider Wertheimer's account, which proposes that exploitation takes place when a person pays a nonstandard market price in a transaction. I argue that excessive benefits do not provide a sufficient basis for exploitation and that there are paradigmatic instances of exploitation that do not appropriately fit with Wertheimer's model. I conclude by considering the implications of the arguments that have been presented.

2.2.1 Marx's account: capitalist ownership of the means of production

Karl Marx's account represents the most comprehensive and well-known understanding of exploitation. One of the many important arguments in *Das Capital* is Marx's efforts to explain that exploitation can go unrecognised. Marx argues that capitalist ownership of the means of production is crucial to this concealment. By establishing this claim, Marx shows how exploitation is hidden beneath the surface of the day-to-day transactions of

the economic system. Like Marx, I also think that exploitation can remain hidden from view. In later chapters, I will use Marx's insight to help to substantiate my thesis that exploitation can derive from a just process of people exercising their moral rights. Although I accept Marx's theory that exploitation can go unrecognised, I depart from Marx's understanding of exploitation.

There are, broadly speaking, three difficulties that Marx's account faces. First, there are well known problems associated with the idea that labour is the source of all value: this undermines Marx's technical definition of exploitation. Second, Marx's understanding of exploitation is both too inclusive and not inclusive enough. Because Marx's analysis of the cause of exploitation is too narrowly focused, this means that many important instances of exploitation cannot be taken into account on Marx's view. In particular, Marx fails to see that exploitation can occur even if everyone has equal access to the means of production. Because Marx's account is too stretched, it also ends up incorporating cases which we wouldn't want to say are instances of exploitation. The final difficulty with the account is that fixating exploitation in capitalist ownership of the means of production detracts from third party exploitation in an objectionable way.

To begin, Marx offers a technical definition of exploitation that focuses on the transfer of value between the capitalist and the worker. Adopting an objective theory of value, Marx suggests that exploitation arises whenever the value transferred by the worker to the capitalist surpasses the value transferred from capitalist to the worker. Thus, the relevant benchmark for Marx is an exchange in which the values transferred are equal.²¹ Marx's theory is concerned with labour contracts, wherein the measure of value is the labour time socially necessary to make each product. This is understood as the average amount of time that it takes to produce the products necessary to sustain the worker for

²¹Exploitation on Marx's account is therefore when an exchange lacks reciprocity of some kind.

the day (food, housing, clothing etc.).²² According to Marx, when workers work longer than the time necessary to reproduce the value of their own labour power, they carry out surplus labour and the value of this surplus labour is claimed by the capitalist as profit.²³ In this sense, capitalists get part of the value the worker produces. Exploitation is measured by the ratio of surplus (or unpaid) labour over necessary labour, or 's/v'. And exploitation increases with the proportion of time that a worker is required to labour for the capitalist.

According to John Rawls, the point of the labour theory of value is to try to explain how surplus labour can exist in a system of personal independence whereby contracts are agreed to between ostensibly free and equal economic agents.²⁴ Importantly, Marx's concern is not only with how surplus labour comes about but how it is hidden from view. Marx wants to understand the details of this hidden process and whether the flows of labour time may be quantified.

Marx's answer to how this surplus labour originates is found in *Capital*, Vol.1. He thinks that the exploitation of workers by capitalists is attributed to the fact that workers (as a class) do not have access to the means of production.²⁵ Because workers have no land or resources they cannot work for themselves. The workers therefore need to sell their labour to capitalists, who have monopoly over productive resources as private property.²⁶ Workers partake in their own exploitation because they have no reasonable alternative available. Marx then considers how this surplus is then redistributed to landowners in the form of rent and to moneylenders in the form of interest. Again, property ownership appears key. The landowners and moneylenders are able to extract part of the capitalist's

²²Marx, *Capital: A Critique of Political Economy*, pp.340-341.

²³ Ibid. p.325.

²⁴John Rawls and Samuel Freeman, 'Marx' in *Lectures on the History of Political Philosophy* (Cambridge, MA: Harvard University Press, 2008), p.324.

²⁵Marx, *Capital: A Critique of Political Economy*, p.344.

²⁶Ibid., p.345.

profit. Thus, capitalists extract surplus labour from the workers and the landowners and moneylenders extract from the capitalists. The exploiters are exploited in turn.²⁷ This conveys private property as the basis of exploitation.

What Marx's theory is intending to illustrate is that even in a competitive capitalist economy, exploitation remains. According to Rawls, what Marx wants to show is the way in which the capitalist order, even when it is fully competitive, and even when it satisfies the conception of justice most adequate to it, is still a system of exploitation.²⁸ It is important to bear in mind that Marx is not claiming that exploitation is a result of intentional manipulation by the capitalists. Rather, his view is that people will naturally believe in the justice of capitalism because it exists as a system of personal independence i.e. contracts are agreed to between seemingly free and equal economic agents. There is also a fixation on the relationship between prices and objects, so people fail to see the sense in which commodities are produced by human labour and that prices reflect a social relation. Because this is hidden, people will consider their position to be just and their income and wealth deserved. According to Marx, this illusion is shared by workers and capitalists alike and is essential to the smooth working of capitalism.²⁹

The moral defect that gives rise to Marxist exploitation is therefore rooted in this unfair class monopoly that capitalists hold over the productive resources. What wrongs the workers is that they are denied control over the means of production: they are born into

²⁷Rawls and Freeman, 'Marx' p.330.

²⁸Ibid., p.331.

²⁹ There has been considerable controversy as to whether Marx condemns capitalism as unjust. Following Norman Geras, G.A. Cohen and John Rawls, what seems most plausible is that Marx does condemn capitalism as unjust, but that he does not see himself as doing so. (See Norman Geras, 'The Controversy about Marx and Justice' in *Literature of Revolution: Essays on Marxism* (London: Verso, 1986), p.36. See also G.A. Cohen's review of Allen Wood's *Karl Marx in Mind* 1983, and Rawls and Freeman, 'Marx' p.336.) Indeed, Marx often presents exploitation as wrong and unjust, calling it 'robbery' and 'concealed theft'. To say this implies that the capitalist has no right to appropriate the surplus value and what is being done is wrongful and unjust. Indeed, because Marx does not think that capitalists steal from the worker according to the capitalist conception of justice, he must mean that they steal on another conception of justice. To steal is to take something that rightfully belong to the worker and hence to act unjustly. It follows that any system that is based on robbery and theft must be unjust. See Rawls and Freeman, 'Marx' p.343.

poverty and do not have the opportunity to develop their skills. In order to survive they must work extensive hours in mind-numbing jobs for a subsistence living. This is thought to promote the ruthless treatment of man by man.³⁰

For Marx, an ideal society is a 'society of freely associated producers'. This ideal has two stages: a socialist stage and a full communist stage. According to Marx, in the second socialist stage illusions and exploitation will no longer exist. Marx makes two assumptions that allow him to make this claim: (i) that human labour is the only rewarded factor of production and (ii) that all members of society should equally have a claim to have access to society's means of production and natural resources. To reiterate, for Marx, exploitation arises because capitalists control the means of production and this allows them to benefit from surplus labour. In a socialist society, however, capitalists will not exert such control and the economy will be directed by a publicly acknowledged democratic plan. Such a society is believed to recognise the claim of all to participate and have equal access to society's resources. Marx therefore thinks that if there is no class monopoly over productive resources, then exploitation will not be produced.

There are, however, various problems with Marx's theory. First, the labour theory of value cannot adequately explain the connection between value and price.³¹ One serious objection is that the theory suggests that industries that are labour intensive ought to produce greater levels of profit than industries that are less labour intensive, but this has been shown to be empirically and analytically false.³² In particular, there are many commodities that the labour theory of value cannot explain. For example, whisky can

³⁰ 'The money owner now strides in front as the capitalist; the possessor of labour-power follows as his labourer,' says Marx. 'The one with an air of importance, smirking, intent on business; the other, timid and holding back, like one who is bringing his own hide to market and has nothing to expect but – a hiding.' Marx, *Capital: A Critique of Political Economy*, p.172.

³¹ Samuelson, 'Understanding the Marxian Notion of Exploitation: A Summary of the so-called Transformation Problem Between Marxian Values and Competitive Prices' p.399-431, Nozick, *Anarchy, State and Utopia*, pp.253-262, G.A. Cohen, 'The Labour Theory of Value and the Concept of Exploitation' *Philosophy and Public Affairs*, 8 (1979) pp.338-360.

³² See, for example, Ibid. p.347.

become more valuable as it gets older, uncultivated land can be worth vast sums, but contains no labour at all, and some of Picasso's sketches took seconds to accomplish but are worth hundreds of thousands of pounds.³³

Similarly, Marx's claim that only labour can create value has also been shown to be mistaken on the grounds that any commodity is capable of performing the same function. Nozick provides a list of counter examples to the theory: 'found natural objects (valued above the labour necessary to get them); rare goods (letters to Napoleon) that cannot be produced in unlimited quantities; differences in value between identical objects at different places; differences skilled labour makes; changes caused by fluctuations in supply and demand; aged objects whose production requires much time to pass (old wines) and so on'.³⁴ Like labour, all of these goods are capable of creating more value than they cost. Thus, labour cannot be the source of all value. This undermines Marx's explanation of how workers are exploited.

A second objection is raised by Cohen, who argues that Marx's analysis of the cause of exploitation is too narrowly focused.³⁵ This is because exploitation can occur even when everyone has equal access to external productive resources. Differences in our natural personal endowments (our talents and abilities) can allow some to extract benefits from the misfortune of others. The following example illustrates the problem.³⁶ Imagine a world of two people, Able and Infirm. Each has an equal right of access to the world's productive resources, but because Infirm came to the world with no productive power he is unable to utilise his access. Able therefore takes advantage of Infirm when she says:

³³ See Jonathan Wolff, *Why Read Marx Today* (Oxford: Oxford University Press, 2002), p.114.

³⁴ Nozick, *Anarchy State and Utopia*, p.258.

³⁵ Cohen notes: 'there are certain assets unmentioned by Marx which are initially, and perhaps also continuingly, unequally distributed, to wit the intangible assets of talent and foresight that can undermine an initial equality in external assets.' See G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), pp.204-205.

³⁶ Cohen uses this type of example to argue that self-ownership cannot be reconciled with equality. I have slightly modified this example to incorporate the issue of exploitation. See Ibid. pp.105, 205.

‘give me all of the world’s assets and I won’t let you starve’. This kind of interaction seems deeply exploitative, but it cannot be described as such using Marx’s definition. It is this kind of scenario that leads Cohen to argue that external resource distributions should compensate for differences in our personal endowments.³⁷ Rawls takes a similar view when he says:

Marx seems to accept this inequality as something inevitable ... But why e.g., can’t society, adopting a principle like the Difference Principle, impose various taxes etc. and adjust incentives so that the greater endowments of some work to the advantage of those with fewer endowments? Is it simply an oversight on Marx’s part that he doesn’t think of this?³⁸

According Cohen, Marx does not compensate for disparities in our personal endowments because his account of exploitation relies on a libertarian notion of self-ownership whereby every person is morally entitled to full private property in his own person and the fruits of his labour.³⁹ Self-ownership is an implication of Marx’s charge that capitalists steal surplus labour from the workers since workers are depicted as owning their labour power. Because an appeal to self-ownership underpins Marx’s condemnation of exploitation, it would be problematic for him to suggest that persons should be forced to bestow their services or products on another.⁴⁰ In other words, if the infirm are given an income from government taxes then they become exploiters on Marx’s account. This is on the basis that part of the workers’ income is forcibly taken

³⁷Cohen, *Self-Ownership, Freedom and Equality*, p.205.

³⁸ Rawls and Freeman, ‘Marx’ p.367. The Difference Principle is the second of Rawls’s two principles of justice, which states that social and economic inequalities are to satisfy two conditions: first, they are attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p.42.

³⁹ G. A. Cohen, ‘Self-Ownership, Communism and Equality’ *Proceedings of the Aristotelian Society, Supplementary Volumes* 64 (1990), p.25.

⁴⁰Cohen, ‘Self-Ownership, Communism and Equality’ pp.25-26.

away and given to the infirm, but it is outrageous to consider the infirm as perpetrators of exploitation. Marx's account therefore stretches the definition of exploitation too far.

The third problem with Marx's account is that fixating exploitation in capitalist ownership of the means of production overlooks third-party exploitation. This is particularly problematic when considering our earlier surrogacy case; the exploitation that takes place is not the kind of bilateral relation that Marx describes. Instead, it involves Western couples exploiting surrogates (who own the means of reproduction) because they have been subject to deprivation (due to factors such as high population density, illiteracy, and being a member of a scheduled caste). It appears that surrogates strike a deal with Western couples (a third party) because that is the best deal they can get. Although the couples gain benefits, they have not in any way shaped the surrogate's external environment so as to bring this agreement about. On this basis, it may be argued that not only is Marx's account of the source of value incorrect, but it also seems that his analysis of the cause of exploitation is again not inclusive enough. This means that Marx is unable to offer a comprehensive account of exploitation.

2.2.2 Cohen, Roemer and Steiner

In this section I will outline the accounts of Cohen, Roemer, and Steiner who develop Marx's approach. These accounts make a strong conceptual link between exploitation and distributive injustice. Specifically, distributive injustice is seen as the cause of exploitation. I will sketch out each of these theories in turn, before considering the problems that each face collectively.

(i) Cohen

To begin, Cohen makes progress on Marx's central problems and argues that 'the relationship between the labour theory of value and the concept of exploitation is one of

mutual irrelevance’.⁴¹ Put succinctly, he says that what matters for Marxists is not that ‘the capitalist appropriates the value produced by the labourer... Rather, it is that capitalist appropriates part of the value of what the labourer produces’.⁴² Creating products that have value is distinct from creating the value of those products. This suggests that exploitation can be captured without the labour theory of value: the labourer is exploited by the capitalist on the grounds that he earns less value than the value of what he produces.

Cohen’s earlier view maintains that workers accept wage offers which generate profit for capitalists because they do not own the means of production or natural resources, but as noted above he argues that Marx’s account of exploitation runs into difficulty because his analysis of the cause of exploitation is too narrowly focused. Cohen therefore introduces his luck egalitarian account of distributive justice and this allows him to include personal endowments as an unjust inequality in distribution. Luck egalitarianism holds that a state of affairs is unjust if it involves disadvantage for which people cannot be held responsible. Brute luck is defined as a person’s advantage or disadvantage that does not ‘appropriately reflect choices that he has made or is making or would make’.⁴³ Distributions caused by brute luck are therefore seen as unfair and unjust, whereas distributions that arise from responsible choices are presumptively just. For Cohen, a person is exploited, and another exploits, only if they partake in an exchange against a background involving brute luck inequality in the distribution of personal endowments or external worldly assets. Exploitation arises because a person is unfairly placed in advantageous bargaining position and is able to extract a surplus value from the exchange. Thus, Cohen states, ‘A person is exploited when unfair advantage is taken of

⁴¹ Cohen, *History, Labour and Freedom*, p.209.

⁴² *Ibid.*, p.228.

⁴³ G.A. Cohen, ‘On the Currency of Egalitarian Justice’ *Ethics* 99 (1989), p.916.

him, and he suffers from (bad) brute luck when his bad luck is not the result of a gamble or risk which he could have avoided'.⁴⁴

(ii) *Roemer*

In a similar vein, Roemer improves upon Marx's account. And like Cohen, he argues that what is necessary for Marxist exploitation is inequality in assets.⁴⁵ He claims that 'exploitation conceived of as the unequal exchange of labour should be replaced with exploitation conceived of as the distributional consequences of an unjust inequality of productive assets and resources'.⁴⁶ Again, injustice on Roemer's account is conceived in luck egalitarian terms whereby a distribution is just if, and only if, it reflects a difference in persons' choices, deserts, or faults.⁴⁷ Thus, for Roemer, an exchange is exploitative if it derives from an unjust inequality in the distribution of initial assets – for which individuals are not responsible. However, an exchange is not exploitative if it derives solely from individual choices and preferences. So for Cohen and Roemer, we can see that the appropriate benchmark for identifying exploitation is a state of affairs in which arbitrary inequalities (the distributive effects of brute luck) have been extinguished.

Roemer begins his account by proposing that a particular person or group can be conceived as exploited if there is some hypothetical situation of distributive equality in which one would be better off – that is, a situation where one withdraws his or her labour and per capita share of external resources. He says that formally, this amounts to specifying a game played by coalitions in an economy. A coalition can either withdraw or participate in the economy. If a coalition can do better by withdrawing and forming

⁴⁴ Ibid., p.908.

⁴⁵ John Roemer, 'New directions in the Marxian theory of exploitation and class' *Politics and Society*, 11 (1982) pp.253-287.

⁴⁶ John Roemer, *Egalitarian Perspectives* (Cambridge: Cambridge University Press, 1996), p.96.

⁴⁷ Ibid., pp.179-98.

their own economy then they are being exploited.⁴⁸ So, a coalition $C1$ in a society S is exploited if and only if:

- (1) There is some conditionally feasible hypothetical alternative (ψ) , in which $C1$ would be better off than in its current position (φ) .
- (2) Under (ψ) , the coalition $S - C1 = C2$, would be worse off than in (φ) .

Roemer acknowledges that these conditions can produce counterintuitive results when we face divided world scenarios, that is, situations where two different coalitions live in different parts of the world without the possibility of interaction. This can be seen in the following case. Imagine poor country $C1$ and rich country $C2$ have different capital-labour ratios due to their different endowments. These countries have no interaction whatsoever, but satisfy conditions (1) and (2) of Roemer's model due to the variation in objective resources between them: citizens occupying country $C1$ would be better off and citizens of country $C2$ would be worse off if they were to withdraw their fair share of international capital. Hence, under these conditions country $C2$ would be condemned as exploiting country $C1$. Many can reasonably accept that such a situation is bad, and many can equally accept that this situation is unjust, but many will deny that this is an instance of exploitation since there is no possibility of interaction between the two groups. There is no sense in which $C2$ takes unfair advantage of $C1$. Roemer therefore maintains that (1) and (2) are not sufficient for exploitation as they stretch the concept too far. So, he adds the following dependency condition to his model:

- (3) $C1$'s gain in (ψ) comes at the expense of $C2$.⁴⁹

This condition avoids the overextension problem that Roemer's definition faces in separate world scenarios, but it fails to avoid other odd counter examples to his analysis.

⁴⁸ Roemer, 'New directions in the Marxian theory of exploitation and class' p.276.

⁴⁹ John Roemer, 'Property Relations Versus Surplus Value' *Philosophy and Public Affairs*, 11 (1982), pp.300-301.

For example, Elster asks us to imagine the following hypothetical society: there are two groups of people, of equal size and with equal assets. They do not interact economically, that is, they produce and consume in isolation from each other, but they interact ideologically in the following way. Group *R* has a puritan religion that makes members work long hours and produce much, but the religion only motivates them to work if they have before their eyes the lazy group *S* whom they smugly believe to be condemned to eternal suffering. Group *S* members work short hours because they wrongly think that the rigid, and to them abhorrent, lifestyle of group *R* is due to long working hours, not to religion.⁵⁰

We can see that *S* would be better off were it to withdraw with its own assets or the per capita share of assets and *R* would be worse off were it to withdraw its own assets or per capita share. Thus, conditions (1) and (2) of Roemer's definition are satisfied. We can also see that *R* gains at the expense of *S*, thus satisfying condition (3). On Roemer's account *R* would be exploiting *S*, but this seems counterintuitive. In order to avoid such odd counter examples, Roemer supplements his definition with the following dominance requirement:

(4) *C1* bears a relation of dominance to *C2* in (φ) .⁵¹

Roemer does not, however, provide analysis of this notion and points out that dominance is as elusive a concept as exploitation. He maintains that his use of the condition is ad hoc as his aim was to provide a purely distributive account of exploitation.⁵² It therefore seems that the purpose of the dominance condition is simply to prevent Roemer's

⁵⁰ Jon Elster, 'Roemer versus Roemer: A Comment on 'New Directions in the Marxian Theory of Exploitation and Class' *Politics and Society* 11 (1982), p.368.

⁵¹ John Roemer, *A General Theory of Exploitation and Class* (Cambridge MA: Harvard University Press, 1982), p.237. and Roemer, 'New directions in the Marxian theory of exploitation and class' p.276.

⁵²Ibid. p.277 fn.15.

definition being stretched too far and including actions that do not intuitively look like instances of exploitation.

(iii) *Steiner*

The next Counterfactual Approach I will consider has been developed by Steiner⁵³ who also defines exploitation in relation to the distribution of resources against which an exchange takes place. Steiner offers a liberal theory of exploitation which is grounded in previous moral rights violations. On this account, exploitation occurs if and only if:

- (1) There exists an unrectified rights violation⁵⁴ in the history of the exchange leading to transaction (φ) that makes one party worse off than he or she would have been.

We can note that the relevant counterfactual benchmark is an exchange in which the values transferred do not contain a prior rights violation. Steiner's own conception of rights violations is left-libertarian and requires that all persons have a right of self-ownership over their own body as well as an entitlement to an equal share of the *value* of all the world's natural resources.⁵⁵ Steiner understands owed payments as constituting a *global fund*, whereby each person has an equal claim.

Although Steiner's view is not Marxist, it is a view that fits with Marx's own in several respects: first, even though persons are not thought to have equal access to natural resources, Steiner does suggest that people are under a duty to ensure that everyone has access to an equal share of the value of the world's natural resources; second, as already

⁵³Steiner, 'A Liberal Theory of Exploitation' pp.225-240. See also, Steiner, 'Exploitation: A Liberal Theory Amended, Defended and Extended' pp.132-148, Steiner, *An Essay on Rights*, Ch. 5. A revised account is advanced in Steiner, 'Exploitation takes Time' and Steiner, 'Liberalism, Neutrality and Exploitation' pp.335-344.

⁵⁴ The rights violation is committed against the exploitee or a third party who would otherwise have offered her more.

⁵⁵ Steiner, *An Essay on Rights*, pp. 266-282.

mentioned, self-ownership is an implication of Marx's charge that capitalists steal surplus labour from the workers because he depicts workers as owning their labour power.

Like Cohen and Roemer, Steiner considers the distribution of individual natural endowments to be an unjust inequality. He argues that each person's entitlement to an equal share of the value of natural resources implies a sharing of the effects of nature. For Steiner, nature accounts for a 'disability beyond a person's control that is due to genetic disadvantage and other natural factors'.⁵⁶ More specifically, he argues that our genetic make-up – our germ-line genetic information – is a natural resource.⁵⁷ Because germ-line genetic information is a natural resource, its appropriation by parents entails that they have a duty – parallel to owners of other natural resources – to share its value equally with all persons through the *global fund*.⁵⁸

For Steiner, it is the prior curtailing of a person's rights, including their rights to self-ownership and to an equal portion of the *global fund*, that best explains why a person is obliged to sell her goods or labour on less favourable terms. As such, exploitation is a result of a previous unjust restriction that can be suffered by the seller herself or a third party that would have offered more for her goods or labour. By denying the exploitee the additional amount of reward for her goods or labour, the exploiter refuses her an increment that is justly hers.⁵⁹

Although Steiner's own conception of rights violations is left-libertarian and underpinned by luck egalitarianism,⁶⁰ it is not necessary that his analysis of exploitation be situated in the context of this particular theory. Other conceptions of distributive justice such as

⁵⁶ Steiner, 'Choice and Circumstance' p.309.

⁵⁷ Steiner, *An Essay on Rights*, p.247. See also Alexander Rosenberg, *The Structure of Biological Science* (Cambridge: Cambridge University Press, 1985), pp. 65-72.

⁵⁸ Steiner, *An Essay on Rights*, p.277.

⁵⁹ Steiner, 'Exploitation: A Liberal Theory Amended, Defended and Extended' pp.132-148.

⁶⁰ For Steiner's left-libertarian theory see Steiner, *An Essay on Rights*. Given that Steiner's left-libertarian theory conceives equality in luck egalitarian terms, this suggests the possibility of fusing Steiner and Cohen's models.

Rawlsian egalitarianism or right-libertarianism might be equally compatible.⁶¹ This traversable feature equally applies to Cohen and Roemer's models. For Steiner and Cohen, this would require altering the normative content of what counts as a previous rights violation or injustice. For Roemer, this would require altering his account's withdrawal conditions. So, if we input Steiner and Cohen's models into a right libertarian conception, a particular person can be conceived as exploited if the transaction is preceded by right-libertarian injustice or rights violation. Equally, if we feed in Roemer's model, a particular person or group can be conceived of as exploited if one can do better by withdrawing with his or her endowments that have been justly acquired according to right-libertarian principles.

One particular advantage of Steiner's account is that it provides an appropriate way of dealing with third-party exploitation – this is a key failing of the Marxist account. Showing that exploitation involves a triadic relation is especially important as it allows us to clearly distinguish exploitation from the concept of coercion. We can see this if we imagine a scenario like the following. Suppose Fran's savings have been stolen by a robber meaning she cannot afford to pay her rent.⁶² Fran and her child will become homeless unless she can pay her landlord by the end of the week. Seeing her plight, the landlord approaches Fran with a proposal: 'Spend the night with me and I'll forget about your rent'. Because Fran has no other means of assistance, she accepts the landlord's offer.

⁶¹ In terms of Steiner's model this has recently been suggested in Ben Ferguson and Hillel Steiner, 'Exploitation' *Oxford University Handbook of Distributive Justice*, (ed.) Serena Olsaretti (Oxford: Oxford University Press, Forthcoming), Risse, Mathias, and Gabriel Wollner. "Three images of trade: on the place of trade in a theory of global justice" *Moral Philosophy and Politics* 1.2 (2014), pp.201-225, Stone, 'Unconscionability, exploitation, and hypocrisy' pp.27-47 and Sameer Bajaj, 'On a liberal theory of exploitation' *Ethics* 125 (2015), pp.1157-1159. It might also be argued that this model is compatible with accounts of structural injustice. See Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' *Social Philosophy and Policy* 23 (2006): pp.102-130 and Onora O'Neill, 'Between Consenting Adults' in *Construction of Reason* (New York: Cambridge University Press, 1989), pp.273-274.

⁶² Assume Fran does not have insurance.

This case is designed to show three things. First, the case exhibits a trilateral relationship between an exploitee, an exploiter, and a rights violator. Second, if we recall Nozick's framework for distinguishing threats from offers, we can see that the structure of the exchange closely resembles what Nozick describes as an offer i.e. the interaction is mutually beneficial and Fran rationally prefers that the landlord move her from her status quo in which she and her child will be homeless to a proposal situation in which they are spared this hardship. Third, it is the wrong actions in the background that allow exploitation to occur. The landlord is able to extract better terms from the agreement because a past rights violation has deprived Fran of other reasonable options. Because of this injustice, Fran has no reasonable alternative but to accept the landlord's offer.⁶³ The fact that Fran is in this kind of restricted position allows the landlord to extract terms that she would not ordinarily contemplate accepting.

Let us now reconsider our case. Again suppose Fran's savings have been stolen meaning that she cannot afford to pay her rent. Fran and her child will become homeless unless she can find rent money by the end of the week. Unbeknownst to Fran, however, her savings have not been stolen by a random robber but by her landlord himself. The next day, the landlord approaches Fran with a proposal 'Spend the night with me and I'll forget about your rent'. As Fran has no other means of assistance, she accepts the landlord's proposal.

Unlike the first example, this case involves a bilateral relation whereby the landlord is also the rights violator. This changes the nature of the interaction to one of coercion. The landlord in the first case extracts a benefit from an unjust situation that is not of his own making. In the second case, however, he intentionally places Fran in a restricted

⁶³ In Chapter 5, I will argue that an alternative is unreasonable when it threatens a person's survival. So, an alternative that involves starvation, thirst, suffocation, hypothermia (if one cannot obtain clothing or a place to live) is unreasonable in this sense as it can lead to loss of life.

choice situation in order to obtain advantages from her. The structure of the interaction now closely resembles what Nozick describes as a threat. If the landlord were to propose that Fran spend the night with him at the point of a gun, then he would be moving her from a status quo to another situation that she would not have chosen to put herself in. By stealing Fran's savings and putting the survival of Fran and her daughter at stake, the landlord is moving Fran from a status quo to a restricted choice situation that she would not have chosen to put herself. The injustice that is created is all of the landlord's own making; he has engineered Fran's option set so that she has no reasonable alternative but to accept his proposal. The distinction between the two cases is also marked by the fact that in the second case the landlord interacts with Fran to gain benefits in such a way that Fran would have been *better off* if the landlord had never intervened. In the first case, however, the landlord interacts with Fran to gain benefits in such a way that Fran would have been *worse off* if it were not for the landlord's intervention.

So using triadic relation, Steiner is able to capture exploitative interactions without coercion. The injustice in exploitation derives from the injustice of a previous rights violation: benefits are being extracted by virtue of an unrectified wrong committed by another. The exploiter gains advantage from this prior wrong and thus, compounds the original injustice.

There are three objections, however, that can be raised against this kind of backward-looking analysis. Although I am directing these problems specifically towards Steiner's account, it is important to note that if we substitute 'previous rights violations' for 'previous distributive injustice', then Cohen and Roemer's accounts are also subject to the same difficulties. Indeed, these objections will apply to any account that claims that an exploitative exchange derives from an unjust background distribution.

To reiterate, this approach claims that if a transaction arises from an initially just distribution, via just steps (a just exchange(s) or transfer(s)), then the transaction is perfectly just and contains no exploitation. The problem, however, is that instances of price gouging look to be examples of exploitation that do not necessarily involve any kind of preceding injustice or rights violations. Consider a case in which I suffer a bad seizure whilst on holiday in the Congo.⁶⁴ If I am charged £50,000 by the only person able to drive me to a doctor, this intuitively feels like exploitation. However, for this to be defined as exploitative on this approach, it would need to be the case that (1) I had been the victim of injustice (thugs attacking me and inducing my seizure for instance) or perhaps (2) someone else was willing to drive me to a doctor (for less than £50,000) but had been unjustly prevented from doing so (suppose his car had been stolen). Yet, most people will think I have been exploited irrespective of how I ended up in such a situation. This kind of price gouging seems to be an instance of exploitation without a preceding injustice or rights violation.

Steiner's response to this charge is that such ordinary uses shift the argument to an objective criterion of value.⁶⁵ This is because we know that in the actual exchange we value the lift to a doctor as not being less than £50,000. To identify this transaction as an exploitation, we must presuppose that the value of the ride is something like the costs incurred by the driver (use of the vehicle + petrol + labour-time per se) or less. Steiner would argue that if the exchange is condemned as exploitative, then this judgement is relying on some objective criterion of value rather than the subjective preferences of myself or the driver. Steiner's reply, then, takes us back to a key objection that I raised earlier in relation to the Anti-Commodification Approach: for once we allow an objective

⁶⁴ Let us assume that I decided not to take out travel insurance.

⁶⁵Steiner makes this point in Hillel Steiner, 'Exploitation: A Liberal Theory Amended, Defended and Extended' p.144

criterion we fail to respect an individual's capacity to form and revise their own conception of value. Instead, we invoke a negative judgement about a person's ability to make decisions for themselves. So, on the face of it, this particular objection does not seem to hold if one defends a liberal theory of justice that strives to be neutral between different conceptions of the good life.

My focus in Chapters 4-6 is to show that exploitation can develop without a prior rights violation and without endorsing an objective conception of value, but even if we set this work aside, Steiner's account intuitively appears problematic. Suppose Lucy invests all of her savings into a new house which is hit by a market crash. Lucy loses her job, home and ends up severely impoverished. Along comes Gary who offers her a position in his sweatshop – gruelling hours, subsistence wages, hazardous working conditions. This looks like a paradigmatic instance of exploitation but Steiner's approach is forced to say that this exchange is perfectly just – unless one accepts an objective conception of value. This is too big of a bullet to bite and it seems more plausible that something is missing from Steiner's account.

Second, Steiner's account has an overextension problem. This charge was first levelled by Steven Walt who argues: 'if a title to objects resulting from a rights violation is invalid and exploitation involves a rights violation, then it follows that most if not all unequal bilateral exchanges are cases of exploitation'.⁶⁶ On this definition, exploitation derives from a previous injustice and given that the history of almost every country is rife with murder, theft, enslavement, conquest, and discrimination, it follows that most mutually beneficial consensual exchanges will be exploitative. Once we undertake this path, how do we stop short and not render all exchanges involving a prior injustice invalid?

⁶⁶ Steven Walt, 'Comment on Steiner's Liberal Theory of Exploitation' *Ethics*, 94 (1984), pp. 242-247; see also Benjamin Ferguson, 'The Paradox of Exploitation: A New Solution' Ph.D. thesis, London: LSE (2013).

In order to mitigate this difficulty, Steiner can point out that exploitation is only said to occur if, and only if, there exists an unrectified rights violation in the history of the exchange that makes one party worse off than he or she would have been. Hence, just because the world is rife with injustice does not imply that most exchanges result in one person being worse-off than she would have been had the injustice not occurred. Here the approach encounters a further difficulty. As mentioned, a key feature of Steiner's account (and indeed all Counterfactual Approaches) is that exploitation is defined using a counterfactual transaction to which persons would have agreed. And it is the counterfactual transaction that forms the benchmark against which an actual exchange is deemed to be exploitative. So, according to the Counterfactual Approach, a person is exploited to the extent of the difference between the value obtained in the actual exchange and the value of the counterfactual benchmark exchange. Importantly, Steiner asks us to compare the extent to which a person is worse off in an actual exchange compared to a counterfactual exchange that does not involve preceding injustice or rights violations. However, such counterfactuals might be logically impossible to evaluate particularly when a party would not exist if the injustice did not take place.

Consider the following example. In a society in which slavery is legal, a couple that is planning to have no children is offered £50,000 by a slave merchant to produce a child that he can go on to sell to a slave owner. The couple sign the agreement, accept the money and produce the child in order to buy a yacht. Although the slave child had a bad start in life, she does not consider her life to be so bad that it would have been better for her not to have existed.⁶⁷ Let's now examine this case in the context of Steiner's model:

⁶⁷ The case of the slave child is borrowed from Gregory Kavka, "The Paradox of Future Individuals' *Politics and Public Affairs* 11 (1982), p.100.

- (1) A slave owner and slave child enter an interaction whereby the slave owner receives labour and the slave child receives shelter and food. This interaction (φ) takes place against a background resource distribution containing rights violations.
- (2) An alternative interaction (ψ) would have taken place had the slave child's background resource distribution not contained this injustice.
- (3) The slave child is worse off in (φ) than she would have been in (ψ).
- (4) The slave child is exploited to the extent of the difference between (φ) and (ψ).

The problem, however, is that injustice (the practice of slavery) directly affected the conditions for the slave child's conception. If the slave child visited the slave merchant and her parents many years later, she would be unable to make an exploitation complaint. Specifically, if the injustice had not taken place – if the couple had turned down the merchant's offer – then the couple would not have procreated (the particular cells from which she was created would not have combined) and the slave child would not have come into existence.⁶⁸ The identity of the slave child with her counterfactual self cannot hold. Statements (2) – (4) are therefore false. Steiner says that exploitation occurs if, and only if, someone ends up worse off as a result of the exchange than she would have been had the injustice not occurred. Given that the slave child believes that her life is not so badly off that it would have been better for her not have existed, the decision made by the couple and slave merchant was not worse for the child. Specifically, having a life and existing is not worse for the slave child than having never existed. Thus, the slave child

⁶⁸ See Kavka, 'The Paradox of Future Individuals' p.100. As Kavka correctly notes, it is highly improbable that the couple, if they turned down the slave merchant, could produce the same child they would have produced had they accepted if they later changed their minds about becoming parents. For it is unlikely that they could arrange conditions of conception similar enough to 'what would have been' to ensure that the very same sperm would fertilise the very same egg. Ibid.

has not been made worse off by past unjust actions. If the slave child has not been made worse off as a result of a past injustice, then she is not a victim of exploitation.⁶⁹

Facts concerning the precariousness of our reproductive system mean that there will be a great many instances of exploitation that cannot be recognised as such using this backward-looking framework. The reason for this is as follows: First, any action or event that affects the conditions of conception (i.e. any action or event that affects particular people procreating at a given time) will change who exists. Second, past injustice has had a pervasive and far reaching effect on the conditions for conception on a global scale. Specifically, a large percentage of the world's population will owe their existence to injustice. If it were not for economic inequality, unequal life chances, war, famine, natural disasters, political oppression, persecution, patriarchy, and racism then many of our ancestors would not have conceived at precisely the time they did and another set of human beings would now exist. Third, it seems reasonable that a large proportion of people living in this world consider their lives to be not so badly off that it would have been better to never have existed. If people feel this way, then the existence of injustice will not have made people worse off than they otherwise would be. If people are not worse off as a result of a past injustice, then they will not be victims of exploitation.

If this argument is persuasive, then a great many instances of exploitation will be missed using a backward-looking framework. This includes some of the most paradigmatic and morally troublesome cases. Consider the exploitation of children fleeing conflicts in Syria, Afghanistan, and Iraq who are currently engaged in child labour in agriculture and the textile industry.⁷⁰ If injustice had not featured in their past – if there had been peace and political stability – then this would have influenced the timings of their conception and

⁶⁹ See Derek Parfit, 'On Doing the Best for Our Children' in *Ethics and Population*, ed. Michael Bayles. (Cambridge, MA: Schenkman, 1976); Kavka, 'The Paradox of Future Individuals' pp.93-112.

⁷⁰ Tomáš Boček, 'Responding to the Refugee Crisis—Status Report on the Council of Europe's Response to the Migrant and Refugee Crisis' *Committee of Ministers* (Strasbourg: Council of Europe, 2016).

many of them would never have come into existence. Consider women entering into prostitution and pornography as a result of living in a patriarchal society. If there had been equal life chances and social and economic equality in their past, then it seems unlikely that their ancestors would have procreated at precisely the moment they did and again, these particular women would never have existed. Consider the example of Indian surrogacy that we examined earlier. Indian women entering surrogacy contracts are typically very poor because they have been marginalised as a result of their caste or ethnic group, denied access to education due to a cultural norm of marrying young and/ or exposed to floods, earthquakes and cyclones which has affected their ability to access food.⁷¹ Again, the surrogates' existence is entirely contingent on the unjust conditions under which their ancestors conceived: the smallest difference in the conditions of conception would have been sufficient to create a different set of people. Thus, in order to show that the victims of these types of past injustice are worse off, it is necessary to determine if it would have been better had they never existed. If this cannot be shown, then such persons cannot be deemed victims of exploitation. Thus, the accounts of Cohen, Roemer and Steiner show that there is an important conceptual link between exploitation and distributive justice, but they do so in such a way that exploitation which results from long standing historical injustice cannot be appropriately identified and they fail to show that leveraging can be exploitative if it occurs without a prior injustice.

2.2.3 Wertheimer's solution: hypothetical markets

The next Counterfactual Approach to be considered is associated with Alan Wertheimer, who claims that we wrongly exploit someone if we take unfair advantage of him. Unlike the previous Counterfactual Approaches, Wertheimer makes a distinction between transactions involving unfair background conditions and transactions which themselves

⁷¹ Kumari, 'Surrogate Motherhood - Ethical or Commercial' pp.28-29, pp.40-55.

treat someone unfairly. He maintains that when we assess a transaction we ought to overlook the background conditions and focus on the particular transaction under consideration. This is on the basis that unfair background conditions do not necessarily taint subsequent transactions. Wrongful exploitation, says Wertheimer, arises whenever a person pays a non-standard price for goods or services in a transaction. Specifically, *A* takes unfair advantage of *B*, and thus exploits *B*, if the transaction is one in which *B* receives less than he would have received in a market with lots of informed and unpressured buyers and sellers.⁷² The benchmark transaction, Wertheimer suggests, is the hypothetical market price as this provides a plausible conception of a fair transaction. Transactions that deviate from this benchmark are said to involve unfair advantage taking and thus wrongful exploitation.⁷³

Although Wertheimer does not think that a competitive market reflects a deep principle of justice or desert, he does insist that it reflects a moral dimension of the relationship between parties to the transaction. The wrongdoing that gives rise to exploitation rooted in the fact that non-competitive markets allow one party to take unfair advantage of shortcomings in the other party's decision making capacity or special vulnerabilities in the other party's circumstances. The exploitees complaint is that the transacting party is receiving a greater value than he or she would have received if they had not encountered each other.⁷⁴

To see this, consider the example of my having a seizure again.⁷⁵ In a competitive market, the driver would normally receive between £10.00 – £15.00 to take people to the nearest doctor, but, the driver alters his price to £50,000 because he believes that I am able to pay more and because he also knows that no-one else is around to offer me a lift. On

⁷² Wertheimer, *Exploitation*, p.230.

⁷³ Ibid., p.230.

⁷⁴ Ibid., p.232.

⁷⁵ Let us assume that travel insurance is unavailable for person's visiting the Congo.

Wertheimer's account, I am exploited to the extent of the difference between the actual transaction and the driver's standard price. Similarly, in our surrogacy example, imagine women typically receive £5,000 when they allow their body to be used for gestational surrogacy but I pay an Indian surrogate much less in view of her dire circumstances. Again, the surrogate is exploited to the extent of the difference between our actual transaction and the price that I would pay if I did not to take unfair advantage of her destitution. To support his view, Wertheimer considers how two friends might negotiate a deal. He says that because of their friendship, parties would want to consummate the transaction at a fair price and not take unfair advantage of the other. On this basis, if both I and the surrogate transact in a competitive market and neither of us takes unfair advantage of the other, then the transaction is not exploitative.

What are the problems with this kind of account? The first concerns Wertheimer's claim that wrongful exploitation arises whenever a person pays a non-standard price for goods or services in a transaction. This general characterisation is too inclusive. Again, consider the example of my seizure, but this time suppose that I simply need a check-up. The only available driver comes along with his outrageous fare – I know this fee is 5,000 times the standard rate for a trip to the doctor – yet, I willingly pay the fare because I am deeply troubled by poverty in the area. Here, the driver gains excessively in a transaction that is beneficial to me but it would be strange to construe the transaction as exploitative. It seems more appropriate to say that I am acting benevolently and seeking to promote the interests of the driver rather than my own. Similarly, I might be willing to pay a surrogate twice the competitive market price but this is out of a desire to support the woman who is carrying my child. Wertheimer's view is also subject to 'accidental' or 'innocent' exploitation where exploiters pay less than a competitive market price without realising it. On all of these grounds, we can see that excessive benefits do not provide a sufficient basis when it comes to judging whether an interaction is exploitative. A fundamental

concern with Wertheimer's definition is that it cannot take the intentions of the contracting parties into account and thus identifies morally unproblematic acts as instances of exploitation.

A second difficulty is that Wertheimer's account is confined to transactional cases, i.e. cases in which the goods and services being exchanged have a market value, but there are paradigmatic instances of exploitation that do not appropriately fit with this model. Consider the following example: a couple produce a second baby, Mia, so that their first born child, Molly, can receive a bone marrow transplant. Suppose that a few years later Molly's illness resurfaces and she urgently needs a kidney transplant. Given that Mia is a perfect sibling match, the couple enlist her as the donor. Next, lymphocytes are needed. This is followed by platelets, full blood and extra stem cells. Every time Molly relapses something needs to be taken from her sibling. Mia is, in effect, a bespoke harvest for her sister's illness. This case satisfies the conditions of an exploitative interaction: the arrangement is mutually beneficial; the parents receive a benefit as Molly is saved and Mia receives a benefit in the form of life and a loving family structure. Let us also imagine that Mia prefers to move from the pre-proposal situation in which she faces her sister's death to the proposal situation in which she can be spared such anguish. Finally, we can note that the interaction is deeply unsettling on a moral level. This allows us to infer that some form of exploitation is occurring.

The problem, however, is that Wertheimer's formula for what constitutes wrongful exploitation seems wrong when applied to this kind of case. Are the couple expected to transact Mia's organs at the hypothetical market price? The case does not seem to be morally amiss on the grounds that it lacks competitive market norms to guide the interaction. We can see a similar difficulty if we apply this conception of exploitation to other kinds of family relationships. Imagine a family living in a patriarchal society in

which daughters are expected to carry out all the household chores and take care of elderly relatives. Would Wertheimer recommend that families negotiate deals with their daughters based on the hypothetical market price of contract cleaning or care for the elderly? A major concern, therefore, is that Wertheimer's formula does not get an appropriate handle on the nature of exploitation that can occur within the family or close relationships.

A third difficulty is that Wertheimer does not offer a defence of his thesis that competitive market prices are fair and thus not exploitative. It is possible that a market system in which everyone acts fairly and transacts at the hypothetical market price may nevertheless produce unfairness and thus exploitation. For example, there currently exists a fairly competitive market for payday loans that are designed for people on low incomes. However, people taking out such loans are often victims of prior injustice, and are forced to default on their loan repayment in order to buy food or essential goods. In such cases, victims of injustice are required to pay a higher rate of interest when taking out these loans (than persons not in financial difficulty) due to their impoverished circumstances and the corresponding high risk of payment default. It matters little if lenders are required to transact on terms that are fair, for they may not be able to offer any kind of transaction at all unless they can charge higher rates of interest (or hefty repossession terms) to cover their costs i.e. lenders might have no reasonable alternative but to subject people to these terms. And what results might, arguably, be considered an unfair distribution of resources on various accounts of distributive justice. Hence, even within a competitive market process we might have exchanges that meet the criteria of an exploitative interaction: exchanges which are mutually beneficial (parties consider themselves to be better off transacting than not transacting at all), consensual (parties prefer to move from their status quo situation to the exchange situation), but are

nevertheless morally amiss on the grounds of the unfair background distribution.

Ruth Sample takes this point further and argues that Wertheimer cannot explain why it is good to conform to the market and bad to fail to conform to it and this stands in tension with his claim that he offers a moralised account of exploitation. She says:

If exploitation is an essentially moralised concept, then it not only must allow us to criticise transactions but must allow us to do so without having the criticism amount to the claim that the transaction is merely abnormal, that it is nonstandard, or in violation of normal practices. For this simply raises the question of why normal practices should be regarded as non-exploitative.⁷⁶

Indeed, it seems highly problematic to claim that an interaction is not exploitative merely because it conforms with a social norm. Again, consider the example of daughters who are expected to carry out the majority of household chores and take care of elderly relatives. Andrew Mason similarly discusses the case of the career sacrificing mother, who acts in way that accords with the norm that mothers should take primary responsibility for childcare.⁷⁷ Many of these women struggle to acquire the skills and experience necessary for success in the job market, and receive little or no remuneration for taking on these roles. This can lead to dependency and destitution. People can, therefore, face significant disadvantage as a result of making choices that conform with the normal ethos in a society. In Part 2, I will develop this line of argument and show that the conditions for exploitation can clearly be produced when people reject a norm, but also when they act in a way that accords with a norm. Thus a fundamental concern with Wertheimer's definition is that it is too narrow to provide us with an adequate understanding of

⁷⁶ Sample, *Exploitation: What it is and Why it is Wrong*, p.24.

⁷⁷ Andrew Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Place in Egalitarian Thought* (Oxford: Oxford University Press, 2006), pp.182-189.

exploitation.

2.3 Conclusion

In this chapter, we have looked at two central accounts of exploitation, but seen that they are problematic. Anti-Commodification theories claim that certain types of interactions are intrinsically exploitative because they commodify an aspect of a person that should not be up for sale. Specifically, sexual and reproductive contracts are understood to be morally defective because the individuals who perform the activities are disrespected when these types of labour are commodified. In this chapter, I have shown that the approach faces the following problems. First, it fails to identify sweatshop labour contracts as exploitative. Second, there is an asymmetry between non-commodifiable labour and human labour more generally. On the whole, it does not seem clear when considering practices such as gestational surrogacy, prostitution and pornography as an intrinsic wrong why such asymmetrical treatment of bodily labour is justified. It is particularly hard to draw a distinction between earning an income from selling these personal goods and services and earning an income from other professions. This is because many forms of employment can display the same troublesome features emphasised by the Anti-Commodification Approach. Moreover, the approach encourages a disrespectful evaluation of people's choices, which is itself a form of degradation. These problems diminish the appeal of the Anti-Commodification Approach and show that it is too narrow in its conceptual attention.

The Counterfactual Approach argues that a moral defect of distribution makes a mutually beneficial and consensual exchange exploitative. This takes the form of an unfair class monopoly over the means of production (Marx), a prior unjust resource distribution (Cohen and Roemer), previous unjust rights violations (Steiner), and a hypothetical competitive market price in trade (Wertheimer). The exploitee's complaint is that the

transacting party is receiving a greater value than he or she would have received had this wrongdoing or previous injustice not occurred. Marx sees exploitation as an unequal transfer of value between the capitalist and the worker, but there are serious problems that have been raised against this definition: its theory of value fails; it cannot identify relevant instances of exploitation; and it overlooks third-party exploitation. Cohen, Roemer, and Steiner develop Marx's approach and draw a link between exploitation and distributive justice. However, many instances of exploitation are missed on this understanding. Unlike the other counterfactual approaches, Wertheimer proposes that exploitation takes place when a person pays a non-standard market price in a transaction, but this definition also faces serious challenges.

Given the deficiencies of the Anti-Commodification and Counterfactual Approaches, some theorists have adopted a Duty-Based Approach to exploitation. This approach seeks to capture the underlying behaviour of the exploiter in the belief that exploitation is an active relationship: an exploiter must be guilty of some kind of immoral conduct in order to warrant the label. It is to these I turn to in the next chapter.

The Duty-Based Approach to Exploitation

This chapter examines the Duty-Based Approach to exploitation. This approach places emphasis on the exploiter's conduct whereby exploitation is thought to involve a violation of a moral duty to protect or respect the vulnerable. In this sense, exploitation stems from morally bad behaviour whereby one violates a duty towards others. But exploitation is less straightforward than this view supposes. I argue that this understanding of exploitation is incomplete: the exploitation conditions that are identified by this approach can fail to entail an exploitation's wrongfulness, and exploitation can occur even if one does not violate a moral duty to protect or respect the vulnerable.

In this chapter, I focus on five accounts of the Duty-Based Approach, from Goodin, Sample, Ferguson, Wood and Vrousalis. In section 3.1, I argue that Goodin's vulnerability-based argument is subject to two serious problems. First, it generates an immense burden on transactors to help the vulnerable. Second, because Goodin's account is contingent on a violation of social norms, it fails to recognise that prevailing norms can also be exploitative. In section 3.2 I consider the account of Sample, who offers a hybrid account of the three approaches being considered. I will argue that Sample's theory faces serious difficulties because some of the problems raised in relation to Goodin, the Counterfactual Approach and the Anti-Commodification Approach also apply to her framework. In section 3.3, I explore Ferguson's account. I will claim that Ferguson's view must preclude exploitative instances of price gouging that can occur without a preceding injustice and that his account is subject to innocent exploitation

whereby an exploiter satisfies Ferguson's conditions for exploitation but does not appear guilty of wrong conduct. In section 3.4, I will examine the accounts of Wood and Vrousalis. Wood argues that exploitation involves an exchange whereby 'A wrongly exploits B when A opportunistically takes advantage of B's vulnerabilities for his own purpose'.¹ The problem with this approach, I will argue, is that exploitation does not necessarily involve disrespect. Vrousalis conceives exploitation as a form of domination for self-enrichment. I will argue that Vrousalis's account is also problematic as the conditions he identifies do not necessarily capture exploitation's wrongfulness.

By the end of the chapter I hope to have motivated the idea that exploitation cannot be *fully* explained by any of the existing approaches to exploitation. My aim in the rest of the thesis is to show that because each of the existing approaches to exploitation are so narrowly construed they fail to identify a fundamental type of exploitation: one that can arise from a cumulative process of people freely exercising their moral rights.

3.1. Goodin's Approach

The first account to be considered has been put forward by Robert Goodin, who claims that exploitation consists in 'wrongful behaviour that violates a moral duty to protect the vulnerable'.² Goodin proposes four conditions, all of which must be present if an exchange is to be deemed exploitative: (i) the parties to the exchange are in an unequal bargaining relationship; (ii) the weaker party to the exchange must need a benefit that the stronger party is in a position to supply; (iii) the weaker party must depend upon the stronger party to supply the needed benefit; and (vi) the stronger party has discretionary

¹ Ibid., pp.150-151.

² Robert Goodin, 'Reasons for Welfare: Economic, Sociological and Political - But Ultimately Moral' in J. Donald Moon (ed.) *Responsibility, Rights and Welfare* (Boulder, Co. West View Press, 1988), p.147.

control over the benefit that the weaker party needs.³

The presence of these four conditions defines vulnerability and makes the weaker party sensitive to exploitation. However, not every interaction involving these vulnerability conditions is exploitative on Goodin's view. Rather, people exploit when they take advantage of an *unusual situation*, when the situation itself is *not standard*.⁴ In particular, Goodin argues that exploitation lies in a failure to follow 'norms governing certain social interactions', or failure to partake in 'fair play' by 'playing for advantage when it is inappropriate to do so'.⁵ As such, on this account we must appeal to an established norm or procedure in order to determine what our duties are and whether exploitation has occurred.

For Goodin, the fact that a person is dependent upon me for something he needs triggers a special obligation to help her. Goodin says, 'it is not just their special need, however, but also your ability to help. That is the crucial factor in imposing the duty upon you in particular'.⁶ So, dependency underpins a duty to help anyone that happens to be vulnerable to us and it is the violation of this particular duty that is said to be the defining feature of exploitation.⁷

If we consider our surrogacy cases in relation to Goodin's model, we can note that the source of exploitation derives from a contracting party's failure to help a vulnerable woman. First, the Indian women wishing to enter surrogacy contracts are in need, and without the assistance of others their needs will remain unsatisfied. Affluent foreign couples wishing to form a contract with an Indian surrogate are capable of satisfying

³ Ibid., p.37.

⁴ Robert Goodin, 'Exploiting a Situation and Exploiting a Person' in *Modern Theories of Exploitation*, ed. Andrew Reeve (London: Sage, 1987), pp.183-184.

⁵ Ibid., p.184.

⁶ Robert Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (Chicago: University of Chicago Press, 1985), p.34.

⁷ Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, p.36.

those needs. Hence, surrogates are dependent on wealthy foreign contractors and are vulnerable to them insofar as without their assistance the surrogate will suffer hardship. But Goodin's argument does not technically apply in the Indian surrogacy cases. As noted previously, surrogates receive an income that is significantly higher than the average national wage. This money is used to build a home and provides food, clothing, and educational opportunities for a surrogate and her family.⁸ On this basis, it seems that foreign contractors are fulfilling a duty to help the vulnerable. Likewise, the driver in the seizure case is fulfilling his duty towards me by taking me to the doctor and ensuring that I receive medical care.

In response, Goodin is likely to reply that the duty to help the vulnerable is unconditional, whereas the help that these people are getting is given conditionally. However, even if we set this response aside, a second difficulty that Goodin faces is that there are instances of exploitation that do not involve a duty to help the vulnerable. Consider the earlier organ case involving Mia and her sister Molly. This case satisfies Goodin's conditions for exploitation if we extend the currency of an exchange to include goods such as love, gratitude, admiration and a feeling of self-worth. Specifically, Molly and Mia are in an unequal bargaining relationship; Molly (the weaker party) needs a benefit (bone marrow, a kidney, lymphocytes, platelets, blood, stem cells) that her sister Mia (the stronger party) is in a position to supply; in exchange for supplying these goods Mia receives love, gratitude and admiration from her family; Molly depends upon Mia to supply the much needed benefits; Mia has discretionary control over the benefits that Molly needs. The difficulty, however, is that Goodin's model seems problematic when applied to this type of case. It seems too demanding to claim that Mia is under an obligation to be a bespoke harvest – to transfer her bone marrow, kidney, lymphocytes, platelets, blood, stem cells

⁸Kumari, 'Surrogate Motherhood - Ethical or Commercial' p.28; p.152.

in order to help her sister. But clearly Mia is perfectly capable of engaging in exploitation if she were to leverage her sister (and parents) and demand an extortionate sum in exchange for these biological goods. A major concern, therefore, is that Goodin's conditions cannot get to grips with a type of exploitation that can be generated in the absence of a moral duty to help the vulnerable.⁹

Ruth Sample raises two further problems against Goodin's account. She notes an internal tension between Goodin's consequentialist underpinnings and his belief that exploitation is both consensual and mutually beneficial. She says, 'if consequences are ultimately what matter, Goodin needs an argument to show that exploitation in general fails to bring about good consequences... Yet, it is hard to see how mutually beneficial exploitation is a case of failing to bring about good consequences, since it is by definition mutually beneficial'.¹⁰ This raises the question of how a consequentialist account can judge an exchange to be morally wrong if it consensually improves the situation of all concerned. Sample also takes issue with the fact that Goodin (like Wertheimer) refers to exploitation as a violation of a social norm or practice. Here, she convincingly argues that if we are using exploitation as an essentially moralised concept, exploitation must not simply mean a failure to conform to prevailing social practices because it is possible for the prevailing standards themselves to endorse exploitation. Sample correctly maintains: 'looking to social convention for insight regarding our moral duties therefore seems dangerous and question begging'.¹¹

3.2. Sample's Hybrid Approach

Although Sample raises objections to Goodin's account, she presents a similar theory. She asserts that exploitation involves 'interacting with another for the sake of advantage

⁹ Both Wood and Sample raise this concern against Goodin. See Sample, *Exploitation*, p.47 and Allen Wood, 'Exploitation' *Social Philosophy and Policy* 12 (1995), p.151.

¹⁰ Sample *Exploitation*, p.51.

¹¹ Ibid., p.54.

in a way that degrades or fails to respect the inherent value in that being'.¹² Sample proceeds by adopting an account of exploitation which can be seen as a fusion of three approaches considered so far. According to Sample, exploitation stems from our failure to respect by:

- (1) neglecting what is necessary for that persons well-being or flourishing;
- (2) taking advantage of an injustice done to him; or
- (3) commodifying an aspect of a person's being that ought not to be commodified.¹³

The wrongdoing that gives rise to an exploitative transaction is rooted in these three forms of disrespect. She says, 'a lack of respect for the value in human beings is what unifies these disparate forms of exploitation judgement, and it is what motivates the charge of exploitation when that charge is made'.¹⁴

However, as Steiner and Ferguson rightly note, there is a moral hazard worry with Sample's (and Goodin's) account.¹⁵ Sample (and Goodin) argue that in a transaction between two parties, exploitation occurs if one party fails to constrain his or her advantage when the other party's needs go unmet.¹⁶ In response, Steiner and Ferguson ask us to consider a case where *A* loses a hazardous gamble and is impoverished as a result. *A* knew that if the gamble went badly then *B* would be under an obligation to constrain any advantages that he may have if they were to enter into a transaction. Here, it seems that *B* is subject to disadvantage via his obligation to *A*. Given that Sample (and Goodin) argue that taking advantage of a disadvantage is unfair, it seems apt to say that *A* is exploiting *B*. So, just as *B* exploits *A* if he fails to constrain his advantage when

¹² Ibid., p.57.

¹³ Ibid., p.57.

¹⁴ Ibid., pp.57-58.

¹⁵ Ferguson and Hillel Steiner, 'Exploitation' *Oxford Handbook of Distributive Justice*, (ed.) Serena Olsaretti (Oxford: Oxford University Press, 2016).

¹⁶ Different duties apply in each case. Goodin is concerned with vulnerability and Sample is concerned with respect.

transacting with her, *A* also exploits *B* if she is insured against the hazard of a gamble by claiming advantages from *B*. This implies that, for *B*, constraining his advantage is both obligatory and impermissible. Hence, a theory that suggests that exploitation consists in a certain sort of wrongful behaviour (namely failing to respect or protect) when transacting with someone affected by vulnerability runs into difficulty when faced with cases in which a person is deliberately taking advantage of a moral hazard as the theory will be left providing contradictory guides to action.¹⁷

Sample's position is also problematic because the objections raised in relation to Steiner, and the Anti-Commodification Approach more generally also apply to her framework. If exploitation is construed as a violation of condition (2), then exploitation might become difficult to counterfactualise and identify. In particular, it will also be subject to Parfit's non-identity problem, meaning that exploitation that results from long-standing historical injustice (such as women living in a patriarchal society) cannot be recognised. If exploitation is conceived as a violation of condition (3), then a state will be subject to the paternalism and asymmetrical labour objections. Specifically, in endorsing condition (3), Sample's account will be paternalistic towards both the surrogate and the contracting couple; it questions the capacity of a surrogate to determine what is in her own best interest. Given that both the surrogate and the couple desperately want to enter into this kind of contract, this condition therefore makes an intruding judgment about the relationship of the couple and surrogate. As noted in the previous chapter, the claim that particular goods or services are non-commodifiable because disrespectful is itself rooted in disrespect.

¹⁷ Similarly, Cecile Fabre also talks about how appeals to vulnerability mean that the exploiters become the exploited in surrogacy contracts. See Cecile Fabre, *Whose Body is it Anyway?* (Oxford: Oxford University Press, 2006), pp.203-204.

3.3. Ferguson's Approach

A third account has been put forward by Ferguson. Like Steiner, he argues that a transaction is unfair if there exists a prior rights violation which has weakened the bargaining positions of one of the parties to the exchange.¹⁸ However, his account differs in the sense that he provides a second condition – namely, an exchange becomes exploitative only if a person truly believes that she takes advantage of the other party in the transaction. According to Ferguson, adding this condition allows Steiner to overcome Walt's overextension objection whilst combining it with a thicker notion of advantage taking.¹⁹ So, in the Indian surrogacy cases when a couple recognise that a potential surrogate is disadvantaged because of previous rights violations and they do not constrain their advantage over her, then not only are they benefiting unfairly from the surrogate but they are actively taking advantage of her. The exploitation complaint is that another party is knowingly taking advantage of a prior injustice that someone has been subjected to.

Important objections can be raised against Ferguson's theory, however. First, because Ferguson is endorsing Steiner's account of exploitation (albeit adding an awareness condition) he does not escape the other problems that were highlighted earlier in relation to Steiner's approach. In particular, his theory cannot account for exploitative instances of price gouging that can occur without a preceding injustice, nor can his account escape the identity problem.

¹⁸ Benjamin Ferguson, 'The Paradox of Exploitation: A New Solution' Ph.D. thesis, London: LSE (2013), p.144.

¹⁹ Recall, Walt argues that exploitation derives from a previous injustice then most mutually beneficial consensual exchanges will be exploitative on the grounds that a large number of exchanges take place against an unjust background. See Walt, 'Comment on Steiner's Liberal Theory of Exploitation' pp. 242-247.

It is also not clear that an awareness condition can overcome the overextension objection. The awareness condition limits the scope of exploitation only to the extent that prior injustices are unknown. Yet, we generally know that historical injustice underlies many of our transactions. And with the ever-expanding online data bases of relevant information, we can increase our knowledge of past injustice and this will, in turn, increase the number of exploiters on Ferguson's account. It follows that the capacity of the awareness condition, to limit the scope of exploitation, is highly contingent and varies inversely with the ever-growing amount of relevant historical information.

A further difficulty is that Ferguson's account is subject to a kind of innocent exploitation whereby an exploiter satisfies Ferguson's conditions but doesn't appear guilty of morally wrong conduct. To see this, consider Ferguson's account of exploitation (where A exploits B), which takes the following form:

- (1) There exists an unrectified property rights violation at some point in a history of exchanges leading to the actual transaction φ .
- (2) There is a counterfactual transaction between A and B ψ in which the violation is not present.
- (3) B values ψ over φ .
- (4) A values φ over ψ .
- (5) A truly believes that he receives advantage from B .

Now, imagine the following case:

- (1) A sets up a sweatshop and pays vulnerable workers (B) as much as she possibly can. B is a victim of a prior injustice as a result of cultural discrimination. A knows that if B had not been subjected to such injustice, B could earn significantly more, but she continues to run her

sweatshop because she thinks it is important to help these workers to earn an income.

This case satisfies Ferguson's conditions (1) – (5). A past rights violation (1) means that *B* receives less than they would have (3) and *A* gets more than they would have (4) had the violation not occurred (2). *A* truly believes that she receives advantage from *B* (5). (And equally, these cases satisfy Sample's conditions because *A* is taking advantage of an injustice done to *B*.) It seems that, although *A* knowingly extracts more value from *B* (in terms of monetary value and general levels of well-being) because of a prior injustice, but most people will be unwilling to claim that *A* acts wrongly. There does not seem to be anything morally wrong or objectionable with *A* using *B* in this way. It seems hard to see what kind of complaint *B* would have – *A* doesn't appear to have wronged *B* in anyway. Instead, *A* seems to be motivated by good intentions that might seem morally worthy. Again, it is also important to note that *A* is paying *B* as much as she possibly can. Thus, it seems that Ferguson's account is also problematic.

3.4. Wood's and Vrousalis's Accounts

Next, consider the Duty-Based Accounts offered by Wood and Vrousalis. First, Wood asserts that exploitation is use that is intentionally planned and manipulative.²⁰ It involves an exchange whereby '*A* wrongly exploits *B* when *A* opportunistically takes advantage of *B*'s vulnerabilities for his own purpose'.²¹ Wood contends that it is not a duty to help that is violated in exploitation cases, but rather persons who are failing to properly respect others when they treat another's vulnerabilities as an opportunity to advance their own interests. Wood maintains that there is a moral belief 'that it is degrading to have your weakness taken advantage of, it is dishonourable to use the weakness of others for your

²⁰ Wood, 'Exploitation' p.141.

²¹ Ibid., pp.150-151.

own ends'.²² He suggests that this moral belief coincides with the Kantian principle that we must always treat persons as ends in themselves.²³

One problem with this approach, however, is that exploitation does not necessarily involve disrespect. For example, the Indian surrogacy contracts seem to be a clear case of wrongful exploitation, but it isn't accurate to claim that the contracting couple's actions are always grounded in disrespect. Many intended parents have gone through the emotional trauma of multiple failed pregnancies and because of the financial and legal constraints, hiring an Indian surrogate will often be the only option they have if they are to raise a child of their own.²⁴ Couples might plausibly consider it morally better to relieve a surrogate's situation and transfer a benefit, rather than neglect her and do nothing at all. They might believe that the transaction is better for both parties, that as long as they do not harm surrogates in their interactions and make them better off than they otherwise would be, then they are treating them respectfully. In this kind of instance, the actions of the intended parents might seem less bad than abandoning the surrogate and choosing not to enter into this kind of contractual relationship at all. If these couples' actions are not disrespectful then this account will be incapable of identifying these transactions as exploitative. This is despite the fact that the intended parents seem to be wrongly receiving or taking an advantage from another's disadvantage.

Vrousalis puts forward a similar account to Wood. He conceives exploitation as a form of domination for self-enrichment. Vrousalis's account has three main features. First, the exploitee is said to be vulnerable to the exploiter in virtue of the exploiter's ownership of the means of production (this includes raw materials and machinery, as well as

²² Ibid., p.151.

²³ Ibid. See also Allen Wood, 'Unjust Exploitation' *Southern Journal of Philosophy* 54 (2016), p.96.

²⁴ Ranjana Kumari, 'Surrogate Motherhood - Ethical or Commercial' *Centre for Social Research* (2012) pp.109-110.

knowledge and perhaps human talents).²⁵ These factors give the exploiter power over the exploitee. Second, the exploiter exercises power over the exploitee in an exchange and instrumentalises her vulnerability to extract net benefits.²⁶ Instrumentalisation implies that the exploitee is being used as a means and it is this inappropriate use that is regarded as a form of domination. Third, using people's vulnerabilities in this manner is disrespectful as it violates norms of equal standing. This final feature constitutes the wrongness of exploitation.²⁷ The exploitees complaint is that she is being degraded whilst she is transacting with another. Here, the wrongdoing on Vrousalis's view resembles that of both Sample and Wood's accounts. Vrousalis believes that vulnerability and domination offer a better account of exploitation than views that identify exploitation as a distributive injustice. Importantly, he argues that his account is more amenable to integration within a rigorous Marxist social science: under Marxist parameters, capitalist exploitation is thought to consist in productive relations that dominate the workers. In order to strengthen his assertion that domination is necessary for exploitation, Vrousalis asks us to consider the following case:

Three Thugs: *B* is threatened by a gang of three thugs, *A1*, *A2* and *A3*. The thugs are weak, such as none of them could take *B* down individually. But all three could: their being (at least) three is a necessary and sufficient condition for taking *B* down. Assume this is common knowledge. By threatening to take *B* down if he does not hand over his money, *A1* gets *B* to give him the money. *A1* runs away, never to share his loot with *A2* and *A3*.²⁸

²⁵ Nicholas Vrousalis, 'Exploitation, Vulnerability and Social Domination' *Philosophy and Public Affairs*, 41 (2013), p.136.

²⁶ Ibid., p.135.

²⁷ Ibid., pp.139-142.

²⁸ Ibid., p.143.

According to Vrousalis, it is the collective power possessed by A_i , $i \in \{1, 2, 3\}$ that allows A_i to take advantage of B and it is in this sense that A_i dominates B . By analogy, he argues that it is not incoherent to maintain that it is the collective power possessed by capitalists that allows individual capitalists to take advantage and dominate workers.

In response to Vrousalis's view, it is important to note that his thug example concerns theft not exploitation. Thugs A_i are engaged in the practice of robbery whereby all are intentionally motivated to take B down if necessary. This results in a collective threat and it is because the thugs are unanimously threatening B that their collective behaviour is regarded as domineering. They are intentionally behaving in a disrespectful and cruel manner, which clearly violates norms of equal standing and so B is subsequently degraded. Such conduct, however, is not necessarily analogous to the collective behaviour of capitalists' C_i , $i \in \{1, 2, 3\}$. To see this, consider the following case:

$C1$ owns a company and wishes to amass a substantial fortune. $C2$ owns a factory and is desperately trying to keep her business afloat as it provides a basic income for herself and other people working within the company. $C3$ owns a charitable business. B lacks the means of production (and talent) she therefore needs to work for one of the capitalists in order to make a living. B opts to work for $C1$.

First, it does not seem fair to say that $C1$ is capable of dominating B simply because $C2$ and $C3$ are present. Unlike the robbery case, there is no form of collusion between the capitalists – a motivation to take persons down or instrumentalise persons is not universally present. The capitalists' motivations to do business are varied; both $C2$ and $C3$ are altruistically motivated and desire to help those with whom they are transacting. Hence, there is no reason to think that domination will be collectively generated on their

part.²⁹ What is interesting is that *C2* and *C3* may collectively uphold a system that guarantees assistance to any person in financial need. Most would agree that in such circumstances, the collective *Ci* interrelation does not equip *C1* with the power to dominate *B*.

Second, unlike the robbery case it does not seem appropriate to say that *B* is being dominated by the capitalists. To see this, I think it is again useful to consider Nozick's distinction between threats and offers. Recall that when a person does something because of an offer she does so willingly, whereas this is not typically the case when someone does something because of a threat. A proposal is an offer if a person would rationally choose to move from the pre-offer situation to the post-offer situation; it is a threat if a person would not rationally prefer to make this move. A threat will leave a person worse off than she was in the pre-threat situation, whereas accepting an offer makes a person better off than she was in the pre-offer situation.³⁰ To see these distinctions within our cases imagine that whilst *B* is out running, *A1* approaches and assures him that if he doesn't hand over his wallet his blood will be on the street. *A1* then points out the presence of *A2* and *A3* to bolster his threat. Here, we can reasonably assume that *B* does not willingly hand over his wallet. Moreover, we can imagine that he would not choose to move from his pre-situation of taking a run to the post-situation of being deprived of his wallet. And, there is also the fact that non-compliance with *A1*'s threat will, typically, leave *B* worse off than he would have been in his pre-threat 'taking a run' situation. By comparison, in the capitalist case *B* consents to an offer. She would prefer to move from the pre-offer situation in which she lacks productive resources to the offer situation in which she receives an income. What is more, the offer makes *B* better off and improves

²⁹ In a recent article 'Greed and Fear' Hillel Steiner makes this point when he argues that the motives for entering into particular market relations are highly diverse. See Hillel Steiner, 'Greed and Fear' *Politics, Philosophy and Economics* 13 (2014), pp.140-150.

³⁰ Nozick, *Socratic Puzzles*, p.6. and pp.15-44.

her situation. On these grounds, I think the capitalist case avoids the charge of domination since *B* does not prefer the status quo and instead welcomes the capitalist's offer. A further differentiating factor between the two cases is that the thugs are actively and intentionally worsening *B*'s status quo in order to gain his wallet. They are creating an unjust situation, backing it up with a threat and clearly violating *B*'s rights in the process. This is not the case with the capitalists. They have not in any way sought to actively or intentionally worsen *B*'s status quo in order to derive themselves a benefit. Instead, *C1* has offered to benefit *B* in light of the situation in which he found her. *C1* may extract advantage from *B*'s misfortune, but he clearly does so without violating *B*'s rights. To be clear, I am not saying that the capitalist case cannot be exploitative. Rather, I am saying that it is not clear that Vrousalis's account can show that capitalists necessarily dominate workers on account of their being part of capitalist collective *Ci*. To invoke the charge of domination, some form of collusion would need to be universally present amongst capitalists or the interaction itself would need to be involuntary i.e. the person with whom the capitalists are interacting would not choose to move from the pre-interaction situation to the post-interaction situation.

Finally, Vrousalis claims that his account is more amenable to integration within a rigorous Marxist social science, yet Marx himself does not claim that exploitation is a result of intentional manipulation by capitalists. According to Marx, capitalists will often struggle to increase wages as they are in competition with other capitalists and worry about being driven out of business by their competitors. It can, therefore, be necessary for capitalists to keep wages low. (This can be seen in our own global economy – capitalists in multi-national supply chains often struggle to increase wages as they are in competition with other sweatshop owners.) So because the capitalists are paying workers what they can and because they are aware that they are providing a much needed benefit

(a benefit that the poor would not receive if they were not employed by capitalists), this contributes to a belief that the capitalist's conduct is not morally amiss. What is interesting, is that even if capitalists intentionally exploit workers, it is not necessarily the case that they would be found guilty of wrongdoing. We can see this if we again revisit our example:

Suppose *C3* sets up a charitable enterprise as she wants to help those in need.

B is vulnerable as she lacks the means of production and talent (she also cannot gain employment from *C1* and *C2* has no vacancies available). *C3* offers *B* assistance on the proviso that she joins her mission and employs her time helping others in need of aid. *B* agrees.

Here it seems that *C3* is interacting with *B* for the sake of advantage and is using *B*'s vulnerability as a means to advance her private ends. *C3* therefore satisfies Vrousalis's conditions for exploitation. She knowingly extracts more value from *B* (in terms of monetary value and general levels of well-being) because of *B*'s vulnerability. As with our other cases, *C3*'s behaviour does not seem morally objectionable; *C3* is not making use of *B* in a way that is unethical or unjust. Because *C3* has altruistic motivations driving her transaction with *B*, her doing so is merely a means to an end which is not wrongful and is, indeed, morally commendable. This illustrates a possible tension between the belief that exploitation implies wrong conduct and these potentially non wrongful acts that Vrousalis's account identifies as exploitation. So, here it also seems that Vrousalis's exploitation conditions do not necessarily capture exploitation's wrongfulness.

In sum, the Duty-Based Approach to exploitation seeks to capture the underlying behaviour of the exploiter in the belief that exploitation is an active relationship: an exploiter must be guilty of some kind of immoral conduct in order to warrant the label. In this chapter, I highlighted the different types of wrongdoing that the Duty-Based

accounts perceive as necessary for exploitation, but my chief purpose has been to reveal that this type of analysis is again too narrow to get a proper handle on the concept of exploitation. I also argued that exploitation conditions that focus on a duty to respect the vulnerable can fail to entail an exploitation's wrongfulness. Specifically, individuals can meet the necessary conditions for exploitation but the actions of those partaking in the exchange do not appear wrongful.

3.5 Conclusion

The aim of Part 1 has been to show that the existing approaches to exploitation are too narrowly construed. This, I think, provides us with sufficient reasons to accept that exploitation can arise another way. Details of this new account of exploitation will be fleshed out Part 2. Chapter 4 begins by drawing the connection between luck egalitarianism and exploitation, and Chapter 5 develops a conception of socially constructed luck. Chapter 6 then shows how the negative effects of socially constructed luck can give rise to a unique type of exploitation. Importantly, the moral defect that is identified does not necessarily involve a prior injustice or immoral conduct and worryingly, arises another way: from a just background, via just steps, when we are simply exercising our moral rights.

But before I begin to provide details of this new account of exploitation, it is beneficial to summarise the main difficulties that have been raised against the existing approaches. Chapter 2 showed that exploitation can extend beyond our entering into reproductive and sexual contracts. I argued that the morally troublesome features connected to personhood, flourishing or degradation are no more intrinsic to these contracts than they are to other types of regular professions. In Part 2, I will build on this position and show that the morally troublesome features that the Anti-Commodification Approach

identifies derives from how people within society are forming, revising, and rationally pursuing their own conception of the good. In Chapter 2, I showed that the existing attempts to ground exploitation in a counterfactual assessment do not provide a sufficient basis when it comes to judging whether an exchange is exploitative. In the following chapters, I will show that exercising our moral rights and acting in morally permissible ways can produce exploitation in exactly the same way as rights violations and previous injustice. This chapter considered the Duty-Based Approach which places emphasis on the exploiter's conduct. Specifically, exploitation is thought to involve a violation of a moral duty to protect or respect the vulnerable. I have argued that this understanding of exploitation is incomplete: the exploitation conditions that are identified by this approach can fail to entail an exploitation's wrongfulness, and exploitation can occur even if one does not violate a moral duty to protect or respect the vulnerable. In Part 2, I will show that there are some contexts in which immoral conduct cannot serve as the standard for determining whether an exchange is exploitative.

In sum, each of the exploitation approaches we have considered fail to explain important instances of exploitation. This is a serious failing, and I think this provides us with a sufficient reason to accept that the conditions for exploitation could rest on an alternative basis.

Part 2

Luck

Luck Egalitarianism

4.1 Introduction

The purpose of Part 1 was to motivate the idea that exploitation cannot be *fully* explained by the existing approaches. My aim in Part 2 is to show that because these approaches are so narrow in their conceptual attention, they fail to identify a fundamental type of exploitation: a type of exploitation that occurs through a process of socially constructed luck.

In this chapter, I explicate luck egalitarianism as a view of distributive justice. I then proceed to discuss the distinction between brute luck and option luck in relation to the main challenges that are pressed against luck egalitarianism. In recent debate, relational egalitarians such as Elizabeth Anderson and Samuel Scheffler have subjected the theory to severe criticism. This is on the grounds that it does not give equal respect and concern for all citizens.¹ There are three reasons for this substantive claim. First, luck egalitarianism is said to unacceptably abandon people who end up in desperate need as a result of their own prudentially poor but voluntary choices. This is known as *the abandonment objection*. The objection is that luck egalitarians do not concern themselves with people who are suffering misfortune if the misfortune was reasonably avoidable.² Second, it is argued that luck egalitarianism holds victims of bad brute luck in contempt or pity. This can be referred to as *the humiliation objection*. Victims are said to have a claim

¹ Anderson, 'What is the Point of Equality?' p.289 and Scheffler, 'Choice, Circumstance and the Value of Equality' p.15.

² Anderson, 'What is the Point of Equality?' p.289, Scheffler, 'Choice, Circumstance and the Value of Equality' pp.15-16, Marc Fleurbaey, 'Equal Opportunity or Equal Social Outcome' *Economics and Politics* 11 (1995), pp.40-42.

to compensation in virtue of their inferiority to others, not in virtue of their equality to others.³ Thus, the view disrespects those that it seeks to assist. Third, luck egalitarianism is said to require compensating people for instances of brute luck, including the provision of plastic surgery for the ugly.⁴ What is important, is that both Anderson and Scheffler go on to admonish luck egalitarians for being consumed with mitigating the effects of brute luck and overlooking the point of equality. This can be referred to as *the what's the point objection*. They argue that equality is a social ideal and that its purpose is to regulate the relationships between members of a political society.

In sections 4.2-5 of this chapter, I show that there is a fundamental connection between answering the normative question ‘What is the point of equality?’ and the question ‘What kind of wrongdoing makes an exchange exploitative?’ When we consider luck egalitarian responses to these questions, we can see that Anderson and Scheffler are harsh in their criticisms: the theory is not disrespectful to those it seeks to assist nor does it miss the point of equality to which these theorists appeal. I do, however, argue within the chapter that existing luck egalitarian responses to the abandonment challenge are unsuccessful.

In Chapter 5, I begin to outline a special category of *socially constructed luck*. By taking into account what John Rawls calls ‘background justice’ and what G.A. Cohen refers to as an ‘accumulation problem’ I claim, in section 5.2, that socially constructed luck is brought about through a cumulative process of people exercising their moral rights and liberties. In section 5.3, I explicate the idea of socially constructed luck more fully and contend that our social positions – whether we have talents, marketable skills, a certain edge or physical appeal – and whether our personal choices result in success or failure is a matter of socially constructed luck. It might seem that our fortune or misfortune has come about

³Anderson, ‘What is the Point of Equality?’ p.306. See also, Jonathan Wolff, ‘Fairness, Respect and the Egalitarian Ethos’ *Philosophy and Public Affairs* 27 (1998), pp. 109-113.

⁴Anderson, ‘What is the Point of Equality?’ p.335.

because of our choices – it was our choice to follow a particular career path, to develop a particular skill – and yet our success or failure is socially constructed: the outcome is simply a collective reflection of everyone’s (permissible) choices operating within a particular social environment or process. I end the section by showing how socially constructed luck can be accommodated within a luck egalitarian framework. This is because socially constructed luck shares features of brute luck and features of option luck, but importantly, it cannot be reduced to either of these categories. Showing that there exists a third category of luck not only has important roots in the ideas of both Rawls and Cohen but it also provides a novel answer to the pressing issues that have been raised by relational egalitarians.

In Chapter 6, I make the connection between socially constructed luck and exploitation. I argue that when we freely exercise our moral rights, the effects of our innocent choices can compound and set unjust restrictive limits on what others may do. This will leave some people with no reasonable alternative but to enter certain agreements. I show that these various restrictions can privilege some individuals over others and result in an exploitation. This puts us in a position to see how the adverse effects of socially constructed luck can give rise to an exchange that is bilateral, consensual, mutually beneficial, but nevertheless, morally defective. Crucially, the moral defect that is identified occurs through a process of people freely exercising their moral rights and liberties. I end the chapter by considering how we might prevent this type of exploitation from occurring.

4.2 What is Luck Egalitarianism?

It seems plausible some kinds of bad luck as a matter of justice should be compensated. This is on the grounds that people cannot take credit or be at fault for things which are a matter of unchosen luck for them. This is a central claim of the view known as ‘luck

egalitarianism' which is associated with the notion that there is something unjust about designing or sustaining social institutions that allow the arbitrary features of people's circumstances to determine their share of social goods.⁵

Rawls expresses a concern with the moral arbitrariness of circumstance, criticising both formal and fair equality of opportunity on the grounds that they allow distributive shares to be influenced by natural fortune and social contingencies which are 'arbitrary from a moral point of view'.⁶ Rawls considers the influence that people's natural talents and abilities can have on their distributive shares and life chances and notes that the more fortunate will have advantages over those without such abilities. He also maintains that fair equality of opportunity can only be imperfectly carried out as long as some form of family exists. This is because 'the willingness to make an effort, to try and so to be deserving in the ordinary sense, is itself dependent upon happy family and social circumstances'.⁷

Rawls takes social primary goods (right, liberties, income and wealth) as objects for redistribution, and suggests that a more demanding interpretation of equality of opportunity be combined with a difference principle. This requires that social and economic inequalities be (a) 'to the greatest benefit of the least advantaged' and (b) 'attached to positions and offices open to all under fair equality of opportunity'.⁸ This argument is particularly relevant to Rawls's analysis of Marx. As mentioned earlier, Rawls queries the inequality of shares of social goods that result from unequal individual endowments, saying:

⁵This term was coined by Elizabeth Anderson, 'What is the Point of Equality?' *Ethics* 109 (1999), p.289.

⁶John Rawls, *A Theory of Justice*, revised ed. (Oxford: Oxford University Press, 1999), pp.63-64. Formal equality of opportunity requires that advantageous positions are open to all and applications are to be allocated and assessed on merit. Fair equality of opportunity requires that 'those with similar abilities and skills have similar life chances'. See Ibid.

⁷Rawls, *A Theory of Justice*, p.64. Whether Rawls can be characterised as a luck egalitarian is very much disputed. See Samuel Scheffler, 'What is Egalitarianism?' *Philosophy and Public Affairs* 31 (2003), pp.5-39.

⁸Rawls, *A Theory of Justice*, p.266.

Marx seems to accept this inequality as something inevitable ... But why e.g., can't society, adopting a principle like the Difference Principle, impose various taxes etc. and adjust incentives so that the greater endowments of some work to the advantage of those with fewer endowments? Is it simply an oversight on Marx's part that he doesn't think of this?⁹

Cohen takes a similar position to Rawls and points out: 'there are certain assets unmentioned by Marx which are initially, and perhaps also continuingly, unequally distributed, to wit the intangible assets of talent and foresight that can undermine an initial equality in external assets'.¹⁰ As a result, Cohen goes on to develop his luck egalitarian account of distributive justice and includes individual endowments as an unjust inequality in distribution. Unlike Rawls, however, Cohen does not think that distributive justice should only be concerned with the distribution of primary social goods. This is on the grounds that individuals convert social goods (such as income and wealth) into welfare at different rates meaning that significant differences in welfare can arise. This can be seen, for example, when some people have cheap tastes and this allows them to reach relatively high levels of welfare that do not cost a lot to satisfy.¹¹ Rawls responds, however, by maintaining that individuals have a 'capacity to assume responsibility for our ends' and argues that the welfare interpretation of distributive justice caters unjustifiably to expensive tastes which are generated by, for example, their bearers lack of foresight or self-discipline.¹² Rawls is here making the observation that there is a division of responsibilities between the individual and society and that it is reasonable to expect people to make do with their fair distributive shares. This makes it

⁹ Rawls and Freeman, 'Marx' p.367. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p.42.

¹⁰ Cohen, *Self-Ownership, Freedom and Equality*, pp.204-205.

¹¹ G. A. Cohen, 'On the Currency of Egalitarian Justice' in *On the Currency of Egalitarian Justice and Other Essays in Political Theory* (Princeton and Oxford: Princeton University Press, 2011), p.5.

¹² John Rawls, 'Social Unity and Primary Goods' in A. K. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp.168-169. See also Rawls, *A Theory of Justice*, p.86.

possible 'for free and equal citizens to pursue their diverse conceptions of the good within a framework that embodies the ideal of reciprocity and mutual respect'.¹³

(i) Brute Luck and Option Luck

Many luck egalitarians have similarly been concerned with 'assuming responsibility for ends' and removing 'arbitrary inequalities' from the distribution of goods. In particular, they seek to draw a distinction between two types of luck: brute luck and option luck.

Ronald Dworkin makes a distinction between these categories of luck when he says:

Option luck is a matter of how deliberate and calculated gambles turn out – whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined. Brute luck is a matter of how risks fall out that are not in any sense deliberate gambles. If I buy a stock on the exchange that rises, then my option luck is good. If I am hit by a falling meteorite whose course could not have been predicted, then my bad luck is brute (even though I could have moved just before it struck if I had reason to know where it would strike).¹⁴

Dworkin proposes that differences in outcomes arising from option luck are permissible in a way that inequalities arising from brute luck are not. This is because option luck is taken to be an object of our voluntary choices and is therefore something for which we can be held responsible. On the other hand, Dworkin thinks that we cannot be responsible for matters of brute luck since it derives from factors that we cannot reasonably avoid. Thus, according to Dworkin it is justified for some people end up with more than others where the outcome derives from voluntary and informed preference from an equal starting position. Likewise, Cohen endorses an equal access to advantage

¹³Ibid. p.28.

¹⁴ Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000) p.73

conception of equality which opposes disadvantage that does not result from an individual's voluntary choice.¹⁵ Roemer also presents an account of luck egalitarianism, which holds that: 'society must provide a level playing field, and individuals should face the consequences of their own choices; those who do well are entitled to the fruits of their success, and those who do poorly cannot ask for rectification'.¹⁶ According to Roemer, what is required to level the playing field is that society indemnify individuals against bad circumstances attributable to brute luck (he describes this as luck that a person could have done nothing to avoid), but does not think that society should indemnify individuals against circumstances that result from their autonomous choices. Richard Arneson's conception of luck egalitarianism endorses a principle of equality of opportunity for welfare which seeks to forestall the effects of luck on people's opportunity for wellbeing.¹⁷ Arneson's definition of equality of opportunity for welfare is as follows:

We construct a decision tree that gives an individuals possible complete life-histories, we then add up the preference satisfaction expectation for each possible life-history. In doing this we take into account the preferences that people have regarding being confronted with the particular range of options given at each decision point. Equal opportunity for welfare obtains among persons when all of them face equivalent decision trees – the expected value of each persons' best (=most prudent) choice of options, second best, ...nth-best is the same.¹⁸

Arneson upholds that the welfares resulting from the decision trees that people actually choose do not need to be equalised. What is important is that each of these accounts

¹⁵ Cohen, 'On the Currency of Egalitarian Justice' pp.3-43.

¹⁶ John Roemer et al, 'Equality of Opportunity' *Boston Review* XX (1995), p.3.

¹⁷ Richard Arneson, 'Equality and Equal Opportunity for Welfare' *Philosophical Studies* (1989),85-86.

¹⁸ Ibid.

requires that individual's opportunity sets are evenly matched so that people can exercise their preferences and freely pursue their own conceptions of the good equally.

(ii) Responsibility

When luck egalitarians consider responsibility there are two distinct concepts that are most relevant: *agent responsibility* and *consequential responsibility*. An individual is agent responsible for a choice or outcome to the extent that it reflects a causal link to her autonomous agency. However, *causal responsibility* is necessary but not sufficient for agent responsibility, since we also need to establish if the choice or outcome appropriately links to her autonomous agency. Thus, a person who flicks a light switch that has been secretly rigged to a bomb may be causally responsible for the subsequent explosion, but would not be agent responsible for it since the individual would have been unaware that her choice would have this kind of effect.¹⁹ For luck egalitarians, there are two necessary conditions that feed into whether it is fair to hold someone agent responsible. These conditions have to do with a person's capacities and include: (i) that the person knew what she was doing – an outcome was reasonable foreseeable – and (ii) that she had a reasonable opportunity to do otherwise.²⁰

For luck egalitarians, those who have been subject to brute luck do not meet the conditions for agent responsibility. Brute luck is explained by factors and circumstances that are reasonably unforeseeable and reasonably unavoidable. It is, therefore, inappropriate to hold a person agent responsible for the effects of brute luck. On the other hand, option luck involves a choice that appropriately links to a person's autonomous agency. The choice is voluntary to the extent that it follows from an

¹⁹ See Peter Vallentyne, 'Responsibility and False Beliefs' in Carl Knight & Zofia Stemploska (eds.), *Justice and Responsibility* (Oxford: Oxford University Press, 2011), pp. 174-175; see also Carl Knight & Zofia Stemploska 'Introduction' in Carl Knight & Zofia Stemploska (eds.), *Justice and Responsibility* (Oxford: Oxford University Press, 2011), pp. 11-12.

²⁰ This capacity based account is influenced by the work of H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

individual's minimally competent exercise of her deliberative capacities and the individual is not radically deceived about the consequences of the choice. Specifically, a person makes a choice with relevant knowledge of the surrounding circumstances, intending or foreseeing a particular outcome when she has a reasonable opportunity to choose otherwise. Thus, in the event of option luck a person will satisfy the conditions of agent responsibility.

The second concept relevant to luck egalitarianism is *consequential responsibility*. An individual being agent responsible for a choice or outcome does not require that she is consequentially responsible (morally accountable) for the choice or outcome in the sense that she is subject to certain moral duties or liabilities in virtue of her bringing about a particular situation. (Moral duties to compensate those harmed by her actions, moral liabilities to be subjected to permissible punishment.)²¹ Most luck egalitarian accounts, however, only hold people consequentially responsible for those outcomes for which they are agent responsible.²² Consequential responsibility requires asking in Dworkin's words 'when and how far it is right that individuals bear the disadvantages or misfortunes of their own situation themselves, and when is it right, on the contrary, that others – the other members of the community in which they live, for example – relieve them from the consequences of these disadvantages?'²³

For luck egalitarians the costs of the unequal effects of brute luck ought to be extinguished. This entails that those who suffer bad brute luck are entitled to compensation and those who incur good brute luck may be taxed to fund that

²¹ See Tony Honore, 'Responsibility and Luck: The Moral Basis of Strict Liability' in his *Responsibility and Fault* (Oxford: Hart, 1990), pp.14-40; Vallentyne, 'Responsibility and False Beliefs,' p.174.

²² For accounts that maintain that substantive moral implications need to be considered separately from agent responsibility see T.M. Scanlon, *What We Owe Each Other* (Cambridge, MA: Harvard University Press, 1998), ch.6; Serena Olsaretti 'IX—Responsibility and the Consequences of Choice,' *Proceedings of the Aristotelian Society*, 109 (2009), pp.165-188.

²³ Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, p.287.

compensation. For example, according to Cohen: ‘When deciding whether or not justice (as opposed to charity) requires redistribution, the egalitarian asks if someone of disadvantage could have avoided it or could now overcome it. If he could have avoided it, then he has no claim to compensation, from an egalitarian point of view’.²⁴

Similarly, Dworkin claims that:

...individuals should be relieved of consequential responsibility for those unfortunate features that are brute bad luck, but not from those that should be seen as flowing from their own choices. If someone has been born blind or without talents others have, that is his bad luck, and so far as this can be managed, a just society would compensate him for that bad luck. But if he has fewer resources than other people now because he spent more on luxuries earlier, or because he chose not to work at less remunerative jobs than others chose, then his situation is the result of choice not luck, and he is not entitled to any compensation.²⁵

Thus, among luck egalitarians there is broad support for the idea that if we offset the unequal effects of brute luck – the category of luck for which we are not agent responsible – then what results will be justified and fair because it derives from the choices we make.

Left-libertarianism (a type of luck egalitarianism) proposes that this brute luck/option luck distinction needs to be further developed. Steiner argues that a person’s brute luck can be subdivided into two types: (a) natural luck and (b) luck caused by others. On this construal, natural luck accounts for advantage and disadvantage that are due to nature.

²⁴ Cohen, ‘On the Currency of Egalitarian Justice’ p.18. Likewise, Brian Barry remarks, ‘A just society is one whose institutions honour two principles of distribution. One is a principle of compensation...The other is one of personal responsibility. It says that social arrangements should be such that people finish up with the outcomes of their voluntary act.’ See Brian Barry, *Theory of Justice* (Berkeley: University of California Press, 1989), p.142. See also, Olsaretti ‘IX—Responsibility and the Consequences of Choice’ p.169.

²⁵ Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, p.287.

For example, when a person is unexpectedly struck by a rare form of cancer, she has suffered brute luck caused by nature and because she is not agent responsible for the consequences that nature produces, it follows that the costs of this burden should be equally distributed amongst others.²⁶ Equal liability for nature's harms (and benefits) derives from the left-libertarian idea that nature's values belong equally to everyone. So compensation entitlements and moral duties with regards to natural luck are the same as standard luck egalitarianism's brute luck. By contrast, luck caused by others means holding people agent responsible for the adverse consequences they inflict upon others and mandates duties of compensation from those perpetrators. This type of luck necessarily involves acts of injustice whereby costs are not to be distributed equally among all: rather the particular person(s) who is thought agent responsible is liable for the costs.

It is important to note, however, that luck egalitarianism allows for a nuanced treatment of choice. As Zofia Stemplowska has pointed out, an account in which people bear the consequences of their choices must presuppose that we have settled the question of what opportunities should be available to individuals i.e. the account must presuppose a structure of opportunities so that it can distinguish between consequences of actions that are attributable to choices and those that are not.²⁷ If luck egalitarianism wants to hold people to account for their choices, then the choice must derive from an equal opportunity set, a reasonable alternative must be available and the outcome must be reasonably foreseeable. These considerations can be seen more succinctly in the table below.

²⁶ See Hillel Steiner, 'Choice and Circumstance' *Ratio*, 10 (1997), p.309 and Steiner, *An Essay on Rights*, p.278.

²⁷ Zofia Stemplowska, 'Rescuing Luck Egalitarianism' *Journal of Social Philosophy* 44 (2013), p.404.

<i>Brute Luck</i>	<i>Option Luck</i>
The structure of opportunities facing the individual is unequal. A reasonable alternative <i>is not</i> available.	The structure of opportunities facing the individual is equal. A reasonable alternative <i>is</i> available.
The outcome is explained by factors and circumstances that are reasonably unforeseeable or unavoidable. These factors and circumstances can be caused by (i) nature or (ii) the actions of others. For example, when a person is unexpectedly struck by a rare form of cancer, she has suffered brute luck caused by nature. By contrast, when a person is a victim of rights violations such as robbery, coercion, rape or murder, she has suffered brute luck caused by others.	The outcome proceeds from a voluntary choice: the choice follows from an individual's minimally competent exercise of her deliberative capacities and the individual is not radically deceived about the consequences of the choice. For example, when a person puts a coin in a slot machine or decides to swim with sharks.
<p><i>Agent Responsibility and Consequential Responsibility</i></p> <p><i>Agent Responsibility:</i> it is not fair to hold someone agent responsible if the individual did not know what she was doing and an alternative was not reasonably available.</p> <p><i>Consequential Responsibility:</i> Standard luck egalitarianism: Responsibility for the costs and benefits of brute luck should be universally shared.</p> <p>Left-libertarianism: in the case of brute luck caused by nature costs should be universally shared. In the case of brute luck caused by others costs are not to be distributed equally among all: rather the particular person(s) who is thought agent responsible (the person who could</p>	<p><i>Agent Responsibility and Consequential Responsibility</i></p> <p><i>Agent Responsibility:</i> It is fair to hold someone agent responsible because the individual knew what she was doing (the consequence was reasonably foreseeable) and she had a reasonable alternative available.</p> <p><i>Consequential Responsibility:</i> Costs should not be shared amongst others. People are liable to pick up the costs and reap the benefits of option luck.</p>

reasonably foresee the consequences of her actions and had a reasonable opportunity to do otherwise) is responsible for the costs.	
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4.3 The Objections

Although luck egalitarianism has intuitively broad appeal, there has been several criticisms levelled against the view. As mentioned above, perhaps the most influential criticism is pressed by relational egalitarians such as Anderson and Scheffler. Both argue that luck egalitarianism does not give equal respect and concern for all citizens and as a result fails the most fundamental test that any egalitarian theory must meet.²⁸ The reason why luck egalitarianism fails the fundamental test involves three objections: *the abandonment objection*, *the humiliation objection* and *the missing the point objection*. In this section, I take steps to provide a luck egalitarian response to the latter two of these objections. I first show that there is a fundamental connection between answering the normative question ‘What is the point of equality?’ and the question ‘What kind of wrongdoing makes an exchange exploitative?’ When we consider luck egalitarian responses to these questions, we can see that Anderson and Scheffler’s criticisms do not hit their mark: the theory is not disrespectful to those it seeks to assist and is very much committed to ending oppression. In the following section I will consider the abandonment objection and argue that the existing luck egalitarian responses to this challenge are unsuccessful. Luck egalitarianism, as noted above, is charged with failing to give equal respect and concern to the victims of bad brute luck: *the humiliation objection*. Anderson says that victims have a claim to compensation (according to luck egalitarian theory) in virtue of their inferiority to others and not in virtue of their equality to others.²⁹ To support this

²⁸ Anderson, ‘What is the Point of Equality?’ p.289.

²⁹ Ibid., p.306.

claim, Anderson asks us to imagine the reasons offered for distributing extra resources to the handicapped or those that lack talent or personal appeal. In each case individuals receive additional funds due to some relative deficiency or defect in their person or personal lives. Thus, in compensating victims of brute luck a luck egalitarian state would convey pity which is 'incompatible with respecting the dignity of others'.³⁰ Jonathan Wolff has also criticised luck egalitarians on similar grounds arguing that requiring untalented citizens to reveal their lack of talent to the state would cause citizens to feel ashamed. Such shameful disclosure is said to undermine a person's self-respect. Wolff asks us to consider the case of someone who is unemployed at a time of low unemployment and no shortage of jobs. He says:

To qualify for welfare benefits this person will have to show that he or she does not have the opportunities that others have. But, by hypothesis, there is no objective lack of opportunity. Therefore, the failure, if there is one, is the lack of talent or aptitude for the jobs that are available. To press a claim, then, one is required not to merely admit, but to make out a convincing case that one is a failure, unable to gain employment when there is no difficulty for others.³¹

Wolff asks us to consider how it must feel to admit to oneself and then have to convince others that one has been unsuccessful in securing a job (despite one's best efforts) when others seem to easily secure employment. Such shameful revelations are said to remove any last shred of dignity for those already situated in unfortunate circumstances.³²

³⁰ Anderson asks us to imagine untalented citizens receiving messages from the State Equality Board explaining the reasons for their compensation. These messages explain to the untalented that they are receiving compensation because their talents are unmarketable. Ibid. p.305.

³¹ Jonathan Wolff, 'Fairness, Respect and the Egalitarian Ethos' *Philosophy & Public Affairs* 27 (1998), pp.113-114.

³² Ibid.,114.

Anderson and Scheffler also admonish luck egalitarians for being consumed with mitigating the effects of brute luck and overlooking the point of equality: *the missing the point objection*. They argue that equality is a social ideal and that its purpose is to regulate relationships between members of a political society and not to eliminate the effects of brute luck from human affairs. For example, Anderson argues that because luck egalitarianism considers the elimination of brute luck to be the purpose of equality, luck egalitarians must compensate ugly people who are troubled by their appearance.³³ Both Anderson and Scheffler go on to maintain that the aim of equality is not to ensure that everyone get what they morally deserve, but to end oppression and create a society in which people stand in relations of equality to others.

In the remainder of the section, I will show how the debate between relational and luck egalitarians over the point of equality connects with exploitation theory. To make this link, I will focus on the views of Cohen, Roemer and Steiner, but I also think that a similar case can be made when assessing Arneson's account. Importantly, distinguishing a connection to exploitation allows luck egalitarians to rebut the humiliation objection and explains why they are very much committed to ending oppression and creating a society in which people stand in relations of equality.

(i) *Putting luck egalitarianism back in its place*

To see luck egalitarians as purely concerned with eliminating brute luck (as the purpose is posed by relational egalitarians in the literature) is to miss something central in terms of the reason *why* luck egalitarians are concerned with eliminating brute luck. When first introducing his luck egalitarian account of distributive justice, Cohen says that nullifying exploitation is the primary impetus for egalitarians. He maintains:

³³Anderson, 'What is the Point of Equality?' p.335. See also, Scheffler, 'Choice, Circumstance and the Value of Equality' pp.22-23.

A person is exploited when unfair advantage is taken of him, and he suffers from (bad) *brute luck* when his bad luck is not the result of a gamble or risk which he could have avoided. I believe that the primary egalitarian impulse is to extinguish the influence on distribution of both exploitation and brute luck. To be sure, principled non- and anti-egalitarians also condemn (what they consider to be) exploitation, but they do not have the same view of exploitation as egalitarians have, partly because they are less disturbed by brute-luck-derived asset differences which skew distributive outcomes.³⁴

As mentioned in Chapter 2, Cohen thinks that Marx's account of exploitation runs into difficulty because his analysis of the cause of exploitation is too narrowly focused. Cohen introduces his luck egalitarian account of distributive justice so as to incorporate personal endowments as an unjust inequality in distribution (personal endowments such as our various talents and physical capabilities). For Cohen, a person is exploited, and another exploits, only if they partake in an exchange against a background involving brute luck inequality. Exploitation arises because a person is unfairly placed in an advantageous bargaining position and is able to extract a surplus value from the exchange.³⁵

Recall that Roemer is also concerned with overcoming the central problems in Marx's account. Like Cohen, he argues that what is necessary for exploitation is asset inequality (assets for Roemer means external natural resources and personal assets such as our talents and capabilities).³⁶ Again, injustice on Roemer's account is conceived in luck egalitarian terms.³⁷ For Roemer, an exchange is exploitative if it derives from an unjust inequality in the distribution of assets for which individuals are not responsible.

³⁴ Cohen, 'On the Currency of Egalitarian Justice' p.5.

³⁵ Ibid.

³⁶ John Roemer, 'New directions in the Marxian theory of exploitation and class' *Politics and Society*, 11 (1982) pp.253-287.

³⁷ Ibid., pp.179-98.

Although Steiner's view is not Marxist, I argued in Chapter 2 that it is a view that fits with Marx's own in certain respects.³⁸ Recall that for Steiner, an injustice in the background of an exchange allows exploitation to occur. Individuals are able to extract better terms from the agreement because injustice – in the form of rights violations – has weakened a person's bargaining position. This denies the exploitee the additional amount of reward for her goods or labour and the exploiter refuses her an increment that is justly hers.³⁹ Again, like Cohen and Roemer, injustice for Steiner involves brute luck disadvantage for which an individual is not responsible.⁴⁰

In extinguishing brute luck disadvantage from a distribution, what each of these views are attempting to equalise is individual freedom. If individuals are to be free to pursue their own conceptions of the good, exercise their liberties and make decisions about how to live their lives then it must be possible to hold them responsible for these decisions. Arguably, what bothers these particular luck egalitarians about brute luck is not simply that it undermines freedom, but that it skews the distribution of freedom and thereby forms disparities in bargaining strength when individuals interact and enter relationships with one another. What makes brute luck inequality morally troublesome is not simply the initial maldistribution, but what the maldistribution facilitates. Specifically, it has a tendency to cause the unjust treatment of some by others whereby they can extract surplus product from the exchange and compound the initial maldistribution. On this understanding, the point of eliminating brute luck inequality is to rectify a maldistribution of freedom, and the point of rectifying a maldistribution of freedom is to prevent exploitation – the unjust treatment of some by others that facilitates further

³⁸ This is because people are under a duty to ensure that everyone has access to an equal share of the value of the world's natural resources and self-ownership is an implication of Marx's charge that capitalists steal surplus labour from the workers because he depicts workers as owning their labour power.

³⁹ Steiner, 'Exploitation: A Liberal Theory Amended, Defended and Extended' pp.132-148.

⁴⁰ Steiner, 'Choice and Circumstance' p.309.

maldistribution. Thus, when considering luck egalitarianism in the context of exploitation, we can see that the crux of equality is to prevent people treating others unjustly.

Anderson says: 'Unequal social relations generate, and were thought to justify, inequalities in the distribution of freedoms, resources and welfare. This is at the core of inequalitarian ideologies of racism, sexism, nationalism, caste, class and eugenics.'⁴¹ Luck egalitarians do not deny this. When positioned in the context of exploitation, what luck egalitarianism is offering is a tripartite model whereby unequal distributions generate unequal social relations, which in turn generate unjustified inequalities in the distribution of freedoms, resources and welfare.⁴² *The point, therefore, of placing individuals in an initially just situation of freedom is to prevent unequal social relations which give rise to further injustice.* Putting luck egalitarianism back in its (arguably) original (Marxist) context of exploitation (rather than simply considering it as a free standing principle) allows us to see how the luck egalitarian and relational views converge on the point of equality.

What is also to be noted is that rectifying brute luck inequality need not be disrespectful to the victims of bad brute luck at all. It does not require humiliating victims nor does it require that they claim compensation in virtue of their inferiority to others. The burden of proof could shift away from the victims of bad brute luck and towards the recipients of good brute luck. Luck egalitarianism could require talented citizens to reveal their fortune and explain why they ought to be considered responsible for all of the goods they have accrued. Consider the case of a High Court Judge. To keep all of his income

⁴¹ Anderson, 'What is the Point of Equality?' p.312.

⁴² Indeed, relational egalitarians might plausibly decide that in order to secure just terms in our interactions, to have equality in social relationships – equal respect, power and standing – then it is important to concentrate on the distributions on which unjust treatment can be based. See Christian Schemmel, 'Why Relational Egalitarians Should Care About Distributions' *Social Theory and Practice* 37 (2011), pp.365-390.

this person would have to show that his talent and aptitude for judging is something for which he is fully responsible. Specifically, he would have to make out a convincing case that he was not subject to superior opportunities to others: private education, advantageous family and social connections etc. Justifying to oneself and then convincing others that one's success results entirely from one's own actions and efforts (if possible) surely does not involve shameful revelation? Indeed, the person willing to engage in such a process will feel nothing but self-worth.

Equally, the victims of bad brute luck need not consider themselves inferior to others. If a group of us play a game of monopoly and it later emerges that I started out with a different hand (say I received an extra £500 in my starting money), a requirement that the results be undone (so as to uphold antecedent justice) does not involve humiliating or shaming those at the short end of the deal. It does not imply that the other players are less worthy. Undoing the results is justified because the procedure did not start out in the right way. If I had bought Mayfair with my £500 and received an extra £700 in rent every time someone landed on it, my redistributing this sum back to the group is a sign of equal respect. Shame (if it features) ought to reside with me. This is on the grounds that I have been amassing freedom, resources and welfare at the expense of the other players. So positioning luck egalitarianism in the context of exploitation and placing emphasis on upholding antecedent conditions of justice is not disrespectful. The purpose of redistribution is to construct equal background conditions which can facilitate respect when individuals transact and form relationships with one another.

(ii) *The Abandonment Objection*

In the previous section, I argued that two of the charges that have been made against luck egalitarianism – that it misunderstands the purpose of equality and that it disrespects

the victims of brute luck – fail. In this section, however, I will show that luck egalitarianism struggles to get to grips with the abandonment objection.

The abandonment objection maintains that luck egalitarianism unacceptably abandons people who end up in desperate need as a result of their own prudentially poor, but voluntary choices.⁴³ To illustrate this problem, imagine, from a perfectly just situation that Izzy decides to go travelling. Whilst on her travels she spends most of her time sampling the local cuisines. When she arrives at the airport to take her flight home she is informed that she will need to purchase an extra seat to accommodate her resulting larger size.⁴⁴ Izzy has no insurance and no money left for the extra ticket.⁴⁵ Consequently, Izzy is stuck in Dubai. She cannot find employment or shelter and she ends up begging and sleeping rough on the streets.

Because luck egalitarianism is said to place no limits on how badly off you can be if you are found consequentially responsible for your choices, then it seems that Izzy has no claim of justice. Equally, because Izzy is not subject to brute luck disadvantage (she has naturally thin genes and has been raised on a healthy diet) she has no egalitarian claim that society assist her with the expense of a flight home. It follows that Izzy's subsistence now depends entirely on the voluntary assistance of others.⁴⁶

Luck egalitarianism is also said to abandon dependent-carers and people who make voluntary, but supererogatory or morally required choices. People who opt out of paid work to care for their own young children tend to be poor or financially dependent on a wage earner or welfare payments. Given that the vast majority of these carers are women, this dependence is said to result in systematic vulnerability and subordination. Former

⁴³Ibid., p.295.

⁴⁴ An increasing number of airlines are now charging double if passengers cannot fit in a single seat. This includes Air France and Kam Airlines. Samoa Airlines has now put in place a pay by weight system whereby heavier passengers are charged more.

⁴⁵ Let us assume that Izzy deliberately chose not to take out insurance.

⁴⁶Anderson, 'What is the Point of Equality?' p.296.

stay-at-home mums also face considerable difficulty when re-entering the labour market. Taking two or three years out typically imposes a sizable penalty in terms of future earnings and career advancement.⁴⁷ Women find it particularly difficult to re-enter professional occupations. Despite having made significant investments in terms of education and training, many women have to redirect their careers and take a less skilled occupation for less pay.⁴⁸

In this regard, let us imagine single mum Fran, who interrupted her career to have a child and is now struggling to find employment. As a result, Fran is experiencing rapid downward mobility, she is losing her confidence, and has less skills and experience because she chose to become a stay-at-home mum.⁴⁹ What is particularly problematic for luck egalitarianism is that Fran voluntarily chose to devote her time and energy to being a mum when special childcare support was readily available and the option of furthering her career was reasonably within her reach.⁵⁰ And let us imagine in this case that the loss of earnings was foreseeable, i.e. Fran knew that she might encounter difficulties when she attempted to re-enter the workforce. All of this suggests that Fran (and other stay-at-home mums) are entitled to no rectification or assistance from the state. The theory

⁴⁷ Meg Lovejoy and Pamela Stone, 'Opting Back In: The Influence of Time at Home on Professional Women's Career Redirection After Opting Out' *Gender, Work and Organisation*, 19 (2012), pp.631-653. See also S.J. Rose and H.I. Hartmann, 'Still a Man's Labor Market: The Long-Term Earnings Gap' *Washington, D.C.: Institute for Women's Policy Research* (2004).

⁴⁸ These occupations include medicine, law and business, teaching, publishing and public relations. See Lovejoy and Stone, 'Opting Back In,' p.633; Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Place in Egalitarian Thought*, pp.182-189.

⁴⁹ Research consistently finds that women who interrupt their careers experience downward mobility in salary, loss of confidence and encounter a strong cultural stigma because they opted to be a stay at home mum. See S.V. Arun et al, 'The Effect of Career Breaks in the Working Lives of Women' *Feminist Economics*, 10 (2004), pp.65-84; D.M. Houston and G Marks, 'The Role of Planning and Work Place Support in Returning to Work After Maternity Leave' *British Journal of Industrial Relations*, 4 (2003), pp.197-214; and Lovejoy and Stone, 'Opting Back In', pp.631-653.

⁵⁰ In the last fifteen years, there has been a substantial increase in UK and US government funding to help parents with the costs of childcare. See for example, https://www.gov.uk/government/.../Childcare_Bill_Policy_Statement_12.... and US Department of Health and Human Services, Administration for Children and Families, Office of Child Care, http://www.acf.hhs.gov/Office_of_Child_Care.

seems to say that if women want to avoid these kind of penalties then they should have either remained childless or chosen not to leave the workforce.⁵¹

This outcome feels deeply unjust, but on a luck egalitarian framework it seems that Izzy and Fran cannot ask for rectification. When looking back at Izzy and Fran's choices there is an absence of differential brute luck. Against a background of equal opportunity, both make productive use of their deliberative capacities and make a decision about how to exercise their moral rights and pursue their own conception of the good. Neither is radically deceived about the consequences of their choice (they can foresee that their decision might turn out badly). It therefore seems that the outcome that results can be attributed to option luck. So, if others in society choose differently from the same circumstances as Izzy and Fran (they face the same risk of things turning out badly) but they have good option luck, then it seems that there is no reason to object to their being in a more advantageous situation to Izzy and Fran, who had bad option luck. All persons make a well-informed, voluntary choice against a background of equal opportunity. This renders the unequal outcome just on a luck egalitarian framework.

Consequently, if an outcome derives from a responsible choice, then it seems that luck egalitarianism struggles to concern itself with any suffering that is generated. The theory tells us that we have a right to deny people assistance or compensation even though doing so could severely disadvantage those in need. And it is the harshness of this claim – that severe disadvantage can be justified by a responsible choice that is a matter of deep controversy.⁵²

⁵¹ Dworkin actually embraces this conclusion in his response to Andrew Williams. See Ronald Dworkin, 'Sovereign Virtue Revisited,' *Ethics*, 113, Symposium on Ronald Dworkin's Sovereign Virtue (2002), pp.136-138.

⁵² Anderson, 'What is the Point of Equality?' pp.287-337. See also Marc Fleurbaey, 'Equal Opportunity or Equal Social Outcome?' *Economics and Philosophy*, 11 (1995), pp.25-55. Matthew Seligman, 'Luck, Leverage, and Equality: A Bargaining Problem for Luck Egalitarians' *Philosophy and Public Affairs*, 35 (2007), p.280; Olsaretti, 'Responsibility and the Consequences of Choice' pp.165-188; Freeman, *Justice and the Social Contract: Essays in Rawlsian Political Philosophy*, pp.111-142; Robert Jubb, 'On the Significance of the Basic

How does luck egalitarianism end up here? How does it move from plausible premises about equality and responsibility to such a counterintuitive conclusion? Theorists can employ three strategies to meet this challenge:

- (i) *The Brute Luck Strategy*: explain Izzy and Fran's choices in terms of brute luck and allow that the final outcome is unjust.
- (ii) *The Mixed Conception Strategy*: adopt a mixed conception of justice that is concerned to save people from absolute deprivation. On this view, justice requires a minimum threshold which no-one should fall below, irrespective of whether individuals are responsible for putting themselves below the threshold.
- (iii) *The Option Luck Strategy*: explain Izzy and Fran's choices in terms of option luck and allow that the final outcome is just.

I will next consider each of these strategies before concluding that all struggle to get to grips with the abandonment objection.

(i) The Brute Luck Strategy

The first strategy claims that the conditions for a responsible choice were not met because disadvantages that are attributable to brute luck remain. Accordingly, the answer to abandonment cases manifestly resides in showing that brute luck entered into and contaminated the final distribution – this allows luck egalitarianism to explain why such cases are unjust.

Theorists might begin by analytically isolating the applicability of the abandonment objection with regards to our hypothetical cases. There are two tactics that theorists might employ to justify this position. First, it might be maintained that the outcome in

Structure: A Priori Baseline Views and Luck Egalitarianism' *Critical Review of International Social and Political Philosophy*, 14 (2011), p.61.

each of our cases must be attributable to brute luck since Izzy and Fran lack a reasonable alternative. More specifically, Izzy's range of choices is influenced by brute luck because (like every other person) she has no reasonable alternative but to eat and drink (it is obviously necessary that people eat and drink regularly so as to avoid life-threatening consequences). Likewise, with regards to Fran, it might be maintained that being required to work and leaving one's child does not count as a satisfactory option. It follows that if Izzy and Fran's situation has arisen as a result of brute luck, then they will not be held responsible for the disadvantage that ensues. Each will have a claim to public compensation, thus defeating the abandonment objection.

This kind of argument is not plausible. It is only disadvantage that derives from unequal brute luck that requires compensation on a luck egalitarian and left-libertarian view. Theorists cannot say that Izzy is a victim of *unequal* bad luck since she has naturally thin genes and has been raised on a healthy diet. Indeed, Izzy simply ate lots of food in accordance with her preferences. Likewise, Fran is not a victim of *unequal* brute luck: she has been born into a world where jobs are a necessary means to acquiring items such as food, clothing, and shelter. This necessity is something that has been handed down throughout the centuries, so even if we do not have a job ourselves, our survival is generally reliant on the practice itself. In addition, Fran has also been born into a world where young children cannot satisfy their own basic needs and require constant care and supervision. The options facing all potential parents are equal: (i) continue with one's career on a full-time basis and use childcare facilities, (ii) continue with one's career on a part-time basis and use childcare facilities, or (iii) become a stay-at-home parent.⁵³ Because all people face the same option set, then there is no case for redistribution.

⁵³ Though for luck egalitarians to truly equalise the option sets, if they are going to hold parents entirely responsible for the costs of their children then they must be sure to entirely deprive non-parents of any benefits of having younger generations (such as social security).

Those opting to become a stay-at-home parent do not have a claim with regard to their background circumstances. There is nothing morally wrong with the fact that people have to work and most people (like Fran) would probably like to forgo working, but choose not to because of the financial implications.

Next, luck egalitarians and left-libertarians might try to discern if unequal brute luck can be ascribed to the examples. So, with regards to Fran, theorists might consider whether biological or psychological influences generate a deep nurturing drive or reproductive instinct to have a child *and* whether pregnancy itself can impact on some woman's willingness to become a dependent caretaker; i.e. whether pregnancy can initiate a very strong bond which accounts for Fran's desire not to leave her child in another's care.⁵⁴ Similarly, when it comes to Izzy's case, theorists might try to see if her eating preferences can also be traceable to a powerful biological or psychological desires, the fulfilment of which leads to disadvantages. In these kinds of instances, there will be a belief that Izzy and Fran are worse off as a result of pre-existing biological desires or character traits. These are features which both do not voluntarily choose and for which they cannot be held responsible. It would, therefore, be unjust if Izzy or Fran were ineligible for compensation.

This kind of reasoning allows luck egalitarianism to rebut the abandonment objection but it raises a metaphysical problem. The worry is that incorporating pre-existing biological and psychological factors into the category of brute luck turns everything into brute luck. If we allow that we are not responsible for our choices because they derive

⁵⁴ See Christine Overall, *Why Have Children? The Ethical Debate* (MA, Cambridge: MIT Press, 2012), p.3. Biologist Lonnie Aarssen has written about a 'parenting drive' that generates a desire to have children, see Lonnie W. Aarssen, 'Some Bold Evolutionary Predictions for the Future of Mating in Humans' *Oikos* 116 (2007), p.1772.

from our pre-existing biological drives or character traits, then responsibility for all of our choices will be extinguished.

The problem is that once we begin classifying aspects of our physical person into the category of brute luck, there is no principled reason – within luck egalitarianism – that allows us to exclude some pre-existing character traits or biological drives and not others. This puts luck egalitarianism on an irreversible slippery slope to determinism. As Cohen argues, this kind of theoretical move makes it awesomely difficult to identify what represents genuine choice and famously tells us that luck egalitarians are ‘up to their necks in the free will problem’.⁵⁵ Cohen’s solution is that luck egalitarianism defends a more minimal claim that only a genuine choice – whether or not it is actually possible – can serve to justify differential advantage. Thus, if there is no such thing as a genuine choice, then all differential advantages are unjust.⁵⁶ Carl Knight develops this line of reasoning, maintaining that ‘whether any outcomes can be attributed to choice for distributive purposes is for the best philosophical accounts of free will and determinism to decide, accounts which are not themselves provided by luck egalitarianism’.⁵⁷ He argues that luck egalitarianism is not threatened by determinism: if complete determinism turns out to be true, then only equality of outcomes is just according to luck egalitarianism.

However, if luck egalitarianism is to remain agnostic about the idea of genuine choice, then it becomes a theory that is unable to give practical guidance in terms of what can and cannot be enforced on grounds of justice.⁵⁸ Luck egalitarians (and left-libertarians) should not be forced into this position. Any liberal theory that justifies a right to freely pursue one’s own conception of the good must accept that we can be held responsible

⁵⁵ Cohen, ‘On the Currency of Egalitarian Justice’ p.934.

⁵⁶ G.A. Cohen, ‘Equality of What? On Welfare, Goods and Capabilities’ *Recherches Economiques de Louvain/Louvain Economic Review*, 56 (1990), p.381.

⁵⁷ Carl Knight, ‘Luck Egalitarianism’ *Philosophy Compass*, 8 (2013), p.927.

⁵⁸ Scheffler, ‘Choice, Circumstance and the Value of Equality’ p.13.

for these choices. Without such an understanding a right to freedom becomes meaningless. Holding people responsible for the consequences of their choices is the flipside of freedom.

Theorists might sensibly decide that we can be held responsible for the outcome of a decision even if we are not responsible for the prior circumstances that led to this decision. Dworkin holds this position when he argues that although we do not choose our basic convictions, tastes and preferences, we do choose to act in some way or another given the convictions, tastes and preferences that we have. For it is possible that we could have chosen differently.⁵⁹ He goes on to insist that ‘when people choose to satisfy those tastes or pursue those ambitions then they should pay the costs of doing so. They are not excused from responsibility because their choices are motivated rather than whimsical’.⁶⁰ Dworkin’s argument is based on the idea that people play a part in producing a given outcome. And what seems appropriate is that we can hold people responsible for an outcome if they (i) knew what they were doing whereby the outcome was foreseeable and (ii) there was an alternative whereby the outcome was reasonably avoidable. So if people do not have a capacity to avoid or foresee genetic diseases then responsibility for the costs of these conditions can be publicly distributed. If someone throws you in front of an oncoming train and satisfies this cluster of knowledge and avoidability conditions, then he is responsible for this outcome. This move, however, comes at the cost of sustaining the abandonment objection. Izzy chose to eat copious amounts of food when she (i) knew the side effects of consuming such goods, (ii) could reasonably have made healthier purchases, and (iii) could reasonably have taken out insurance. Likewise, Fran (i) voluntarily chose to devote her time to a caring role (when continuing her profession and childcare are readily available) and (ii) could foresee that

⁵⁹ Ronald Dworkin, ‘*Sovereign Virtue Revisited*,’ *Ethics*, 113 (2002), p.118.

⁶⁰ *Ibid.*, p.119.

vulnerability and subordination typically result. So, in making this type of response we must assume that Izzy and Fran are responsible for their actions – even when the outcomes can prove ruinous. This leaves luck egalitarians and left-libertarians caught in a dilemma: (a) extinguish responsibility to the point of non-existence or (b) accept responsibility is possible at the expense of abandoning people who have the capacity to avoid and foresee a dire outcome.

(ii) The Mixed Conception Strategy

The second strategy to the abandonment objection involves luck egalitarians (and left-libertarians) adopting a mixed conception of justice that is concerned with saving people from absolute deprivation. Theorists might accept that justice requires an unconditional threshold which no-one should fall below, irrespective of whether they are responsible for putting themselves below the threshold. This approach has recently been put forward by Kok-Chor Tan, who argues that it is a matter of justice that people should not be without access to certain necessary goods.⁶¹ Tan also argues that luck egalitarianism is compatible with Rawls's position and can accept the application of the difference principle.⁶² The difference principle aids the unfortunate because it functions to improve the interests of the worst off group and ignores the matter of *how* people come to be in more or less advantaged positions. This strategy has two important flaws. One is that it stands in tension with luck egalitarianism, the other is that it too fails Anderson's equal respect and concern test.

The first flaw is that an unconditional threshold and a Rawlsian difference principle can undermine luck egalitarian equality. Luck egalitarianism requires that people internalise

⁶¹ Kok-Chor Tan, *Justice, Institutions and Luck: The Site, Ground and Scope of Equality* (Oxford: Oxford University Press, 2012). They might, for example, adopt the view of Paula Casal, 'Why Sufficiency is Not Enough,' *Ethics*, 117 (2007), pp.296-326 or Alexander Brown, 'Luck Egalitarianism and Democratic Equality,' *Ethical Perspectives*, 12 (2005), pp. 293-339.

⁶² Tan, *Justice, Institutions and Luck: The Site, Ground and Scope of Equality*, pp.119-120.

the costs of their responsible choices. This is for two reasons. First, it is believed that people should bear the costs of their responsible choices because to do otherwise would diminish the equal shares to which others are entitled.⁶³ Second, and connectedly, it is considered unjust to take away resources from those who are suffering from brute luck disadvantage and give them to victims of option luck. To make this concern vivid, Richard Arneson asks us to imagine a rescue team who must decide whether to rescue: (a) a party of stranded school children caught in an unforeseeable blizzard while on a school trip; (b) a party of experienced climbers who deliberately pursue a difficult route in hazardous conditions; and (c) a group of reckless hikers.⁶⁴ In these kind of situations, or when there is not enough basic goods to go around, luck egalitarians and left-libertarians will find it hard to accept that those who deliberately and recklessly place themselves in danger can enjoy an equal claim to be rescued as those who are morally innocent.

As previously mentioned, the basic thrust of Anderson's objection against abandonment is that it does not express equal concern and respect for all citizens. As a consequence, she claims that luck egalitarianism does not meet the standard which any egalitarian theory must meet. The second flaw with the mixed conception strategy is that it does not overcome this pressing objection. This is because an unconditional threshold or difference principle can generate a moral hazard problem.⁶⁵ For example, Stemplowska asks us to consider a situation of relative scarcity and imagine an individual who persistently engages in mountain climbing uninsured. She then asks us to assume (a) that the costs of any rescue are so high that the climber would not be able to cover them

⁶³ See Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, pp.65-119 and Richard Arneson, 'Luck and Equality' *Proceedings of the Aristotelian Society Supplementary Volume* 75 (2001), p.84.

⁶⁴ Richard Arneson, 'Luck Egalitarianism and Prioritarianism' *Ethics*, 110 (2000), p.348.

⁶⁵ Ben Ferguson and Hillel Steiner, 'Exploitation' *Oxford University Handbook of Distributive Justice*, (ed.) Serena Olsaretti (Oxford: Oxford University Press, 2016)

himself (unless he had purchased insurance) and (b) that the individual is sane and otherwise responsible for this conduct. Stemplowska argues that it is problematic to think that this climber has an egalitarian claim against others to be saved (free of charge) each and every time he needs to be rescued.⁶⁶ However, in situations of relative scarcity, an unconditional threshold or difference principle allows people to extract benefits at the expense of others on the grounds that they have a claim of justice to be rescued – no matter how recklessly they behave. In such instances, it seems that the distribution of resources in society will be held hostage to people who engage in morally hazardous behaviour. So, theories that simply compensate disadvantage or ignore the matter of *how* people come to be disadvantaged will disproportionately direct resources towards opportunists in a way that undermines other people's ability to satisfy their own pursuits and interests. Importantly, individuals will not have equality of authority or status in their dealings with the state. This is because the ends and interests of non-opportunists will be subordinate to those of opportunists. It follows that an unconditional threshold or difference principle strategy is not going to provide luck egalitarianism with a satisfactory solution to the abandonment objection since it is far from clear that the scheme successfully treats people with equal concern and respect.

(iii) The Option Luck Strategy

The final strategy amounts to arguing that the outcome in abandonment cases is just and a matter of option luck. Here, theorists might reason that luck egalitarianism is a view about justice and not a complete theory of moral goodness. It follows that people's intuitions surrounding the abandonment cases might be confused by the deeper issue of the relation between justice and morality. On many views, justice is one amongst a plurality of mutually irreducible basic values or principles and our intuitions about it can

⁶⁶ Zofia Stemplowska, 'Making Justice Sensitive to Responsibility' *Political Studies*, 57 (2007), pp. 252-253.

often be associated with other members of that plurality.⁶⁷ Accordingly, luck egalitarianism does not imply the absence of other moral values or principles such as compassion, charity, or benevolence to help the victims of bad option luck: the view is not committed to denying that a world that is both just and helps the needy is morally better than a world that both is just and abandons the needy. Thus, luck egalitarians and left-libertarians might consistently think that the outcome in abandonment cases is morally *bad* and that people ought to aid the victims of option luck. What they will deny is that these kinds of outcomes are *unjust*.

This might seem like the most compelling strategy for luck egalitarianism to take when faced with abandonment cases, but it has deeply counter-intuitive extensions. For it is only principles of justice – as sets of enforceable rules – that constitute the primary standard on which political systems are morally assessed. Consequently, once we conceive of the outcome in abandonment cases as just and that the people involved are responsible, does it then become morally permissible for others to form contracts that leverage the abandoned? Clearly, the beneficiaries of good option luck and even those who have zero option luck – neither good nor bad option luck – will have bargaining power over the victims of bad option luck. In cases involving the abandonment objection, the victims are often in dire straits and face the prospect of hardship or even death. So, we arrive at a situation where others can turn victims' plights to their own advantage. Because these situations derive solely from the victims' responsible choices, then luck egalitarianism must judge the situation just and the political system should not prevent or refuse to enforce these contracts.

⁶⁷ See Hillel, Steiner, 'Responses' in Stephen De Wijze, Matthew Kramer and Ian Carter, eds. *Hillel Steiner and the Anatomy of Justice: Themes and Challenges* (New York: Routledge, 2009), pp. 235-267.

So, imagine Izzy signs a contract with Eric where she is to commit to 10 years of servitude in exchange for food and basic shelter. Or imagine single mum Fran, who cannot gain employment after taking time out to care for her child. In this instance, Fran's only option to pay her rent is to strike a deal with her landlord, with whom she agrees to a usurious loan rate. In both of these cases, appeals to injustice aren't going to do any work in terms of helping Izzy and Fran escape contractual agreement. Because the background conditions are just, and because Izzy and Fran are responsible agents, they are free to enter any agreements they choose and the state must enforce these agreements in the event of contravention.⁶⁸

This reasoning seems deeply counterintuitive. The state will be complicit in the leveraging of Izzy and Fran and coercing them into action. As a way of responding to this difficulty, public officials may look to other considerations to justify non-enforcement. For example, it might be argued that economically disadvantaged people such as Izzy and Fran cannot give meaningful consent to usurious loans or onerous labour contracts because they are so desperate. Courts might therefore refuse to enforce a contract if it is made in circumstances involving coercion or defective consent. On this basis, public officials might draw on the influential work of Serena Olsaretti, Robert Nozick, or David Zimmerman.

According to Olsaretti, a person is forced to do x if and only if (a) there is no acceptable alternative to doing x, and (b) the fact that there is no acceptable alternative to doing x motivates that person.⁶⁹ Thus, it might be argued that Izzy was forced into the agreement

⁶⁸ Seana Shiffrin persuasively argues that liberal states can refuse to enforce an agreement if the conditions under which it was made are unjust. Luck egalitarians and left-libertarians will be prevented from drawing on this kind of reasoning because the conditions in which the contracts are formed are considered just. See Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine and Accommodation' *Philosophy and Public Affairs*, 29 (2000), pp.205-250.

⁶⁹ See Serena Olsaretti, *Liberty, Desert and the Market*, (Cambridge: Cambridge University Press, 2004), pp.138-43. According to Olsaretti, the standard of acceptability by which options are assessed is an objective one that views needs satisfaction as central.

because she had no acceptable alternative to it: she had no other choice than becoming homeless. Likewise, Fran was forced into the agreement because she knew that her only alternative was eviction. The options of entering into servitude and taking out an exorbitant loan are chosen because there are no acceptable alternatives. According to Olsaretti, it is these considerations, and not the considerations of whether the background conditions are just or whether the contracting parties act within their rights, that are relevant for assessing the voluntariness of the agreements.

Let us now suppose that public officials use this line of reasoning and place restrictions on these types of contract. Public officials might say that any contract deriving from a lack of eligible alternative should not be enforced and may be prohibited. There are two problems, however, with a state adopting this position. First, although the state would not be complicit in leveraging Izzy or Fran, it might disadvantage them further by making them more vulnerable and marginalised. For instance, freedom of contract is a basic right to which Izzy and Fran will be denied: any contract that they wish to enter would be effectively blocked by the state on grounds of defective consent. This manoeuvre would potentially worsen the underlying conditions that make these contracts involuntary: Izzy and Fran would be left begging people for assistance and if they happened to enter into a quasi-agreement with another, the other would be under no contractual obligation to stick to the terms of the deal.

The second difficulty with appealing to Olsaretti's view is that a lack of reasonable alternative is actually insufficient to establish defective consent. For instance, patients regularly enter into agreements with physicians to undergo a life-saving operation. In these cases, there is a general presumption that patients are capable of giving their consent even when a reasonable alternative is lacking. Indeed, there is something odd about saying that a patient's consent is defective merely because his or her alternatives

are very bad or dire. Consequently, Olsaretti's view means that most life-saving choices would have to be deemed involuntary, which is implausible.

Public officials might next draw on Nozick's framework for distinguishing threats from offers – recall that Nozick maintains that threats consist in coercion and offers do not. The problem, however, is that the agreements taking place in our cases are analytically symmetrical with offers. On Nozick's account, B's proposal to A is an offer if A would rationally choose to move from the pre-offer to the offer situation; it is a threat if A would not rationally prefer to make this move. Here, we can see that both Izzy and Fran consent to genuine offers: Izzy prefers to go from her pre-offer situation in which she starves to the offer situation in which she has a choice between 10 years of servitude or begging. Fran prefers to go from her pre-offer situation in which she faces eviction to the offer situation in which staying in her home is an option. So, arguments surrounding coercion might draw little support as we can reason that both Izzy and Fran desperately *want* the deal and both desperately *want* the benefits that can be secured with a binding contract. Equally, given that both would not prefer to move back to their pre-offer situation we have strong reasons for doubting whether the contracts are involuntary. In both cases, it seems that their choice flows from the minimally competent exercise of their deliberative capacities. Moreover, epistemically speaking, neither party is deceived about the consequences that derive from the agreements. Nozick's view will, therefore, not support a state preventing or refusing to enforce Izzy's and Fran's contracts.

Another apparent solution might be to draw upon the argument of David Zimmerman. According to Zimmerman, underlying coercion is the idea that the person who does the coercing undermines, or limits the freedom of the person who is coerced.⁷⁰ Specifically, he maintains that for an act to involve coercion, it must be the case that the coercer is

⁷⁰ See David Zimmerman, 'Coercive Wage Offers' *Philosophy and Public Affairs*, 10 (1981), pp.131-4

responsible for placing the coerced in a vulnerable position and is actively preventing the coerced from being in an alternative position which he or she strongly prefers. Again, we can see that Eric and the neighbour's actions do not involve coercion in this sense either: neither is responsible for Izzy and Fran's vulnerable situation. Eric and the neighbour simply make their offer in light of this fact. Equally, neither Eric, nor the neighbour are actively preventing Fran or Izzy from being in an alternative situation. Both have made an offer and would walk away if Izzy and Fran did not want to form an agreement. All of these points show that it is difficult for a state to render these contracts impermissible on grounds of coercion or defective consent. The cases do not meet the conditions for coercion and a lack of reasonable alternative is insufficient to undermine the voluntariness of an agreement. This means that if Izzy and Fran's contracts are to be condemned then other judicial defects must be uncovered.

Addressing this problem, some people might maintain that objectionable outcomes – the belief that these contracts inflict a harsh bargain against one party – would give the court grounds for judging contracts unjust. The difficulty here, however, is that this kind of judgement is relying on some objective criterion of value rather than the subjective preferences of the contracting parties themselves: that is, Izzy and Fran are being offered something of less value than what they must give in return. The problem with this move is that once we allow an objective criterion we fail to respect an individual's capacity to form and revise their own conception of value. Instead, we invoke a negative judgement about a person's ability to make decisions for themselves. So, on the face of it, this particular response is not going to hold if one defends a liberal theory of justice that strives to be neutral between different conceptions of the good life. Moreover, if Izzy and Fran's agreements are voluntary and it has been established that the conditions in which they were made were just, then a state's refusal to enforce contracts on the grounds of objectionable outcomes will be paternalistic in nature because it is motivated by a

desire to protect Izzy and Fran from themselves. This is something which no liberal conception of justice can ignore: paternalism conveys a distinctive, generally impermissible insult to autonomous agents.⁷¹ Thus, individuals will not be treated as equals and will be disrespected in their dealings with the state.

Consequently, like the first response, this strategy – maintaining that abandonment cases are just – is also inadequate. Advocates say that although people are not required, as a matter of justice, to come to the aid of the abandoned, this does not preclude them coming to their aid for non-justice based reasons. What this response overlooks, is the fact that the abandoned are often in dire straits and that other people may turn this dire situation to their own advantage. If a grossly inequitable agreement is formed courts cannot refuse to enforce this contract: the agreement will be considered to be made voluntarily, in just conditions, by responsible agents. Courts may point out that the terms of the agreement are so objectionable or outrageous that the agreement must be impermissible. Voiding the contract on these grounds would treat the contractors paternalistically and goes against the interests of the abandoned in a serious way.

4.4 Implications

In this chapter, I have shown that there is an important connection between answering the normative question ‘What is the point of equality?’ and the question ‘What kind of wrongdoing makes an exchange exploitative?’ When we consider luck egalitarian responses to these questions we can see that the theory is not disrespectful to those it seeks to assist and converges with relational egalitarians concerning the point of equality. The chapter considered the extent to which the abandonment objection raises problems

⁷¹ For such accounts of paternalism see Shiffrin, ‘Paternalism, Unconscionability Doctrine and Accommodation’ pp.205-250 and Quong, *Liberalism without Perfection*, p.80.

for luck egalitarians by way of two hypothetical cases involving abandonment. Although these cases are deeply troubling, the existing luck egalitarian framework cannot get to grips with the problems involved. If luck egalitarians or left-libertarians attempt to explain matters in terms of brute luck, then they will make implausible claims about responsibility. If they attempt to apply a mixed conception minimum threshold or difference principle, then they seem to violate luck egalitarian principles. If they attempt to explain matters in terms of option luck, then they will be committed to the view that leveraging the abandoned is not unjust. Rather than undermine luck egalitarianism, I think these shortcomings allow us to see that something is missing from the conceptual framework within which luck egalitarians and left-libertarians are operating.

In the following chapter, I will show that the difficulty with abandonment cases arises because there is another category of luck which is unjustly affecting distributions. Unlike traditional luck egalitarianism, I argue that the concept of luck can be classified in terms of brute luck, option luck, and '*socially constructed luck*'. In putting matters this way, our judgements concerning luck and responsibility can be made more precise. By taking into account what Rawls calls 'background justice' and what Cohen identifies as an 'aggregation problem', socially constructed luck can justify compensation for disadvantage that is generated by many actions that might otherwise be classified as option luck. Socially constructed luck, therefore, has significant implications for liability judgements and offers very different advice than the existing framework suggests in many concrete cases.

The Missing Category: Socially Constructed Luck

5.1 Introduction

Rawls's argument from background justice involves the idea that an accumulation of individually free and fair transactions and agreements will, over time, causally erode the background conditions that make free and fair transactions and agreements possible. This leads Rawls to argue that special principles are needed to regulate society's basic structure. In a similar fashion, Cohen's accumulation argument maintains that accruals of seemingly innocent actions fail to preserve an initially just situation. This leads Cohen to argue for the imposing of patterned principles of justice. In this chapter, I try to trace the connection between these two important positions. In particular, I show that Rawls's appeal to 'background justice' and Cohen's 'accumulation problem' must be understood as an appeal to the adverse effects of a particular type of luck, which I refer to as *socially constructed luck*.

Much of this chapter will be spent developing the idea of socially constructed luck. I will show how it arises from an initially just state via otherwise morally permissible actions. This work will put us in a position to see more clearly, at the end of the chapter, how the adverse effects of socially constructed luck can give rise to injustice. What is important is that the type of injustice that develops coheres most acutely with the structure of an exploitative interaction.

5.2 Rawls and Cohen

One of Rawls's central claims is that society's basic structure is the primary subject of justice. The basic structure is the way in which major social structures assign basic rights and duties and regulate the division of benefits and burdens that arise through social co-operation. Major social structures are thought to include the political constitution, legally recognised forms of property, the organisation of the economy and the nature of the family.¹ For Rawls, special principles of justice apply to the basic structure and these must have priority over other principles. He maintains that having a just basic structure secures what we may call background justice.² The argument from background justice is one of the reasons Rawls puts forward to explain the basic structure's priority. However, the argument is also used to expose problems with historical process doctrines like Nozick's.³ I will begin by considering Nozick's view. I then focus on Rawls's account of background justice.

In *Anarchy, State and Utopia*, Nozick famously claims: 'whatever arises from a just situation by just steps is itself just'.⁴ Nozick argues that if we begin with an initially just state of affairs then any subsequent states of affairs resulting from parties' voluntary actions will also be just. Nozick animates his point in his famous Wilt Chamberlain case. He asks us to assume that 1 million people are freely willing to give 25cents each to watch Chamberlain play over the course of a season. As a result, Chamberlain accrues \$250,000. Nozick reasons that unless we find some injustice within or surrounding the fans' decisions to watch Wilt play (for example, coercion, force, assault, fraud etc.) then we

¹ Rawls, *Theory of Justice*, p.7; John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass: Harvard University Press, 2001) p.10; Rawls, *Political Liberalism*, p.11, pp.201-2, p.258.

² See Rawls, *Political Liberalism*, p.271.

³ Historical Process views generally encompass libertarian views that derive from the philosophy of John Locke.

⁴ See Robert Nozick, *Anarchy, State and Utopia*, p.151 and also 'An entitlement theorist would find acceptable whatever distribution resulted from the party's voluntary exchanges,' Ibid., p.188.

must consider the resulting distribution to be just.⁵ Crucially, for Nozick, a particular transaction or exchange is deemed forced or coercive only if those placing limits on one's alternatives did not have the right to behave in this way. To recapitulate, he states: 'Other people's actions place limits on one's available opportunities. Whether this makes the resulting action non-voluntary depends upon whether these others had the right to act as they did'.⁶

For Rawls, the problem with Nozick's view is that it fails to appreciate how the accumulation of individually free and fair transactions and agreements will ultimately erode the background conditions that make free and fair transactions and agreements possible. Thus, when seen in isolation individual actions may seem just, but once these actions interact with the similar actions of others cumulative problems begin to emerge. Indeed, considerable wealth and property may accumulate in a few hands and these concentrations are likely to undermine fair equality of opportunity, the fair value of political liberties and so on.⁷

Rawls maintains that:

The conditions necessary for background justice can be undermined, even though nobody acts unfairly or is aware of how the overall result of many separate exchanges affects the opportunities of others. There are no feasible rules that it is practicable to require economic agents to follow in their day-to-day transactions that can prevent these undesirable consequences.⁸

⁵ Ibid., pp.160-162.

⁶ Ibid.

⁷ See Rawls, *Political Liberalism*, pp.265-267; Rawls, *Justice as Fairness: A Restatement*, pp.52-53. There are two distinct arguments being presented here. The first argument looks like an internal critique of Nozick: without background justice, eventually the agreements individuals strike will no longer be free, something which Nozick and other libertarians care about. The second argument looks like an external critique: without background justice the agreements between individuals will no longer be fair, where fairness is defined by appeal to substantive principles (fair equality of opportunity) that libertarians like Nozick don't endorse. Thomas Porter Sinclair puts forward this distinction in Thomas Porter Sinclair, 'The Limits of Background Justice' *Social Philosophy and Policy*, 30 (2013) pp.352-372.

⁸ Rawls, *Political Liberalism*, p.266.

Thus, because historical process views like Nozick's apply only to people's choices, rather than the social background structures that shape and constrain those choices, they cannot address the context in which choices are made. In this vein, Rawls argues that without the right kind of regulatory institutions, the conditions for free and fair agreements will be damaged through the interactions of individuals. Such interactions can have profound and pervasive effects. Indeed, distributions may develop whereby some individuals are left with no reasonable alternative but to enter into unfavourable agreements.⁹ From this, Rawls deduces that social structures, such as the economic order, raise distinctive normative problems. This is because unlike rights violations, it isn't clear who the wrongdoer is and what we can do to stop it. Indeed, so understood, no wrongdoing has taken place. Consequently, unjustified inequalities and restrictions need not be a state of affairs that anyone is aiming to bring about – this could just be an unintended result of many different, independent decisions that develop in the market over time.

The key feature of the basic structure is that it is a social background against which individual transactions and decisions take place. Because it is situated in the background, the structure often lies unperceived. Yet, it does a good deal of unacknowledged work. It is a structure around which much of our activity is organised and it has a particular way of distributing the benefits and burdens that are produced in society. Once this work is appreciated, Rawls argues, we can see that the basic structure is to be understood as the primary subject of justice. In particular, special principles of justice ought to be directed towards the basic structure, and these must have priority over other principles.¹⁰ The role

⁹ Like Arash Abizadeh and Miriam Ronzoni, I understand Rawls, in these passages to be articulating why a basic structure is necessary rather than presupposing its existence. See Miriam Ronzoni, 'The Global Order: A Case of Background Injustice? A Practice Dependent Account' *Philosophy and Public Affairs*, 37 (2009), pp.229-256 and Arash Abizadeh, 'Co-operation, Pervasive Impact and Coercion: On the Scope (Not Site) of Distributive Justice' *Philosophy and Public Affairs*, 35 (2007), pp.318-358.

¹⁰ Rawls states: 'The Kantian form of the contract doctrine focuses on these inequalities in the basic structure in the conviction that these inequalities are the most fundamental ones: once suitable principles are found to govern them and the requisite institutions are established, the problem of how to regulate other inequalities can be much more easily resolved.' Rawls, *Political Liberalism*, p.271. See also pp.282-283.

of institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will cease to be just, however free and fair particular transactions may look when viewed by themselves.¹¹

Importantly, Rawls insists that special principles of justice *only* apply to the institutions of the basic structure. This is on the grounds that applying these principles elsewhere will place an excessive burden on individuals. He states: 'These consequences are often so far in the future, or so indirect, that the attempt to forestall them by restrictive rules that apply to individuals would be an excessive if not an impossible burden'.¹² Accordingly, a division of labour is needed between two kinds of principles. (1) Those that regulate the social background structures. (2) Those that govern the transactions and agreements between individuals and associations. The former appropriately preserve background justice from one generation to the next and the latter preserve just conduct, relating directly to rights violations such as fraud, assault and the like. Framing justice in this way means that individuals and associations are free to effectively pursue their own ends without excessive constraints.¹³

In *Self-Ownership, Freedom and Equality*, Cohen also takes issue with Nozick's claim that injustice cannot emerge from a process that involves no injustice.¹⁴ He offers a two-part explanation of this tendency. The first, which he calls a crude train of reasoning, runs as follows: Nozick infers that if a new situation arises from (nothing but) an earlier just situation and just steps then there cannot be any defect in the upshot.¹⁵ Thus, injustice is necessarily associated with being a defect, and Nozick wrongly assumes that defects can

¹¹ See Rawls, *Political Liberalism*, p.266.

¹² Ibid.

¹³ Ibid., p.268.

¹⁴ Cohen, *Self-Ownership, Freedom and Equality*, p.41.

¹⁵ Ibid.

only come about through some kind of injustice. Yet, Cohen reasons, ‘combining perfect things can indeed generate imperfection’ and in this way ‘a just situation can be transformed into an unjust one without any unjust step occurring’.¹⁶

The second explanation comes from Nozick’s failure to note that there can be morally relevant differences between the acts of abstracted individuals and the structures within which individuals behave.¹⁷ This claim that libertarians fail to acknowledge institutional structures is notably similar to Rawls’s position, but it can also be found in Cohen’s earlier papers. For example, in ‘Capitalism, Freedom, and the Proletariat’ he argues:

A structure which is not a permanent part of the human condition can be misperceived as being just that, and the institution of private property is a case in point. It is treated as so given that the obstacles it puts on freedom are not perceived, while any impingement on private property itself is immediately noticed. Yet, private property, like any system of rights, pretty well is a particular way of distributing freedom and unfreedom.¹⁸

With regards to the organisation of the economy, Cohen maintains that individuals can be forced to sell their labour power. He says, ‘I am forced to do something when I have no reasonable or acceptable alternative course. It need not be true that I have no alternative whatsoever’. Rather, the statement means something like, ‘I had no choice worth considering...and the claim that the worker is forced to sell his labour power is intended in that familiar sense’.¹⁹ Cohen stresses that the way the economy is structured leaves us with no choice but to work. But he notes that the structure is not self-

¹⁶ Ibid., p.42.

¹⁷ Ibid., p.50.

¹⁸ See G.A. Cohen ‘Capitalism, Freedom, And the Proletariat’ in G.A. Cohen, *On the Currency of Egalitarian Justice, And Other Essays in Political Philosophy* (Princeton: Princeton University Press, 2011), p.152.

¹⁹ G.A. Cohen, ‘The Structure of Proletarian Unfreedom’ *Philosophy and Public Affairs*, 12 (1983), p.4. For accounts of unacceptable alternative, see G. A. Cohen, *History, Labour and Freedom*, (Oxford: Clarendon Press, 1988), Ch 12 and Ch 16.

sustaining. Rather, it has become necessary for us to work because of the previous legitimate actions of other persons.²⁰ Construed in this way, we can note that this situation might not be intentionally brought about. More precisely, it may arise indirectly by people acting within their rights. This links to a further difficulty observed by Cohen (and Rawls). He states, if ‘we widen our focus away from discrete pairs of transacting agents to the mass of uncoordinated transactions in a market economy, we can see that a just situation could be transformed into an unjust one because of the way that a mass of uncoordinated transactions foreseeably or otherwise combine’.²¹ Crucially, common, innocent transactions can subvert the justice of situations.²² Cohen goes on to say, ‘we cannot know how our innocent actions will affect others when they combine. Such knowledge will usually be unavailable. This is because the results to which given market transactions contribute are so complex and ramifying that little beyond the probabilities of various immediate outcomes can ever be generally known’.²³ From this, we can see that social practices and patterns of personal choice can have very profound effects; they can produce severe inequalities whereby some people have much more power than others. For Cohen, the worry is that these effects will weigh heavily on those that suffer misfortune.

What is to be noticed is just how closely each of these points fits with Rawls’s account. Like Rawls, Cohen is also emphasising that seemingly innocent actions can form a

²⁰ Cohen, ‘The Structure of Proletarian Unfreedom,’ p.6.

²¹ See footnote 7, where Cohen observes a similar chain in Rawls ‘The Basic Structure as Subject’. In Cohen, *Self-Ownership, Freedom and Equality*, p.46.

²² Cohen draws upon an example inadvertently given by Nozick in *Anarchy, State and Utopia*, whereby, Nozick describes a case in which a person (innocently) becomes the monopoly holder of drinking water. No injustice brings about the situation, yet Nozick believes that it calls for rectification. See Nozick, *Anarchy, State and Utopia*, p.180. cited in Cohen, *Self-Ownership, Freedom and Equality*, p.46.

²³ Ibid. pp.50-51. For a similar argument see F.A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960), pp.93-95. See also F. A. Hayek, ‘The Use of Knowledge in Society’ *The American Economic Review* 35, (1945): pp.519-530. Note that all of this brings us very close to Rawls’s position in ‘The Basic Structure as Subject.’ Rawls says: ‘individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and transform their present tendencies’. See Rawls, *Political Liberalism*, p.268.

background structure under which people act. This structure impedes some options and promotes others and this can have diverse effects on people's holdings. Rawls's idea of the basic structure and Cohen's defence of patterned principles can thus be seen as unified, in the sense that they are a conscious attempt to control the background structures within which we live so that unjust inequalities do not randomly develop.²⁴ In the remainder of the chapter, I aim to show how the distinctive features of Rawls and Cohen's arguments and the conditions that they identify must be understood as a type of luck not yet explored in the literature. I propose that once the argument is laid out our intuitions will lead us to see that there is merit to this understanding.

5.3 The Missing Category: Socially Constructed Luck

I am proposing that in addition to brute luck and option luck there is another category of luck, which I refer to as '*socially constructed luck*'. This type of luck arises from people acting in accordance with their preferences when they exercise their moral rights and liberties. These rights and liberties might include freedom of thought and liberty of conscience (moral liberties such as sexual and religious freedom), political liberties and freedom of association, as well as freedom covered by the liberty and integrity of the person and a right to hold property.²⁵ What I want to show is that exercising our moral rights has special normative significance, particularly pertaining to our abandonment cases.

To begin, let us reconsider Izzy and Fran's cases. Recall that Izzy has been overindulging on her holiday and now needs to purchase an extra seat on her return flight home due to her weight gain. Because Izzy cannot afford the extra ticket she is now begging and

²⁴Given that Cohen criticises Rawls on the basic structure and argues that it doesn't have fundamental relevance, it might appear confusing that I wish to proceed here by only explaining their agreement and not their disagreement. My reasoning here is simply that I think there is much to be gained by considering how the two views coincide.

²⁵ This list of basic liberties is mostly drawn from Rawls, *Political Liberalism*, p.291 and also, H.L.A. Hart, 'Rawls on Liberty and its Priority' *University of Chicago Law Review*, 40 (1973), p.541.

sleeping rough on the streets. Fran interrupted her career to have a child, she is now struggling to find employment and cannot pay her rent. When looking back at Izzy and Fran's choices there is no prior injustice. Against a background of equal opportunity, both make use of their deliberative capacities and make a decision about how to exercise their moral rights. Neither is radically deceived about the consequences of their choice. This, however, is only a partial diagnosis of the situation. To see this, imagine Izzy chooses to act in the same way but unbeknownst to Izzy, on social media there is a frenzy of tweets, clicks, likes and posts as people of a larger size become very desirable and popular. As a result, people begin to consume more food, have fat injections and bodies become heavier. Because air travel suppliers base the size of their seats on the average size of passengers, they set about providing seating arrangements to accommodate this enlargement. So when Izzy arrives at the airport for her return flight home her situation is rather different: her social position is favourable and she is not required to pay any further monies towards her flight. Here, we can see that Izzy's situation shifts on the basis of different social preferences. More precisely, we can see that Izzy's situation is a function of other people's choices as well as her own.

Let us now suppose that Fran acts in the same way, but hiring a former stay-at-home parent becomes a signature trend. The skills and knowledge that this group develop are considered highly valuable when applied at high management and CEO level. Figuring out how to negotiate with the unreasonable, to recognise small victories, to achieve success through others and to be creative when sleep deprived all become things that businesses desperately need. So, when Fran attempts to re-enter the workforce her situation is rather different: her position is more favourable as her skills are highly sought after. Again, we can observe that Fran's situation shifts on the basis of different preferences. Her situation is a function of other people's choices as well as her own.

In each of these cases the outcome is neither the result of a deliberate centralised decision, nor has there been any kind of specific agreement to bring the outcome about. Instead, the outcome results from a process that aggregates the preferences of numerous individuals. What this demonstrates is that the fortune and misfortune in the original cases and the situation in which Izzy and Fran end up, depend not only on their own decisions but also on the decisions of others. It is entirely possible that both could have made exactly the same decision, in exactly the same circumstance, and their lives would have turned out very differently. Izzy and Fran's cases closely cohere with Rawls's 'background justice' and Cohen's 'aggregation problem'. Their exercising their moral rights combined with patterns of the personal choices of others had very profound and pervasive effects. In Izzy and Fran's cases, these seemingly innocent actions formed a background structure under which Izzy and Fran were able to act and weighed heavily on both of them when they were subject to misfortune.

What I would now like to show is that Izzy and Fran's circumstances can be elaborated much more precisely if they are explained in terms of an *invisible-hand explanation*. This again closely coheres with Cohen's thinking about social accumulations and Rawls himself makes reference to the invisible-hand in his theorising. Indeed, when describing how background justice can be eroded by individuals acting fairly, he maintains that the overall result of separate and independent transactions can be away from, and not congruent with background justice. He states, 'in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair equality of opportunity'.²⁶

²⁶ See Rawls, *Political Liberalism*, p.267.

The notion of an invisible-hand refers to social outcomes that result from an accumulation of many individual actions whose collective consequences are not produced by any person's or group's intention. This concept is articulated in the writings of David Hume, Josiah Tucker, Adam Smith, and Robert Nozick, but has been developed most astutely in the work of Edna Ullmann-Margalit.²⁷

5.4 An Invisible-Hand Process

According to Ullmann-Margalit, in all invisible-hand cases the phenomenon explained is shown to be the product neither of centralised decisions nor of explicit agreement to bring it about; rather, it is presented as the end result of a certain process that aggregates the separate and 'innocent' actions of numerous and dispersed individuals into an overall pattern which is the very phenomenon we set out to account for.²⁸ Most importantly, invisible-hand explanations involve social phenomena that result from the separate actions of many individuals who are not intending to produce the ultimate overall outcome.

At the core of the explanation, therefore, is the idea that a social outcome arises that was produced by the intentional actions of the participants but no one acted with the intention to bring about the social outcome. This involves excluding not only natural processes but also social patterns and institutions that are centrally planned and brought about by a deliberate and concerted action. By way of explicating the concept further, Ullmann-Margalit stipulates four conditions that make a social outcome eligible for an

²⁷ See David Hume, *The Philosophical Works of David Hume* Eds. Thomas Hill Green, and Thomas Hedge Grose Vol I and II (Longmans, Green and Company, 1874), p.296; Josiah Tucker in *Josiah Tucker: A selection from his Economic and Political Writings*. Ed. R. L. Schuyler (New York, 1931), p.59; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*. (Liberty Fund Inc, 1994), p.421; Robert Nozick, *Anarchy State and Utopia* (New York: Basic Book, 1974); Edna Ullmann-Margalit 'Invisible Hand Explanations' *Synthese* 39 (1978), pp.263-291. See also F.A. Hayek, 'The Results of Human Action but Not Of Human Design' in his own *Studies in Philosophy, Politics and Economics* (London: Routledge and Kegan Paul, 1967), pp.96-105 and T.C. Schelling, 'Models of Segregation' *American Economic Review* 59 (1969), pp.488-493.

²⁸ Edna Ullmann-Margalit 'Invisible Hand Explanations,' pp.282-283.

invisible-hand explanation. The first condition is that the initial stage of the process is to consist of nothing but the private intentions, beliefs, goals and actions of participating individuals in a specified set of circumstances. The second condition is that the process is to involve an ordinary and normal course of events. The third condition is that there must be an orderliness or patterned structure to the process. More specifically, she says 'it is the degree to which this mechanism is explicit, complex, sophisticated – and, indeed in a sense unexpected – that determines the success and interest of the invisible-hand explanation in question'.²⁹ Because the social process exhibits orderliness and a patterned structure this leads us to attribute the outcome to someone's intentional design i.e. we will naturally attribute the outcome to the beliefs, intentions or goals of a designing agent. The final condition is that the social outcome of this process *can be shown* to be the unintended product of dispersed individual activity where individuals are not intending to produce the ultimate overall outcome.³⁰

According to Ullmann-Margalit there are two frameworks into which an invisible-hand explanation can be cast: an '*aggregate*' framework and a '*functional-evolutionary*' framework.³¹ The '*aggregate*' framework is concerned with how a certain social pattern or institution came about. In particular, it involves a process that aggregates the separate and 'innocent' actions of numerous individuals into an overall pattern. The second, '*functional-evolutionary*' framework is concerned to establish the reason for the social pattern or institution's existence. This framework is inherently bound up with the assumption that the pattern or institution must perform a useful service to the social unit incorporating it. Put succinctly, Ullmann-Margalit says that the first framework 'provides a chronicle of (a particular mode of) emergence,' the second establishes 'raison d'être'.³²

²⁹ Ibid., p.262.

³⁰ Ibid., pp. 271-272.

³¹ Ibid., pp.282-283.

³² Ibid., p.284.

Ullmann-Margalit points out that the two frameworks will often converge. She says that a social arrangement can first be considered in relation to the *aggregate* framework, so that – if successful – an invisible-hand account of how it emerged can be obtained. It may then be noted that the social arrangement is functional, it contributes to the well-being and working order of the society incorporating it. So, the social arrangement may also be subject to the *functional-evolutionary* framework, thus accounting for its durability and prevalence. Although Ullmann-Margalit thinks that many (if not all) social patterns that fall within the first framework will also be functional (and hence amenable to the second framework as well), she prefers to withhold judgement on that. This is because she thinks it important that the two frameworks are distinct and ought to be conceptually isolated from each other.

What I would now like to show is that the social pattern involved in Izzy and Fran's cases can be seen to emerge along the lines suggested by Ullmann-Margalit. If we consider stay-at-home parents becoming CEOs, we can first apply Ullmann-Margalit's '*aggregate*' framework and note that stay-at-home parents independently develop skills that are effective for managing a strong business. Because these skills contribute greatly to the success of a company this leads to a prevalence of hiring stay-at-home parents at CEO level. Here, we may apply Ullmann-Margalit's '*functional-evolutionary*' framework; we can see the emergence of a pattern of hiring stay-at-home parents because of the success that results. This alters the surroundings for the next generation of individuals that are required to have these skills if they wish to become a top CEO. This process develops into a pattern of more and more individuals adapting to the new conditions created by the other.³³ If we consider Fran's action of re-entering the workforce, we can see that the

³³ By the end of the example, we might imagine that the sum of these actions make it the case that budding CEOs have only one reasonable alternative worth considering: that of spending time as a stay-at-home parent. Thus, individuals continue this pattern because they are acting on a belief that they will not get to the top without it.

reason she is so successful is a conjunction of her own preferences and also the social decisions of many other people, but this is not a state of affairs that anyone is intending to bring about: Fran did not choose to be a stay-at-home parent in order to develop these skills and she certainly wasn't trying to make herself eligible for a top post – this is just an unintended result of many different independent decisions.

This invisible hand structure can be illustrated in the other case. Consider the original Izzy example and imagine that many different groups of people independently decide to exercise regularly, making healthy living very popular and this has the consequence of reducing the average body weight. Here we can apply the '*functional-evolutionary*' framework. Because air travel suppliers operate by a policy of apportioning the size of their seats to the average size of passengers, the seating facilities on any new aircraft will coincide with this reduction. This results in a pattern of body weights reducing the size of aircraft seats – the '*aggregate*' framework. If we consider Izzy being required to purchase an extra seat, we can see that the reason she has to do this is a conjunction of her own eating preferences and also the social decisions of many other people. This not a state of affairs that anyone is aiming to bring about: no one is trying to make it the case that some will have to purchase two tickets – this is just an unintended result of many different independent decisions.

How should we think about these types of social accumulations in relation to luck? At the onset of this chapter, I suggested that I would offer a conception of socially constructed luck. I would now like to take steps towards fleshing out this conception. My hope is that socially constructed luck will offer a plausible way of conceiving luck that connects an individual to social accumulations. Importantly, I am not rejecting brute or option luck. I will eventually show that both categories contain important features that

distinguish them from socially constructed luck and will thus be included in the luck egalitarian framework that results. My claim, rather, is that many consequences that have typically been attributed to brute and option luck need to be re-classified into this new category.

5.5 Socially Constructed Luck

I propose that socially constructed luck is constituted by the separate, uncoordinated activities that we all engage in when we exercise our moral rights in the pursuit of our own conception of the good life. It is a *hybrid* account that shares some of the central features of *both* brute and option luck. For example, it arises when a person is exposed to a choice that he or she cannot reasonably avoid (we cannot avoid making choices about how to exercise our moral rights). This is conjoined with the fact that – as with option luck – the choices people make will also be voluntary and performed with adequate knowledge of the situation. It can also be noted that socially constructed luck will impact differentially on different people: it will advantage some and disadvantage others. More precisely, what a category of socially constructed luck captures is the way in which our innocent decisions can drastically shape our own lives and also the lives of others. When we choose to exercise our rights and pursue our own conceptions of good – to value certain qualities in people, to choose a particular career path, to purchase certain goods, to become a stay-at-home mum, to practice a religion, to move country, to marry, to diet, to vote – we can put the lives of others on the balance. For our decisions will accumulate and form – as with brute luck – a circumstance imposed on others. This, in turn, will distribute benefits and burdens and will influence the holdings that people are able to acquire, which, for some, can mean poverty and desperation.

Drawing on the work of Rawls, Cohen and Margalit, I suggest that there are seven key features that distinguish socially constructed luck: (1) as previously mentioned, socially

constructed luck involves a lack of reasonable alternative but this situation does not involve wrongdoing; (2) socially constructed luck involves a social accumulation of many individuals making choices about how to exercise their moral rights and liberties in pursuit of their own conception of the good; (3) the choices people make within the accumulation are ordinary and involve morally accepted courses of action; (4) the choices people make are voluntary and performed with adequate knowledge of the situation; (5) the distribution of benefits and burdens that derive from socially constructed luck will be influenced by how people within the social accumulation decide to exercise their moral rights; (6) those involved in the accumulation will not be intending to influence the distribution in this way i.e. there will be no centralised decision or explicit agreement to produce an ultimate overall outcome, instead the accumulation consists only in the private intentions, preferences and actions of participating individuals; (7) the good and bad fates that result from socially constructed luck may be out of proportion to the voluntary choice for which a person can rightly be held responsible.

I suggest that each of these features must be present if a situation or event is to be characterised as socially constructed luck. The first feature is that socially constructed luck can involve a lack of reasonable alternative, but I *deny* that this lack of alternative is unjust. More precisely, if we consider the physical conditions in which we are all born, we know that our survival requires that we breathe, eat, drink and keep our body at a constant temperature. When we exercise our moral rights and make decisions about such matters we do so because the alternatives of suffocation, starvation, thirst and hypothermia are unreasonable and lead to loss of life. Equally, when people exercise their rights and make decisions about whether to earn a living or whether to care for one's children we also lack a reasonable alternative. This is because not earning a living will often lead to starvation, thirst, hypothermia (if one cannot obtain clothing or a place to

live), and loss of life. Similarly, not taking care of one's children can subject them to various degrees of harm.³⁴ Exercising our rights and making decisions about these matters is both necessary and functional because it constitutes part of our own and our family's well-being and survival. Thus, we might say that an alternative is unreasonable when it results in a serious amount of harm that can affect a person's survival. The tragedy and finality associated with loss of life forms a very real and universal constraint that is entrenched within our psychological make-up. It is the overwhelming finality associated with loss of life that constitutes an unreasonable alternative and allows us to draw a line around these types of constraint.

We can also note that individuals cannot reasonably avoid making choices about how to exercise their moral rights and liberties. Although these choices are not compulsory in the strong sense, they are fundamental if we are to pursue their own diverse plans of life i.e. if we are unable to choose how to exercise our liberties then we will be incapable of forming, revising, and rationally pursuing our own conception of the good.³⁵ Indeed, not being free to exercise our liberties causes injustice. The life of a slave will obviously be restricted in this sense, but so too will people born into a cult or a politically oppressed state. A person's liberty will be restricted if she is born into a patriarchal society and denied access to certain educational or careers opportunities or if she is unable to determine her sexuality, career, alcohol consumption, how to raise her child, what foods to consume, what clothes to wear, what religion to practice, and so on. We might therefore say that an alternative is unreasonable if it is liberty restricting whereby individuals are unable to pursue their own conceptions of the good and exercise liberties such as freedom of thought and liberty of conscience (moral freedoms such as sexual, ethical, and religious freedom), political liberties and freedom of association, as well as

³⁴ This is on the assumption that others will not intervene in these matters.

³⁵ This accords with liberal principles, particularly those of Rawls, *Political Liberalism*, pp.54-61.

freedom covered by a right to hold property.³⁶ Exercising these liberties is fundamental to all liberal accounts and a salient feature of John Locke's view when he asserts that an individual has '...a Liberty to dispose, and order as he likes, his Person, Actions, Possessions, and his whole Property, within the Allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own'.³⁷ Because exercising our rights is *equally* unavoidable and functional *for everyone*, then it seems reasonable to assume that there can be no wrongdoing or injustice in the background. In Rawls's words, if some situation is 'unalterable... the question of justice does not arise'.³⁸

Note here that a standard luck egalitarian framework would not cover socially constructed luck, given its focus on brute luck. On this view, an outcome is unjust because it *arises* from an unjust disadvantage. More specifically, the principal injustice lies in the background. So, luck egalitarianism puts redistributive policies in place that seek to level the playing field. The idea is that if we all start off with equal opportunities then what results will be just and fair because it derives from the choices we make. *By contrast, socially constructed luck does not involve wrongdoing and there is no injustice in the background.*

The second feature is that socially constructed luck involves an accumulation of individuals, each exercising their moral rights according to their diverse tastes and preferences in the pursuit of their own conceptions of the good life. Whilst regulation of our tastes and preferences is formally possible, it is also unreasonably costly in the sense that it would go against the very bulwark of individual freedom. The factors that give rise to socially constructed luck therefore involve moral rights that we cannot avoid

³⁶ This list of basic liberties is mostly drawn from Rawls, *Political Liberalism*, p.291 and Hart (1973) 'Rawls on Liberty and its Priority' p.541.

³⁷ John Locke, *Second Treatise of Civil Government*, ed. Thomas I. Cook, (New York: Hafner, 1980), p.57.

³⁸ Rawls, *A Theory of Justice*, p.291. Most notably, Rawls makes a strong analytic link between injustice and wrongdoing.

exercising, but also regulating how people exercise these rights ought to be eschewed if a society is committed to upholding individual freedom.

The third feature specifies that socially constructed luck involves ordinary, morally acceptable courses of action. This contrasts with brute luck which is the interruption of normal and expected course of events. For example, if a person is unexpectedly struck by a meteorite or is a victim of a rights violations such as a robbery, this deviates from the norm (and in the case of rights violations the moral norm) and the person is considered a victim of bad brute luck. By contrast, socially constructed luck involves normal, everyday courses of action that almost every person instantiates or is reliant on others who necessarily instantiate.³⁹

The fourth feature is that the choices people make are voluntary and performed with adequate knowledge of the situation. More specifically, the choice will follow from an individual's minimally competent exercise of her deliberative capacities and the individual will not be radically deceived about the consequences of the choice. This makes a difference to the voluntariness of the action – it is the same sense in which we often make decisions in accordance with our preferences.

This fourth feature closely connects to feature five. What is important here is that the benefits and burdens that result from people's choices are influenced by other people's preferences and the way in which others choose to exercise their moral rights. For example, if I am a top model, my success might seem to come about because of my inherited looks and I might rightly believe that my choices are a contributing factor – my choice of career, to control my diet, to exercise regularly etc. – and yet I know that the preferences of my contemporaries matter greatly because it is the aggregation of their

³⁹ So in Izzy and Fran's cases we might say that making decisions about diet or childcare are actions that every person necessarily instantiates or is reliant on others who necessarily instantiate or have instantiated.

subjective preferences that determines my fortune or misfortune. People's preferences regarding whether I have beauty, a certain edge or physical appeal can make all the difference: take this spillikin away from my genetics and personal choices and my success will fall. Thus, there is an extent to which my success as a model is at least partly the collective reflection of everyone's permissible choices. If lots of people – other than me – were suddenly (and permissibly) to decide that I was not very attractive, my career would plummet. In socially constructed luck terms, this would be a piece of bad socially constructed luck for me. Likewise, if I own a coffee bean farm and lots of people suddenly (and permissibly) decide not to drink coffee, then my crop price would collapse: if lots of people suddenly (and permissibly) have a penchant for the coffee bean I have harvested, then my crop price would soar. Again, it might seem that all of my fortune or misfortune has come about because I chose to own a coffee farm, and I might rightly believe that my choices are a contributing factor – it was my choice to cultivate a particular bean, water the crop regularly etc. – and yet I can see that there is an extent to which my luck here is socially constructed: my luck is also the collective reflection of everyone's (permissible) choices operating within the social practice of market purchasing.

The sixth feature specifies that socially constructed luck consists in the private intentions, preferences and actions of participating individuals i.e. there will be no centralised decision or explicit agreement to produce the effects that derive from socially constructed luck. If the actions were intentionally coordinated (and other relevant conditions met) then those involved in the process would form a coordinated collective agent which is morally/causally equivalent to those of a single person's actions. Co-ordinated collective actions – like boycotts or surprise birthday parties – are not the kinds of socially aggregated actions that Rawls, Cohen Ullmann-Margalit have in mind.

The final feature of the concept is that the good and bad consequences that result from socially constructed luck may be out of proportion to the voluntary choice for which the person who incurs that luck can be held responsible. For example, in the original cases Izzy and Fran end up living in poverty and desperation. What is relevant here is the degree to which their agency can be tied to or implicated in the consequences of their choice. Whilst these negative effects do partly derive from their voluntary choice, it is important not to lose sight of the fact that the situation also partly derives from the cumulative interactions of others.⁴⁰ To the extent that the outcome is not all down to Izzy and Fran and to the extent that they could not reasonably avoid these actions, it follows that holding Izzy and Fran fully responsible for the end result would be disproportionate to the voluntary choice they made.

At this point, luck egalitarians may still want to insist that an extra category of luck is completely unnecessary. Surely, they would say, this needlessly complicates how we understand luck? Some may continue to think that this state of affairs can be attributed to pure option luck. When Izzy and Fran make their initial choices (to take a child related career break/ to sample local cuisines) there is no brute luck in the background. Thus, what I am describing does not appear to be relevantly different from the National Lottery. This is also a social construct; when people play it voluntarily and some win while others lose, this surely is just plain option luck. So being a social construct does not, necessarily, take my cases out of the category of option luck. On the other hand, others may still think that what I am describing is just plain brute luck. They might query my claim that ‘background justice’ is something that should be assessed only at the very beginning of a whole series of plays, rather than at the beginning of each round in the game. The

⁴⁰ Symmetrically, in the positive pair of cases, both end up living prosperously. Again, these consequences will also derive partly from their choice and partly derive from the cumulative interactions of others.

situation people are in at the beginning of each round is the background against which they play that round. Although Izzy and Fran's resulting background may have come to be what it is through the innocent preferences of others, this background can still be considered unfair and something that luck egalitarians might want to correct deeming it bad brute luck. However, as I will argue, the application of brute and option luck to these cases does not work.

To begin, features such as an equal starting point, a voluntary choice, combined with lots of people doing their own thing – making ordinary, morally permissible choices – explain why one might be tempted to describe these cases as option luck. Both Izzy and Fran made voluntary choices using their deliberative capacities. Izzy wanted to sample lots of cuisines. Fran very much wanted to have a career break so that she could care for her young child. It might seem that the relevant counterfactual that needs to be considered here is one where Izzy and Fran do not put themselves in a disadvantageous position. Thus, some may think it is a mistake to describe this state of affairs as anything other than option luck. Sure, Izzy and Fran's situations may have been partly caused by the accumulative actions of others, but this not sufficient to let Izzy/Fran off the option luck hook because they could have foreseen the misfortune that awaited them. Given that they rejected the reasonable alternatives they had – alternatives to eating lots of cuisine/personal caring – their situation might be thought to be attributed to option luck. This kind of analysis is oversimplified. To describe these cases as option luck is to overlook half their nature. What is relevant is the degree to which Izzy and Fran's voluntary agency is tied to the consequences of their choice. Whilst these consequences do partly derive from Izzy and Fran's choice, they are also sensitive to the discrete preferences and plans of others exercising their rights i.e. Izzy and Fran are less than fully responsible for the outcome that results because the changeable tastes, plans, and

ambitions of others causally interact with their particular choices. Among the effects of many individuals exercising their rights and pursuing their own conceptions of the good are not only physical disadvantages, but also an increased risk that individuals can suffer such disadvantage. Sudden changes in individual preferences are difficult to predict and may only be known in a society by ex-post aggregate statistics, if ever. Hence, because the outcome involves other people's preferences which are difficult to avoid and predict *ex-anti*, Izzy and Fran's capacity to avoid risk is thwarted. Classifying these cases as pure option luck should be ruled out.

Moreover, the claim, that Izzy and Fran's cases appear to be no different from playing the National Lottery is vulnerable to the straightforward reply that the outcomes of the National Lottery are instances of option luck. The multi-person actions that bring these outcomes about are collectively co-ordinated ones, performed by persons who consciously intend that there will be winners and losers and who can, in the overwhelming number of cases, predict their own outcomes: namely, losing. Lotteries are definitely *not* invisible-hand cases.

It might still be replied that there is no relevant difference between Izzy and Fran's cases that I have been describing and more generally cases involving plain brute luck. On this view, whether or not injustice exists in the background is beside the point because we can still think of these types of accumulated preferences as a brute luck intervention. It really doesn't matter from a luck egalitarian perspective whether Izzy missing her plane or, Fran losing her home is caused by a freak meteorite or by a great many people permissibly exercising their rights, the luck egalitarian point would remain; this is still bad brute luck which ought to be extinguished.

There are two fundamental difficulties, however, in classifying these cases in terms of brute luck. First, unlike typical instances of bad brute luck (falling meteorites, freak

lightning bolts), which involve an interruption in the predictable course of events, socially constructed luck involves people exercising their rights in ordinary, morally permissible ways. If luck egalitarians are to respect the idea that people should be free to pursue their own conceptions of the good life, then neutralising the constraining effects of persons' exercising their rights, by preventing those exercises in the first place, is not an available solution.

The second difficulty is that the current luck egalitarian framework struggles to make sense of the cases I am classifying as socially constructed luck because we cannot use counterfactuals as a tool with which to neutralise the effects of other people's permissible choices. The application of brute luck to these cases renders compensation indeterminate. Unlike typical instances of brute luck 'unavoidable falling meteorites' etc., we cannot easily read backwards and establish how much better off you would have been had others had different preferences and exercised their rights differently. Because there are so many diverse ways that people may have exercised their rights the extent of an individual's socially constructed luck disadvantage is extremely difficult to evaluate. For example, suppose that Izzy's intended plane and Fran's home are unexpectedly destroyed by a meteorite – Izzy can no longer catch her flight and Fran loses all of her possessions. To identify bad brute luck, luck egalitarians use a counterfactual as a tool with which compare Izzy and Fran's situation with a normal state of affairs in which a meteorite does not feature. It is this type of counterfactual assessment which provide luck egalitarians with a tool to analyse and recompense brute luck disadvantage.⁴¹ However, we cannot similarly neutralise the effects of people's preferences because preferences are not something that can be assessed counterfactually. In Izzy and Fran's original examples, both are subject to disadvantage for which they cannot fully be held responsible; had

⁴¹ For an account of counterfactual analysis see David Lewis, *Philosophical Papers*: Vol 11. (Oxford: Oxford University Press, 1986) pp.556-567.

others exercised their rights in a different way then both would have come away with a better deal. How do we calculate this arbitrary disadvantage? There are many different ways that other people might have exercised their rights and, depending on which of these patterns is picked as the relevant comparison, Izzy and Fran might have confronted very different situations. In Izzy's example, Izzy needs to purchase an extra seat on her return flight due to her weight gain. Let's say the extra ticket costs £800. If others had exercised their rights differently – had alternate preferences – then Izzy presumably would not have had to pay this sum. How much less she would have had to pay depends on which counterfactual we imagine. There might be counterfactual 1, where air travel suppliers provide large seats at no extra cost, counterfactual 2, where they provide extra large seats for £50, counterfactual 3, where the extra ticket costs £1500, and so on. Similarly, in Fran's case, Fran cannot find employment or afford to pay her rent. Had others exercised their rights differently – had alternate preferences – then Fran would have had a job and would presumably not face eviction. Again in order to know the extent of Fran's socially constructed luck disadvantage, we need to decide which counterfactual we are comparing it to. Counterfactual 1, where she gains employment and is able to pay her rent? Counterfactual 2, where she gains low paid employment and is only able to afford cheap bedsit accommodation? Counterfactual 3, where she lands a job as a CEO and can afford to buy her own home? And so on. We can confirm that someone is less than fully responsible for the outcome that results in these type of cases, but we cannot determine, in an appropriately systematic way, what is the most likely counterfactual world, given the amount of people who contribute to socially constructed luck and the difficulty of imagining them without such preferences.

A brute luck defender might argue that it is still possible to classify these cases as brute luck. In cases where we cannot establish the extent of brute luck advantage or disadvantage then luck egalitarianism requires equality of outcomes i.e. we equalise the

result of many of our everyday decisions and activities – including the vast number of commercial exchanges and activities that take place in the market. This brings us to a further difficulty. These cases involve individuals making decisions about how to lead their own lives and pursue their own conception of the good. If individuals are to be considered free in this sense – and if this right is to have any meaning – then we must think that people can be held responsible, at least to some extent, for the consequences of these decisions. Otherwise, such a right becomes futile. The flipside of freedom and pursuing a conception of the good is responsibility and the idea that we can be held responsible for the consequences of our choices. That luck egalitarianism is interested in making the appropriate connection to our responsibility is part of what makes the theory appealing. However, a commitment to neutralising the effects of all our decisions, ambitions, and preferences – which is what equalising outcome would do – would diminish our responsibility to the point of non-existence and we lose the value of freedom. These problems, by my lights, raise the likelihood of a conceptual gap and open the way for socially constructed luck.

5.6 A Conceptual Gap

So far, I have argued that luck egalitarians cannot make the relevant normative distinctions between brute luck and option luck when we consider an accumulation of people freely exercising rights and pursuing their own conception of the good. These cases are special because while they embody elements of both option luck and brute luck, they are not fully reducible to either one of them. When assessing these cases, the existing counterfactual methods struggle to determine the benefits and burdens that it is appropriate for an individual to bear as a result of her own personal choice. Other people exercising their moral rights also fix these outcomes, but we are typically unable to assess

ex post how the individual would have fared if others had exercised their rights differently. Because we cannot pick out a baseline, the extent of socially caused disadvantage is indeterminate.

Socially constructed luck is partly other-caused and also partly self-caused: it is this conjunction that makes socially constructed luck possible and distinctive. The category offers a way for luck egalitarians to conceive luck that derives from an individual but also from the permissible tastes and preferences of others. It is important that luck egalitarians draw a line around these types of cases and say that a person *is* responsible for his or her resulting fortune or misfortune, but this responsibility is mitigated insofar as he or she cannot be responsible for all of it.⁴²

I will say more about how this mitigation might be applied in section 6.5 of the following chapter, but for now it is important to note again that I am not rejecting brute or option luck. Both categories contain important features that distinguish them from socially constructed luck and will thus be included in the luck egalitarian framework that results. My account calls for a division of labour between three categories of luck. Socially constructed luck is luck that is generated by people exercising their rights according to their diverse tastes, ambitions and preferences in the pursuit of their own conceptions of the good life. It applies to the choices people make within a just framework whereby the choices of others (when freely exercising their own rights and liberties) also serve to fix the outcome that results. This contrasts with option luck which, I suggest, involves an intentionally coordinated collective action, or not been produced by the actions of others at all. An example is an individual who chooses to live alone on a self-governed plot of

⁴² Mason argues against the luck egalitarian idea that justice requires us to neutralize the effects of people's circumstances, and holds that it requires us to merely mitigate these effects to prevent them from having an undue impact upon people's relative access to advantage. See Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Place in Egalitarian Thought*, pp.90-111.

land. *If* the individual had the option of membership in political society – on equal terms with the other members – then the benefits and burdens that derive from this decision (excluding any unforeseeable externalities) can be classified as option luck and something for which the individual can be considered consequentially responsible. The outcome in such a case is too disconnected from the social and this difference, I claim, helps to distinguish this as an instance of option luck. I think option luck also involves luck relating directly to rights violations whereby a person deliberately and non-consensually moves another from a status quo to an alternate situation in which she is worse off (subjecting a person to harm such as torture, rape, assault, robbery, racial and sexual discrimination etc.). In this case, the individual who inflicted the harm/made another worse off is responsible for the consequences of her actions (has a duty to compensate those she harms, or is liable for punishment etc.).

An implication of this position is that many instances typically thought of as option luck will become instances of socially constructed luck on this framework: undertaking a caring role, driving, the jobs we apply for, the salaries we earn, and so on. It follows that if a category of socially constructed luck justifies mitigation, then individuals will not be held fully responsible for the negative consequences that result from these kind of decisions. And if the victims are not fully responsible for the negative consequences of these decisions, then they will not be abandoned on a luck egalitarian framework. Thus, the abandonment objection will not apply to them.

Brute luck, I suggest, involves luck caused outside of the social sphere. On this construal, brute luck includes things that have not been transformed by people. Things like tornados, earthquakes, volcanos, falling meteorites, gamma radiation, fertile land, minerals, and wild animals. Since these are natural forces and are not something for which any person can be held responsible, then the benefits and burdens generated by this kind

of luck should be shared amongst everyone in some egalitarian sense.

An implication of this position is that many things that have typically been thought of as brute luck will be reclassified on this framework. Recall that Anderson and Scheffler admonish luck egalitarians for being consumed with extinguishing the effects of brute luck. Anderson argues that because luck egalitarianism considers the elimination of brute luck to be the purpose of equality, luck egalitarians must absurdly compensate ugly people who are unhappy with their appearance, perhaps in the form of public provisions for plastic surgery.⁴³ However, being unhappy with our appearance is not a matter of brute luck on the framework I am proposing. If we are disadvantaged in society (unable to secure employment etc.) as a result of physical characteristics such as ugliness, then rectification is required. Rectification will be examined in more detail later in Chapter 6, in the discussion of exploitation. However, it is fundamental that we pay attention to how this disadvantage came about. This will only be a matter of socially constructed luck if the disadvantage arises indirectly, as a result of an accumulation of people pursuing their own conception of the good. If the disadvantage involves people acting wrongly – intentionally discriminating against the ugly, then the case is a matter of option luck whereby the individual(s) who inflicted the harm is to be held accountable (has a duty to compensate those she harms, or is liable for punishment etc.).

5.7 Conclusion

To conclude, unlike traditional luck egalitarianism, I have argued that the concept of luck can be classified in terms of brute luck, option luck, and socially constructed luck. Putting matters this way, renders judgements concerning luck and responsibility capable of being

⁴³Anderson, 'What is the Point of Equality?' p.335. See also, Scheffler, 'Choice, Circumstance and the Value of Equality' pp.22-23.

made more accurate. By taking into account what Ullmann-Margalit (and others) refer to as an invisible hand process, what Rawls calls background justice, and what Cohen identifies as an aggregation problem I have explicated how socially constructed luck can arise from an initially just state and is constituted by the separate, uncoordinated activities that we all engage in when we exercise our moral rights in pursuit of our own conception of the good life.

In the next chapter, I will show that socially constructed luck can be viewed as especially significant because it generates vast inequalities of wealth, income and power. This, in turn, weighs heavily on those who are subject to its negative effects and left in a restricted choice situation. I will argue that unless this type of luck is offset, exploitative interactions can arise where people fail to respect others as they will be able to use another's lack of reasonable alternative as an opportunity to advance his or her own interests. What is fundamental is that this type of exploitation arises from just conditions, through a process of people freely exercising their moral rights. These interactions are morally defective irrespective of whether they involve sexual, reproductive or any other kind of contract. And even if an intention to degrade or disrespect another is not involved, we would still have reasons to say the situation was one of exploitation

Exploitation and Socially Constructed Luck

6.1 Introduction

The task of the present chapter is to explicate how the negative effects of socially constructed luck can produce manifest injustices. In particular, when a social accumulation results in poverty and desperation it can create a situation where people will have no reasonable alternative but to accept an offer that is open to them. These types of exchanges, I argue, cohere with the structure of an exploitative interaction. My underlying aim is to show that there is another type of exploitation – a type that can develop from a perfectly just background when everyone is acting within the bounds of their moral rights. What emerges is the idea that it is possible for us to bring about exploitation indirectly, when no intentional wrong doing takes place and we are not individually engaged in morally impermissible steps. Admittedly, it seems a little odd to say that morally permissible actions can result in exploitation. Nevertheless, my aim is to show that it is important that we broaden our understanding of the concept.

I proceed as follows. In section 6.2, I consider the surrogacy cases we discussed in Chapter 1. I argue that exercising our moral rights and acting in morally permissible ways can reduce and restrict the ability of others to make choices in exactly the same way as rights violations. This process helps us to understand how socially constructed luck can give rise to exploitation. In section 6.3, I tease out the implications of the argument I develop from Rawls and Cohen and suggest that the injustice that Rawls's principles of

justice (and the primacy of the basic structure) and Cohen's patterned principles is meant to overcome is one of exploitation. In section 6.4, I argue that transactions should not be forbidden on exploitation grounds. A careful examination of the structure of exploitation, and the various motivations that account for why exploitation is wrong, reveals that if a state prohibits an exploitative exchange then it will systematically reinforce the wrong that it aims to avoid. I conclude, in section 6.5, by defending a basic right to a reasonable alternative. This will be fleshed out as an economic right to a guaranteed minimum income package. This package provides individuals (rather than households) with a bundle of socioeconomic advantages to help in preventing people from taking control of others and trusts people to make their own decisions.

6.2 Back to India

Exploitation, recall, involves a *bilateral exchange* that is *mutually beneficial*, *consensual* but, nevertheless, *morally defective* in some respect. The aim for the exploitation theorist is to identify the defective property that makes a mutually beneficial and consensual exchange exploitative. This provides the exploitee with a moral basis for complaint and the permissibility of the exchange becomes subject to question. The purpose of this chapter is to show that the conditions for exploitation can develop from a just situation even though no one intended it or tried to bring it about, by a process in which everyone is exercising their moral rights. To better understand my proposal let us return to the issue of gestational surrogacy contracts discussed in the opening chapter.

Surrogacy. Consider a slum area in Gujarat, India. People here are very poor, living in dilapidated housing with inadequate sanitary facilities. Many are poor because of exposure to extreme weather and natural disasters. Others are also poor because their caste or ethnic group has been subject to long-standing historical injustice. A great many women are illiterate and relegated to unclean or menial jobs for very little pay. Now,

suppose you set up a business offering these women food and decent shelter on the proviso that each signs an agreement allowing the use of her body for surrogacy. Desperate Narula and her daughter are living in this wretched landscape: Narula therefore steps forward and agrees to your company's conditions. As a result, your company is able to make a sizeable profit as you rent out the use of her womb.¹

This case is designed to show three things. First, this agreement is mutually beneficial as your company is also offering to benefit Narula: her circumstances will be much improved by accepting your proposal. Second, Narula will be consenting to your offer. She would rationally prefer to move from the pre-proposal situation in which she and her daughter suffer from destitution and poverty to the proposal situation in which they are spared such hardship. Third, there is something morally amiss in the background that allows exploitation to occur. Your company is able to extract better terms from the agreement because some kind of historical injustice has deprived Narula of other reasonable options. Let us now consider two further cases.

Izzy and Fran. As we saw in Chapter 5, Izzy and Fran are victims of the negative effects of socially constructed luck. Izzy no longer has the opportunity to eat, drink, find shelter, or return home without the assistance of others. Likewise, Fran cannot find employment and faces eviction. So, let us imagine that Izzy signs a contract with Eric where she commits to working long hours in his sweatshop factory in exchange for food and basic shelter. Let us also imagine that Fran's only option to pay her rent is to strike a deal with her landlord, with whom she agrees to a usurious loan rate. Because their situations are

¹ The women who enter into surrogacy contracts in India are typically very poor, uneducated and live in slum areas with inadequate housing and sanitary facilities. The need for money is also deeply felt because many surrogates have a young family of their own. Kumari, 'Surrogate Motherhood - Ethical or Commercial' pp.28-29, p.41, p.42.

so desperate, neither can reasonably refuse Eric and the landlord's offers. Eric and the landlord then use Izzy and Fran's dependency as leverage to secure benefits from them.

Izzy and Fran's restricted situation emerged from a just process of people innocently exercising their moral rights and liberties. Nevertheless, I think this process has helped to create the conditions for Izzy and Fran's exploitation. Notice, that when Eric and the landlord make their offers, the structural features of Izzy and Fran's option set are equivalent to those of Narula in the surrogacy case. The way of understanding this is as follows: first, these interactions involve a mutually beneficial exchange – Eric gains labour/the landlord gains financial benefits while Izzy receives a job/Fran receives shelter. Second, Izzy and Fran choose to enter these contracts, to the extent that they prefer to move from the pre-proposal situation in which they cannot satisfy their basic needs to the proposal situation in which they can be spared such hardship. And finally, it is the social activity in the background that allows exploitation to occur. In freely exercising their moral rights and liberties, people have contributed to the creation of restrictive conditions where Izzy and Fran cannot reasonably refuse a transaction. Notice that in Narula's case, past injustice (her caste being historically subjected to long-standing abuse) constricted her choices leaving her with no reasonable alternative to surrogacy. What I want to emphasise here is that people exercising their rights can play essentially the same role. In the examples, an accumulation of people exercising their rights effectively constrains Izzy and Fran's choices leaving them with no reasonable alternative but to enter a transaction with Eric and the landlord.

Recall from Chapter 5 that I argued that an alternative is unreasonable if individuals lack basic goods that are necessary for survival (food, water, shelter) or if it is liberty restricting whereby individuals lack a fundamental liberty that is necessary for pursuing their own conception of the good (such as freedom of thought, freedom of association, the liberty

to trade and dispose of one's property). We might think of these fundamental liberties and basic survival goods in terms of *positional goods*. Positional goods have a zero-sum aspect; the mere fact that some have more worsens the absolute position of those who have less.² When it comes to striking a deal, there are two important things that affect how much people will take away from the agreement: (i) their stock of 'positional goods' and (ii) their bargaining power. Bargaining power is a function of risk aversion: of how long persons are willing to hold out for a favourable deal. Clearly, people will have strong bargaining power over the victims of socially constructed luck and the victims of rights violations. This will certainly be the case if a person's stock of positional goods has been reduced to such an extent that they face the prospect of severe hardship. In such instances, people's misfortune becomes an opportunity for others to advance their own interests and direct the terms of an exchange.

When we apply this analysis to Narula's case, we can see that past injustice and rights violations have limited her stock of positional goods to such an extent that she has no reasonable alternative but to enter a surrogacy contract. In the cases involving Izzy and Fran, their stock of positional goods depends upon how people (both themselves and others) chose to exercise their rights. When employers decide not to hire former stay at home mums and when air travel suppliers determine their seating arrangements, Izzy and Fran's stock of positional goods is significantly reduced. Thus, we can see that people exercising rights and people violating rights can equally limit a person's positional goods. Importantly, when this happens, the cases share the same wrong-making feature. First, because these positional goods are so beneficial, it puts others (who have control over the positional goods) in an unearned position of power over the lives of others. The

² Harry Brighouse and Adam Swift, 'Equality, Priority and Positional Goods' *Ethics* 116 (2006), pp.471-497. For example, Brighouse and Swift argue that the value of our health depends on how healthy other people are. This is because fit and healthy people are more likely to succeed in competition for jobs and other scarce goods. 'In the land of the blind, the one-eyed man is king.' *Ibid.*, p.479.

reason why these bargaining positions are unearned derives from the fact that if other people had not committed rights violations or if other people had exercised their rights differently, then victims would not be required to enter into these extortionate deals.

On the approach I am suggesting, then, there are two ways in which exploitation occurs. The first has past injustice and rights violations in the background whereas the second has a just background and people exercising their rights. In the case of background injustice, exploitation can occur when rights violations create restrictive conditions. What is wrong in such cases is that people have no reasonable alternative but to accept particular arrangements: the fact that A is in a restricted position allows B to extract unjust terms that A would not have contemplated accepting were it not for her diminished circumstances. Thus, the restricted position enables the unjust treatment of A by B . Importantly, what B takes away from the agreement will, to a certain extent, be unearned because his positional advantage is not of his own making (either by merit or effort). Instead it derives from A 's lack of a reasonable alternative for which he can take no moral credit. This is because A 's restriction derives from a prior injustice. Although B is not responsible for A 's restricted circumstances, he is able to direct the terms of the agreements in light of this factor. This provides a basis for arguing that B is not fully entitled to the deal he is able to secure. So we might say, in effect, that *since* the prior injustice produces the unjust surplus that B appropriates, then in order to make this unjust surplus disappear we need to rectify the background injustice. This would prevent the unjust treatment of A by B and prevent that which allows the unjust extraction to occur.

My point is that effectively the same thing can happen even though we have a just background. Exercising our liberties (pursuing our own conception of the good) can, over time, restrict the choices of others leaving some people with no reasonable

alternative but to enter certain agreements. And this equally plays a direct role in privileging some individuals at the expense of others. Situations can emerge where one party cannot reasonably refuse or walk away from a transaction. This enables the unjust treatment of some by others. The interaction is morally defective because a surplus benefit is being taken from someone who cannot reasonably refuse the contracting party's offer.

Using this framework, we can trace exploitative interactions in the market and political society, but it is not restricted to cases in which the goods and services being exchanged have a market value. Indeed, the framework can extend and allow us to identify exploitation in relations such as the family. Consider an example I used earlier which concerned a couple who produced a second baby, Mia, so that their first born child, Molly, could receive a bone marrow transplant. Years later Mia becomes something of a bespoke harvest for her sister's illness: each time Molly's illness resurfaces she asks her sibling to enlist as a donor. Notice that the structural features of Mia's option set are equivalent to that of Izzy and Fran. First, the arrangement involves a bilateral exchange. Molly receives bone marrow, a kidney, lymphocytes, platelets, blood, and stem cells whilst Mia secures a greater amount of love, affection and gratitude from Molly and her family. Second, the interaction is mutually beneficial: Molly will be saved and Mia keeps a much-loved sister. Third, Mia will genuinely be consenting to the procedures. She would prefer to move from the pre-proposal situation in which she faces her sister's death to the proposal situation in which she is spared such anguish. Finally, it is the actions in the background that allow exploitation to occur. In exercising their rights and surrounding Mia in a loving family structure, her parents have created conditions where it is very costly for her to refuse to go ahead with the operations. Just as rights violations can restrict a person's choices, the behaviour of our intimates can play the same role. In Mia's case, her parent's behaviour effectively constrained her choices leaving her with no

reasonable alternative but to save her sibling. Somewhat bizarrely, had they failed to be such good, devoted parents (perhaps subjecting her to rights violations and the like) then she might not have been inclined to donate. So we can see that Mia has been constrained as a result of her parents exercising their liberties and surrounding her in a loving family relationship. And although Molly is not responsible for Mia's restricted situation, she is able to secure benefits (a kidney, lymphocytes, platelets etc.) in light of this factor. What this suggests is that family relationships can be exploitative when one is conditioned through a loving environment and intimacy to accept large sacrifices for one's loved ones and one does not see oneself has having other reasonable options.

In some cases, the surplus extraction on this framework will be deliberate. Parties entering exchanges with the victims of socially constructed luck will be intentionally treating the victim's poor circumstances as an opportunity to extort benefits. In these types of situations, people will be degrading victims of socially constructed luck and treating them with less than the full respect they deserve. In other cases, the exploitation will remain latent. Features such as a voluntary choice, interacting with an accumulation of lots of people exercising their rights and making ordinary, morally permissible choices can lead us to attribute full responsibility for an outcome to the individual who made the voluntary choice. In other words, people might fundamentally believe themselves to be fully responsible for the positional goods with which they have been bestowed. In these types of instances, the misconceptions surrounding responsibility conjoined with the benefit that is transferred to the victim (access to shelter, an income etc.) can conceal the injustice that underlies people's actions. In these cases, the victims of socially constructed luck will unwittingly be treated, or will let themselves be treated with less than the full respect they deserve.

So what we can see are bilateral interactions that are mutually beneficial, consensual but,

nevertheless, morally defective. On this '*Socially Constructed Luck Approach*', an individual: (1) suffers positional disadvantage as a result of socially constructed luck (people freely exercising their rights and pursuing their own conception of the good); (2) ends up at the short end of the distribution of positional goods; (3) has no reasonable alternative but to enter an exchange; (4) is subject to terms of an exchange directed by another. Features (1) – (4) mean that a person becomes a kind of bonanza for others. The fact that he or she cannot reasonably walk away from an interaction or deal gives other people leverage and allows them to secure surplus benefits. So, within this framework, I am saying that the morally problematic feature of exploitation lies in the extraction of an unjustified surplus (unjustified on the grounds that it is unearned) from someone who cannot refuse an offer. These interactions are morally defective irrespective of whether they involve sexual or reproductive contracts. Even if an intention to degrade or disrespect another is not involved, we would still have reasons to say the situation was one of exploitation. What is fundamental for my argument is that this type of exploitation can arise from just conditions, through a process of people freely exercising their moral rights.

What we can now see (if we apply a slight variation) is that this model can also apply to victims of option luck. For example, let us consider the individual who chooses to live alone on a self-governed plot of land. Let us imagine that he goes out hiking, trips, and falls into a crevasse. As it happens, the individual is carrying a distress flare in his pocket. He sets it off and people living in the neighbouring village come to investigate the situation. Seeing the individual's predicament, they make the following offer: 'Come work in our sweatshop factory and we'll get you out'. If we assume the individual agrees to these conditions, what we also have is a situation in which an individual: (1) suffers positional disadvantage as a result of option luck (he was freely exercising his moral rights and pursuing his own conception of the good); (2) ends up at the short end of the

distribution of positional goods; (3) has no reasonable alternative but to enter an exchange; and (4) is subject to terms of an exchange directed by another. Again, features (1) – (4) mean that the individual becomes something of a windfall for others. The fact that he or she cannot reasonably refuse the interaction gives other people leverage and allows them to secure surplus benefits. And again – just like the cases involving rights violations – we can identify the taking of an unjustified surplus (unjustified on the grounds that it is unearned) from someone who cannot refuse an offer.

This approach not only explains why instances of leveraging are exploitative that occur against a just background, but it also allows us to identify exploitation that derives from long-standing historical injustice. Recall, that the Counterfactual Approach struggles to account for both of these instances of exploitation. With regards to the latter, Cohen, Roemer, and Steiner each hold that exploitation occurs if and only if there exists an unrectified injustice in the history of the exchange that makes one party worse off than he or she would have been. For example, although Narula's case involves historical injustice, exploitation may not be identified – using the Counterfactual Approach – if the past injustice affected the conditions for her conception and she has not been made worse off. For example, if we imagine that Narula's existence is contingent on the unjust conditions (the abuse and discrimination against her caste) under which her parents procreated: had there been a just situation, then the particular cells from which she developed would never have joined and a different person would have come into existence. If we further imagine that Narula does not consider herself to be so badly off that it would be better for her to never have existed, then she is not worse off as a result of a prior injustice. And if Narula is not worse off as a result of a prior injustice, then exploitation does not transpire on the accounts of Cohen, Roemer, and Steiner. The approach I am proposing, however, is not subject to this difficulty. If long-standing

historical injustice has restricted a person's options so that she has no reasonable alternative but to enter a transaction, then exploitation can be recognised. This is because a lack of reasonable alternative can become an opportunity for others to direct the terms of the exchange and secure surplus benefits.

The approach I am suggesting also shows that claims of degradation associated with sexual and reproductive contracts can be attributed to the negative effects of socially constructed luck. Recall from my discussion in Chapter 2, that many women entering sexual and reproductive contracts are, typically, poor, young, and uneducated. It therefore seems plausible that a lack of reasonable alternative will be part of why these women enter such lines of work. It also seems plausible that the lack of reasonable alternative and the degradation associated with these contracts can derive from a previous injustice or the way in which people within society are forming, revising and rationally pursuing their own conception of the good. Importantly, the Socially Constructed Luck Approach not only allows us to explain why the same concerns can be repeated when we see poor, young, and uneducated women entering other types of low-skilled, low-paid employment, but it also allows us to understand why degradation might not feature in sexual and reproductive contracts. For example, imagine a very large number of people decide to have children later in life and this results in a sharp increase in infertility. It is entirely plausible that a sharp increase in infertility might elevate the status of commercial surrogates, particularly if a large number of infertile couples wish to have their own child. If people's values change so that degradation does not apply, then sexual and reproductive contracts would emerge as acceptable.

To conclude this part of the discussion, in order to ground my case that exploitation can emerge via a just process of people exercising their rights it is necessary to apply two criteria to justify an exploitation claim. The first is that an individual cannot reasonably

refuse an offer. This will be the case if the individual lacks things necessary for survival (food, water, shelter) or if the individual lacks a fundamental liberty necessary for pursuing her own conception of the good (such as freedom of thought, freedom of association, the liberty to trade and dispose of one's property). I suggested that we might think of these fundamental liberties and basic survival goods in terms of *positional goods*. When an individual's situation is restricted in the sense of lacking positional goods she can become something of a windfall for others. The second criterion, is that although a person is not responsible for another's restricted situation, she is able to secure surplus benefits (surplus because unearned) in light of this factor. These criteria can be applied to family relationships and can also judge instances of price gouging to be exploitative, even when such instances derive via option luck.

6.3 Back to Rawls and Cohen

In Chapter 5, I considered Rawls's argument from background justice which leads Rawls to argue that special principles are needed to regulate society's basic structure. I also considered Cohen's accumulation argument which leads Cohen to argue for the imposing of patterned principles of justice. I then said that the phenomenon they describe is best understood as a special category of *socially constructed luck*. I have thus far argued that the injustice that emerges from socially constructed luck accords with the structure of exploitation. An implication of my argument, therefore, is that the injustice that Rawls's principles of justice (and the primacy of the basic structure) and Cohen's patterned principles is meant to overcome is one of mutually beneficial exploitation. I have already argued that luck egalitarianism (particularly the accounts of Cohen, Roemer, and Steiner) ought to be understood within the context of exploitation. I think this is also true for Rawls. Specifically, I think that Rawls's justification for the primacy of the basic structure

and the application of his principles of justice is underpinned by ‘*Socially Constructed Luck Exploitation*’. In particular, Rawls argues that an accumulation of individually free and fair transactions and agreements will ultimately erode the background conditions that make free and fair transactions and agreements possible and that distributions may develop whereby some individuals are left with no reasonable alternative but to enter into unfavourable agreements.³

The conditions Rawls is describing cohere with the structure of an exploitative interaction i.e. interactions that are voluntary, mutually beneficial, but nevertheless morally amiss. Within the thesis, I will not attempt to adjudicate between the positions of Rawls and Cohen and how they depart from one another. For the present purposes, I think that important progress can be made by focusing on how the positions converge. What is particularly relevant for this purpose is the fact that Rawls and Cohen suggest that the injustice they are considering ought to be dealt with by the operations of a taxation system, rather than rules of regulation in contract law. Indeed, Rawls states:

There are no feasible rules that it is practicable to require economic agents to follow in their day-to-day transactions that can prevent these undesirable consequences...any attempt to forestall them by restrictive rules that apply to individuals would be an excessive if not impossible burden.⁴

Rawls’s claim lends further support to the idea that the injustice that both Rawls and Cohen are describing is one of exploitation. Indeed, there has been much work within exploitation theory which suggests that interfering in an exploitative agreement is highly problematic.⁵ This might initially seem like a puzzling position to take: most people

³ See Rawls, *Political Liberalism*, pp.265-267; Rawls, *Justice as Fairness: A Restatement*, pp.52-53.

⁴ Rawls, *Political Liberalism*, p.266.

⁵ See for example, Wertheimer, *Exploitation*, pp.278-309.

believe that we should not be in the business of exploiting others and that the rules and practices of a state ought to prohibit these kinds of arrangements, but exploitation is complex and voiding exploitative agreements raises difficulties because of the nature of the interaction. In the following section, I put forward a further reason to explain why voiding an exploitative agreement is unjustified. A careful examination of the structure of exploitation and the various motivations that account for why exploitation is morally defective reveals that prohibiting an exploitative contract, no matter how well intended, will not forestall or constrain the defect that underlies them. Instead, it will reinforce the pattern of wrongdoing that the prohibitor is concerned to eradicate. I first call attention to this issue through *Socially Constructed Luck Approach* to exploitation before considering it in relation to the other approaches. In section 6.5, I defend a basic right to a reasonable alternative and show that exploitation is better prevented by the operations of a taxation system, rather than blocking exploitative exchanges in contract law.

6.4 Prohibiting Exploitation

In this section, I consider the different moral defects that make an interaction exploitative and show that these defects cannot be reconciled with interfering and prohibiting this type of exchange. If we begin by considering the Socially Constructed Luck Approach, I have argued that an exchange can become exploitative if one party cannot reasonably refuse or walk away from an interaction. The moral defect on this approach is that a surplus benefit is being taken from someone who cannot reasonably refuse the contracting party's offer. Individuals cannot refuse the offer if they lack positional goods: goods that are necessary for survival or fundamental liberties (such as freedom of thought, freedom of association, the liberty to trade, and dispose of one's property). Let us now suppose that a state appeals to this approach to prohibit the exchange taking place between Fran and her landlord. The upshot is that although the state will be taking

a stand and prohibiting an exploitative agreement, it might be complicit in worsening the underlying conditions that make the contract exploitative. More specifically, if the state bans a contract, claiming it as morally defective because Fran lacks positional goods, then it would appear that this ban should universally apply to any other contract Fran wishes to form. This would be catastrophic. The law will prevent Fran from taking care of her basic needs as she will only be able to rely upon gifts or charity that do not involve contracts. It follows, strikingly, that Fran will be in a position of servility and left begging for subsistence. All of this tells us that a state implementing a ban on these grounds, far from eliminating exploitation, in fact worsens and reinforces the very conditions that make an agreement exploitative in the first place.

This difficulty can also be seen with the Counterfactual Approach to exploitation. Recall that this account defines exploitation in relation to the distribution of resources against which an exchange takes place. For example, the accounts of Cohen, Roemer, and Steiner ground exploitation in previous injustice. Problems arise, however, if the state has failed to ensure that people are not in an unjust position in which usurious deals would appear attractive. The state preventing an exploitative transaction, and worsening the position of victims of injustice does not constitute a plausible response. As Rebecca Stone has convincingly argued, if a state is involved in creating or preserving the unjust conditions of contract – say its taxing and spending policies help to create the unjust distribution, while the enforcement of its property laws help to preserve it – then the state acts hypocritically if it prohibits an agreement on the grounds that it has been tarnished with injustice. The state’s complicity in the conditions it invokes to justify its actions appear to deprive the state of its moral standing to invoke them.⁶ Thus, if unjust background conditions contribute to a state’s view that a transaction is morally amiss,

⁶ Stone, ‘Unconscionability, Exploitation and Hypocrisy’ p.29.

then it is difficult for the state to invoke this injustice to justify prohibiting a contract. Unless the state begins to rectify these unjust conditions, then it acts hypocritically in prohibiting a transaction because of its active preservation of the injustice that compels people to enter into usurious agreements.

The Anti-Commodification Approach suggests that certain types of interactions are intrinsically exploitative because they commodify an aspect of a person that should not be up for sale. But there are problems with a state appealing to this approach in order to prohibit an exchange. Most importantly, improper commodification, on the Anti-Commodification Approach, is said to be exploitative because it involves degradation. The difficulty, however, is that some people may believe that these contracts are morally degrading and others may not. Prohibiting these agreements would therefore be equally degrading since the state is failing to respect a person's ability to make decisions about her own life. The state will be attempting to protect a person's dignity, whilst also implying a negative judgement about that person's innate ability (assuming he or she has full knowledge of the possible consequences this may have on her life) to make the decision for herself.⁷ This kind of justification is, therefore, inconsistent. If a state were to draw upon this approach to justify its banning of an exploitative contract, it would commit the wrong that lies at the core of the view it is invoking and reinforce the pattern of wrongdoing that the state is concerned to eliminate.

The Duty-Based Approach holds that exploitation stems from morally bad behaviour whereby one violates a moral duty to protect or respect the vulnerable, but it would also be problematic for a state block an exploitative exchange on these grounds. For example, Wood contends that exploitation occurs when one fails to respect others and treats

⁷ For such an account of paternalism, see Quong, *Liberalism Without Perfection*, p.80; see also Shiffrin, 'Paternalism, Unconscionability Doctrine and Accommodation' pp.211-220 and Stone, 'Unconscionability, Exploitation and Hypocrisy' pp.27-47.

another's vulnerabilities as an opportunity to advance one's own interests.⁸ In this regard, if contractors are using someone's dire situation to secure a cheaper deal, then a state will be justified in prohibiting an exchange as it stops people from being subject to this form of disrespect. However, disrespect can play a troublesome role in the justification of banning an exchange. First, if a contractor prefers to enter into a contract rather than not, and if it has been established that this is the best deal she can get, then a state's refusal to allow this contract on the grounds of disrespect will be paternalistic in nature. There is something uncomfortable and degrading about being prevented from improving one's dire situation; there is also a large degree of self-contradiction in claiming that particular contracts are impermissible because disrespectful when such a judgement is itself rooted in disrespect. In the case of our surrogacy example, there is something disrespectful about a state (i) denying a surrogate the right to secure a better contract and (ii) denying a surrogate the right to decide for herself whose child she may or may not carry. Consequently, if a state were to appeal to the Duty-Based Approach to ban an exploitative exchange, it would commit the wrong that lies at the core of the approach to which it appeals. In particular, the state would be failing to respect its citizens because it is attempting to advance their welfare whilst also (as with the Anti-Commodification Approach) invoking a negative judgement about their ability to determine what is in their own best interest.

So far, I have analysed the various approaches to exploitation and highlighted the different types of wrongdoing that these accounts perceive as necessary for exploitation. The chief purpose has been to show that if a state appeals to any one of these approaches to prohibit an exploitative contract, then its law will be grounded in contradiction insofar as it will either commit or reinforce the wrong that lies at the core of the approach to

⁸Wood, 'Exploitation' p.151.

which it appeals. The underlying argument is that we will struggle to appropriately tackle exploitation by voiding an exploitative contract. I have tried to show that such voiding might offer a lot of official rhetoric about eliminating exploitation, but will systematically work against those who are most at risk of being exploited. Importantly, if a law is committing the wrong that it is supposed to prevent, then the law itself will be fundamentally wrong.

Exploitation is complex and difficulties arise when insufficient attention is paid to the way in which exploitation is structured. It is tempting to handle exploitation in much the same way as we handle other wrongs and simply prohibit the practice, but a ban, no matter how well intended will not suffice. We need instead to think further about how an exploitative interaction – whilst morally defective – nevertheless involves a voluntary, mutually beneficial exchange. Wrongs such as coercion or theft do not share these features. In these cases, victims are left worse off and are moved from their status quo to another situation that they would not have chosen. This seems to vitiate the inference that exploitation ought to be treated like these other wrongs. Voiding an exploitative exchange raises difficulties not only because it goes against the express wishes of the contractor, but also because it can obstruct people satisfying their basic needs. It is a strategy that not only makes the weakest and poorest members of society worse off, but it also involves the state committing the same deep wrong against citizens that it is trying to eradicate. These factors reveal the limits of the application of an outright ban and lend support to the idea that exploitation needs to be tackled more convincingly in another way.

6.5 Tackling Exploitation

I will now argue that tackling exploitation will be served more effectively by introducing a fundamentally important basic right to a reasonable alternative. Throughout the thesis

I have argued that an alternative is unreasonable when people lack basic goods necessary for survival (food, water, shelter) or if individuals are unable to exercise a fundamental liberty. The right to a reasonable alternative can be fleshed out as a civil and political right in addition to an economic right to a guaranteed minimum income package. The idea behind the minimum income package is that individuals have access to universal health care, free higher education, rescue services, a home and a guaranteed minimum income. This package provides individuals (rather than households) with a bundle of socioeconomic advantages to ensure that no one's circumstances fall below a level to meet his or her basic needs. This will help individuals to avoid starvation, thirst and homelessness and will guarantee access to medical provisions. Importantly, it will also help in preventing people from taking control of others and trust people to make their own decisions. In most cases, a basic right to a reasonable alternative will help to mitigate the conditions that make an exploitative exchange possible and will provide people with the capacity to accept or refuse a contract on their own terms. If people have a reasonable alternative and a capacity to walk away from a deal, then a state will have a basis for confidence that it is helping to ensure that the individual transactions carried out within its legal framework will not be exploitative. This point can be demonstrated by showing how this right can be appropriately reconciled with the various approaches to exploitation we have considered.

First, if a state adopts the Socially Constructed Luck Approach to exploitation, then this right will provide victims of socially constructed luck with positional goods in their dealings with potential contractors. So, the fact that A can reasonably refuse the deal, removes B's leverage and prevents A's goods or labour from being undersold. Or to put the point another way, B is prevented from extracting a surplus benefit that he or she cannot be responsible for. Thus, in many cases a right to a reasonable alternative will help in giving people the capacity to avoid Socially Constructed Luck Exploitation.

One of the fundamental problems with socially constructed luck is that when we look at an interaction *ex post*, we cannot determine how much better off a person would have been if others had alternate preferences and exercised their rights differently. We can confirm that someone is less than fully responsible for the outcome that results, but we cannot determine, in an appropriately systematic way, exactly what benefits and burdens that it is appropriate for an individual to bear as a result of her own personal choice. I propose that what luck egalitarians need to focus on is the fact that whilst a person *is* responsible for his or her resulting fortune/misfortune in these types of cases, this responsibility will always be mitigated insofar as he or she cannot be responsible for all of it. This reasoning allows us to justify this income package *ex ante* i.e. before people even engage in the process of pursuing their own conception of the good and irrespective of what results from these decisions. Implementing a right to a reasonable alternative in Izzy and Fran's cases would have meant that their circumstances were not restricted. A minimum income and socioeconomic advantages, for example, would have stopped the landlord and Eric from exploiting their unearned position of control over Izzy and Fran and taking surplus benefits from the exchange.

Importantly, the minimum income package can be financed via a progressive tax where those who have earned the most from socially constructed luck (those socially constructed luck beneficiaries with the highest incomes and largest fortunes) can be taxed at a significantly higher rate. This is on the grounds that the advantages and superior power that people lay claim to – as a result of socially constructed luck – are not something for which they can fully be held responsible. These benefits also derive from the many complex and countless ways in which other people have exercised their rights. The revenues from the progressive tax can then be redistributed to fund a minimum income package. Given the considerable wealth that social accumulations generate on

the market, taxing those that have amassed high incomes should provide a large enough revenue to sustain such a scheme.

A basic right to a reasonable alternative will reduce socially constructed exploitation considerably, particularly cases that transpire in the family. Importantly, it will provide an income to people who engage in work that is not remunerated, like caregivers. It will also ensure that people who are dependent on a spouse have the financial means to leave abusive or oppressive relationships. Unfortunately, I do not think that all cases can be solved using this right as it is currently construed. Applying this right to Mia's case, for example, would be ineffective. If someone has been conditioned through a loving environment and intimacy to accept large sacrifices for her loved ones and she does not see herself has having other reasonable options, then she will not be able to walk away from the transaction simply because she has access to free health care and a minimum income. This right may not hold water when this type of exploitation occurs between intimates or within the family, but what is crucial, is that a state should not revert to prohibiting these kinds of transactions. As I argued in the previous section, prohibition not only makes the exploitee worse off (for example, in Mia's case she will lose a beloved sister) but it will also commit a wrong against the exploitee. If it has been established that a person prefers to enter into a transaction rather than not, then a state's prohibiting the transaction will be disrespectful. The state will be making a negative judgement about a person's mental capacity to know what is in her own interests. This is the very same wrong that the Anti-Commodification and Duty-Based Approaches are trying to eradicate. This does not preclude a state from identifying these types of interpersonal interactions as exploitative, but it should not interfere precisely because it will disrespect its citizens.

A state also has to be careful in terms of exploitation generated by option luck. Although these types of exchanges satisfy the same criteria as socially constructed exploitation, getting to grips with these cases is problematic as this can trigger a further injustice. In Chapter 4, I discussed Tan's mixed conception response to the abandonment objection and argued that it (i) stands in tension with luck egalitarianism and (ii) fails Anderson's equal respect and concern test. Presently, my arguments may also seem inconsistent. I have argued that Tan's unconditional threshold strategy does not provide luck egalitarianism with a satisfactory solution to the abandonment objection since it conflicts with luck egalitarianism and it is far from clear that the scheme successfully treats people with equal concern and respect. Yet, I'm now proffering a basic right to a reasonable alternative as a solution to socially constructed exploitation. Although socially constructed luck reduces the number of abandonment cases, there is still a question of whether victims of option luck who come to be in a restricted situation should also have a right to a reasonable alternative. Answering this question can pull luck egalitarians in two opposing directions. If victims are denied access to this right, then exploiters can use their lack of alternative to secure unearned surplus benefits. Therefore, it seems that luck egalitarians ought to endorse this right as it helps to prevent this unearned surplus extraction. On the other hand, we have to think of the incentive effects of guaranteeing a right to a reasonable alternative and whether such a right would change people's behavior. People might be more willing, for example, to use the lack of reasonable alternative (the enforcement of a social minimum) to secure unearned surplus benefits. The right can allow the distribution of resources in society to be held hostage to people who engage in morally hazardous behaviour. This worry applies to Stemplowska's hiker who persistently gets in trouble whilst engaging in risky climbing activities: my income package implies that this climber has a claim against others to be saved (free of charge)

each and every time he needs to be rescued.⁹ If the right to a reasonable alternative is used in this way, then it will lose its appeal, which was to prevent exploitation: the extraction of unearned surplus benefits from the restricted situations of others.

Thus, a right to a reasonable alternative can either be a recipe for helping victims of option luck to avoid exploitation or a recipe for exposing society to exploiters who can draw unearned surplus benefits. Therefore, the aim is to establish if it is possible for luck egalitarians to balance these conflicting exploitation claims. In order to do this, luck egalitarians should first accept that a right to a reasonable alternative can pull in opposite directions. What seems like a sensible resolution is that this right extends to all, but in order to prevent victims of option luck exploiting society, it will be necessary for them to cover the costs of this right *ex post*, once they are able and their restricted situation has been alleviated. This means that a person will not be left in a restricted position where they are vulnerable to exploitation, but equally, if a person has to cover the cost of the minimum income package at a later date, then this removes any possible incentive effects that people may have to secure surplus benefits from the provision of these goods and services.

Thus, a right to a reasonable alternative can still work with alleviating socially constructed exploitation. We now need to reflect on the other accounts to add weight to this right. First, we can begin by noting that a right to a reasonable alternative coheres nicely with the Counterfactual Approach. For example, if the state were to endorse the approach of Cohen, Roemer, or Steiner, then it can do so without compromising the legitimacy of subsequent transactions. Importantly, the scheme can be financed by taxing the beneficiaries of previous injustice. This is on the grounds that the advantages and superior power that people lay claim to – as a result of previous injustice – are not

⁹ Stemplowska, 'Making Justice Sensitive to Responsibility' pp. 252-253.

something for which individuals can fully be held responsible. These revenues can then be redistributed to fund a minimum income package. This should go some way to reducing background injustice and rights violations. Although this will not be precise, it is likely that it will substantially redistribute monetary gains from the beneficiaries of injustice to the victims. What is more, because a state will be attempting to rectify past injustice, then it will not be charged with preserving and reinforcing the unjust conditions that make its contracts exploitative.

Second, if a state adopts a Duty-Based Approach then a right to a reasonable alternative will be a more effective way to fight exploitation. It allows a state to stop people taking advantage of those in need without interfering in contractual relations. In this regard, if people have access to free healthcare, education, and a minimum income per se, then they will not be driven to the wall when they enter negotiations with others. Because this right puts people in a stronger position, they are able to retain their self-respect. It enables people to push for better terms of agreement or walk away from an exchange if they want to. Most importantly, in making this decision a person's judgement will not be undermined or supplanted by the state. Because the right involves less governmental control, people will not be subject to the humiliation or shameful embarrassment that can come with an outright ban. Consequently, in implementing the moral right to a reasonable alternative, the state can tackle exploitation without committing the wrong that it is meant to be preventing.

Let us finally turn to the Anti-Commodification Approach. Now it is entirely possible that a state can insist that exploitation is grounded in the commercialisation of sexual and pregnancy contracts, but nevertheless accept that it would be morally wrong for a state to prohibit these contracts. In this sense, a legal framework will not be encouraging a disrespectful legal evaluation of people's choices or questioning citizens' abilities to make

decisions about their own lives. What seems likely is that a right to a reasonable alternative will reduce the number of pregnancy and sexual contracts being formed because people will no longer be entering these agreements as a means to escape poverty. The general point here is that the enforcement of this right and the Anti-Commodification Approach do not stand in tension. If a minimum income reduces the demand for these types of contracts then, ipso facto, it will reduce the amount of exploitation identified by this approach. Importantly, the right allows a state to bring about this reduction whilst respecting the choices of its citizens.

The central argument of this section has been to explain why a right to a reasonable alternative seems like the best means of alleviating exploitation. This point has been demonstrated by showing how this right can be appropriately reconciled with the various approaches to exploitation we have considered.

6.6 Conclusion

Throughout Part 2 of this thesis, I have argued that the impact of a suffusion of people exercising their moral rights and liberties constitutes a category of socially constructed luck. The task of the present chapter has been to explicate how the negative effects of socially constructed luck can produce manifest injustices. In particular, how a social accumulation of people exercising their moral rights can create a situation where people will have no reasonable alternative but to accept an offer that is open to them. These types of exchanges, I have argued, cohere with the structure of an exploitative interaction.

I first considered the original surrogacy cases we discussed in Chapter 1 and showed how exercising our moral rights in the pursuit of our own conception of the good can create restrictive conditions in precisely the same way as rights violations. This structural symmetry helps us to understand how socially constructed luck can give rise to exploitation. I then linked my argument back to the theories of Rawls and Cohen and

suggested that the injustice that Rawls's principles of justice and Cohen's patterned principles is meant to overcome is one of mutually beneficial exploitation. In the latter half of the chapter, I considered how we might prevent this type of exploitation from occurring. First, I argued that voiding an exploitative agreement in contract law raises difficulties because of the nature of the interaction. A careful examination of the structure of exploitation and the various motivations that account for why exploitation is morally troublesome reveals that a state ban on any kind of exploitative contract, no matter how well intended, will not forestall or constrain the moral complaint that underlies them. Instead, it will reinforce the pattern of wrongdoing that the state is concerned to eradicate. To overcome this limitation, I proposed the introduction of a basic right to a reasonable alternative and showed how this particular right coheres with the three different approaches to exploitation that we have considered.

Chapter 7

Conclusion

I would like to conclude by reviewing the steps of the thesis and its inferences. It seems strange to accept the idea that exploitation can develop from a perfectly just background where everyone is acting within the bounds of their moral rights. Nevertheless, this strangeness can be offset once the following propositions are affirmed: (1) that a cumulative process of people exercising their moral rights and liberties constitutes a distinct category of luck – namely socially constructed luck; (2) that socially constructed luck can affect people in different ways; and (3) that the negative effects of socially constructed luck can restrict a person's choices in exactly the same way as rights violations. When this happens a person has no reasonable alternative but to accept particular arrangements: the fact that a person is in a restricted position allows others to secure usurious terms that the person would not have contemplated accepting were it not for her diminished circumstances.

What might first be disputed is my claim, in the second half of this thesis, that luck egalitarianism ought to be positioned within the context of an account of exploitation. But the fact that the luck egalitarian theories of Cohen, Roemer, and Steiner connect with exploitation cannot, I think, be disputed. And there is a strong case for thinking that each of these theories is concerned with making progress on Marx's central problems. In extinguishing brute luck disadvantage from a distribution, what each of these views is

attempting to rectify is a maldistribution of freedom. If we ask, ‘what is the point of rectifying a maldistribution of freedom?’, these luck egalitarians can reply that the point of such rectification is to prevent exploitation – the unjust treatment of some by others that facilitates further maldistribution. Putting luck egalitarianism back in its original (Marxist) context of exploitation, I have argued, allows us to see how the luck egalitarian and relational views converge over the point of equality. Indeed, Anderson says: ‘Unequal social relations generate, and were thought to justify, inequalities in the distribution of freedoms, resources and welfare. This is at the core of inegalitarian ideologies of racism, sexism, nationalism, caste, class and eugenics’.¹ When positioned in the context of exploitation, what luck egalitarianism is offering is a tripartite model whereby unequal distributions generate unequal social relations, which in turn generate unjustified inequalities in the distribution of freedoms, resources and welfare. Luck egalitarians can consistently accord people equal freedom and also claim that the point of equality is to prevent unequal treatment that gives rise to further injustice. Thus, luck egalitarians have not been looking in the wrong place when considering the point of equality. Tackling unjust social relationships, hierarchies of power – of domination and subordination – is fundamental. However, in order to secure just terms in our interactions and to have just social relationships – equal respect, power and standing – we need to concentrate on the share of freedom, resources and welfare one has in relation to others. Luck egalitarianism aims to firmly limit the distributive foundation on which unjust treatment can otherwise be based.

In Chapter 4 I protested that rectifying brute luck inequality need not be disrespectful to the victims of bad brute luck at all. I argued that luck egalitarianism does not require humiliating victims because it could require that talented and successful citizens reveal

¹ Anderson, ‘What is the Point of Equality?’ p.312.

their fortune and explain why they ought to be considered responsible for the benefits they have acquired. Justifying to oneself (and then convincing others) that one's success results entirely from one's own actions and efforts will be motivated by the belief in one's self-worth and does not involve emotions like shameful revelation.

The luck egalitarian framework I have presented, in Chapter 5, proposes the introduction of a third category of *socially constructed luck*. This is on the grounds that luck egalitarianism struggles to conceptualise luck that arises from an aggregation of people freely exercising their moral rights. This difficulty, I have argued, lies at the heart of Anderson's abandonment objection. The problem is that these kinds of cases cannot be appropriately categorised as brute luck or option luck.

When we consider the difference between events involving brute luck and those involving option luck, we presuppose a concept of normality. Brute luck involves an interruption in the normal and expected course of events that we cannot foresee or reasonably avoid: for example, if someone is unexpectedly struck by a bolt of lightning. Because brute luck is explained by events that are reasonably unforeseeable and reasonably unavoidable, luck egalitarians consider it *inappropriate* to hold a person consequentially responsible for the effects of brute luck. The extent of a person's brute luck disadvantage (or advantage) can be determined by considering the normal and expected course of events i.e. the course of events which the brute luck recipient would have encountered had the brute luck event not taken place. We are then meant to extinguish these brute luck effects and return the individual to her original state. This entails that those who suffer bad brute luck are entitled to rectification and those who incur good brute luck can be taxed to fund that rectification. Option luck, on the other hand, involves an event that appropriately links to a person's autonomous agency. Specifically, a person makes a voluntary choice, intending or foreseeing a particular

outcome when she has a reasonable opportunity to choose otherwise: for example, if someone decides to commit a robbery. Because option luck is explained by interventions that are reasonably foreseeable and reasonably avoidable, luck egalitarians consider it *appropriate* to hold a person consequentially responsible for the outcome of option luck. In the case of a robbery the perpetrator is responsible for rectification.

In Chapter 5, I have identified a third kind of event that derives from an accumulation of people making decisions about how to exercise their moral rights in the pursuit of their own conception of the good life. The luck that derives from these accumulations differs from option luck because it is unavoidable: we cannot reasonably avoid making these kinds of decisions because they are necessary to sustain our own survival – this pertains to decisions involving food consumption, employment, protection from the elements etc. Moreover, we also cannot reasonably avoid making these decisions if we are to be considered capable of forming, revising and rationally pursuing our own conception of the good life. Indeed, not being free to exercise our rights and liberties is a core element of injustice – the life of a slave is restricted in this sense. This luck also differs from option luck because there is a degree to which a person's agency cannot be fully tied to or implicated in the consequences of her choice. Whilst these consequences do partly derive from a person's choice, they are also sensitive to the discrete preferences and plans of others exercising their rights. Among the effects of many individuals exercising their rights and liberties is an increased risk that individuals can suffer disadvantage. Sudden changes in individual preferences are difficult to detect and may only be known *ex-post* in a society. On the other hand, unlike instances of brute luck, these cases do not involve unusual, non-standard situations which go against the norm. Instead, they involve normal, everyday, social events that are aspects of people exercising their rights in ordinary, morally permissible ways. And although other people exercising their moral rights are involved in fixing a particular outcome, luck egalitarians are unable

to determine the benefits and burdens that it is appropriate for an individual to bear as a result of her own personal choice. We cannot use the existing counterfactual method to determine how the individual would have fared if others had exercised their rights differently: there are simply too many ways that other people might have exercised their rights. Because we cannot pick out a baseline, the extent of advantage and disadvantage deriving from this intervention is indeterminate.

It might be thought that if we cannot establish the extent of socially constructed luck advantage or disadvantage then what luck egalitarianism requires is equality of outcomes. But this solution strikes me as deeply implausible. Because these cases involve people exercising their right to form, revise and rationally pursue their own conception of the good life – luck egalitarians should be very wary of applying equality of outcomes as a solution i.e. extinguishing the consequences of these decisions. If individuals are to be considered free – and if our moral rights are to have any meaning at all – then we must treat people as responsible agents, capable of directing their own lives and pursuing their own conception of the good. If we are to make sense of these rights then we must hold people responsible, at least to some extent, for the consequences of these decisions. This point cuts deeper than luck egalitarianism: it will equally apply to any theory committed to the core idea that we each have a moral right to direct our own lives corresponding with a similar right for others. The flipside of freedom and pursuing a conception of the good is responsibility. In order to attribute people with the moral power necessary to direct their own life, we must allow them to be held somewhat accountable for these decisions.

Luck egalitarianism needs a workable account that allows us to firmly get to grips with luck that derives from our social interactions. I have used the accounts of Rawls, Cohen and Ullmann-Margalit as a basis from which to work out a conception of socially

constructed luck that offers a way for luck egalitarians to conceive luck that derives from an individual, but also from the permissible tastes and preferences of others. It is a category that says that when we exercise our rights and pursue our own conceptions of the good that we are obviously responsible for the outcome of these decisions, but we are only partially responsible – it remains true that other people exercising their rights also fix the results, and it is therefore appropriate to mitigate this responsibility to a certain extent.

A compelling argument in favour of the theory of socially constructed luck is that it fills a conceptual gap and offers a novel way of disarming the abandonment objection. An implication of the theory is that many instances typically thought of as option luck will become instances of socially constructed luck: undertaking a caring role, driving, the jobs we apply for, the salaries we earn. It follows that if a category of socially constructed luck justifies mitigation, then individuals will not be held fully responsible for the negative consequences that result from these kind of decisions. And if the victims are not fully responsible for the negative consequences of these decisions, then they will not be abandoned on a luck egalitarian framework.

In Chapter 6, I have shown that socially constructed luck is especially significant because it generates vast inequalities of wealth, income, and power. This, in turn, impacts heavily on those who are subject to its negative effects and left in a restricted choice situation. In particular, I have argued that an accumulation of people exercising their moral rights can reduce and restrict the ability of others to make choices in exactly the same way as rights violations do. This process helps us to understand how socially constructed luck can give rise to exploitation. In particular, when people act unjustly and commit rights violations, this can create a desperate situation where some people have no reasonable alternative but to accept an offer that is open to them. When this happens, others can use

this desperation as leverage and secure surplus benefits from the exchange. I have argued that socially constructed luck can play essentially the same role. People exercising their liberties (pursuing their own conception of the good) can, effectively, constrain people's choices leaving them with no reasonable alternative but to enter a transaction. This enables the extraction of surplus benefits and allows the unjust treatment of some by others. Both of these types of exchanges count as wrongful because a surplus benefit is being taken from someone who cannot reasonably refuse the contracting party's offer.

A notable feature of this socially constructed luck account of exploitation is that it is not restricted to cases in which the goods and services being exchanged have a market value. Indeed, the framework can extend and allow us to identify exploitation in social relations such as the family. Again, just as rights violations can restrict a person's choices, the behaviour of our intimates can play the same role. Specifically, family relationships satisfy the conditions for exploitation if we extend the currency of an exchange to include goods such as love, affection, admiration, social acceptance and a feeling of self-worth. These types of relationships can be exploitative when one is conditioned through a loving environment and intimacy to accept large sacrifices for one's loved ones, and one does not see oneself as having other reasonable options. I have used the example of Molly and Mia to illustrate this point, but this framework applies to many caring roles within the family when a surplus benefit is taken from someone who cannot reasonably walk away from an exchange or interaction.

I have also argued that taking a surplus benefit will, in some instances, be deliberate whereby parties entering exchanges with the victims of socially constructed luck will be intentionally treating the victim's poor circumstances as an opportunity to extort benefits. In these types of situations, people will be degrading victims of socially constructed luck and treating them with less than the full respect they deserve. However, I am not claiming

that this kind of manipulation is necessary for exploitation. I do think that it is possible that exploitation can remain latent. One of the many important arguments in *Das Capital* is Marx's efforts to explain that exploitation can go unrecognized by everyone involved in it. Marx argues that capitalist ownership of the means of production is crucial to this concealment. By establishing this claim Marx shows how exploitation is hidden beneath the surface of the day to day transactions of the economic system. Although I depart from Marx's understanding of exploitation i.e. I do not accept the labour theory of value, I do think that Marx is correct in his belief that exploitation can remain hidden from view. Indeed, on the account of exploitation that I have proposed, it is possible that people will naturally believe in the justice of an exchange. Features such as a voluntary choice combined with lots of people exercising their moral rights only in morally permissible ways can lead people to attribute full responsibility for an outcome to the individual who made the voluntary choice. In other words, people might fundamentally believe themselves to be fully responsible for the benefits and burdens which they have incurred. In these types of instances, the misconceptions surrounding responsibility conjoined with the benefit that is also transferred to the victim (the fact that entering into an exchange with victims of socially constructed luck will improve a victim's situation) can conceal the injustice that underlies people's actions. In these cases, the victims of socially constructed luck will unwittingly be treated, or will let themselves be treated with less than the full respect they deserve.

I ended Chapter 6 by suggesting that exploitation will be tackled more effectively by the introduction of a basic right to a reasonable alternative. This right can be fleshed out as a civil and political right in addition to a minimum income package. The minimum income package provides individuals with access to universal health care, free higher education, rescue services, a home and a guaranteed minimum income. If people have a

reasonable alternative and a capacity to walk away from a deal, then a state will have a basis for confidence that it is helping to ensure that the individual transactions carried out within its legal framework will not be exploitative. I have suggested that the minimum income package can be financed via a progressive tax where those who have earned the most from socially constructed luck pay a higher rate. This is on the grounds that the advantages and superior power that people lay claim to – as a result of socially constructed luck – are not something for which they can fully be held responsible. These benefits also derive from the ways in which other people have exercised their rights.

A basic right to a reasonable alternative will significantly reduce socially constructed exploitation. It will provide an income to people who engage in work that is not remunerated, like caregivers. And it will also ensure that people who are otherwise dependent on a partner are financially able to leave abusive or oppressive relationships. I have also suggested that this right can extend to victims of option luck who come to be in a restricted situation. If victims are denied access to this right, then exploiters can use their lack of alternative to secure unearned surplus benefits. However, getting to grips with these cases is problematic. A right to a reasonable alternative can allow the distribution of resources in a society to be held hostage to people who engage in morally hazardous behaviour. As a solution, I have suggested that a right to a reasonable alternative extends to all, but in order to prevent victims of option luck exploiting society, it will be necessary for them to cover the costs of this right once they are able to do so and their restricted situation has been alleviated. This strategy means that a person will not be left in a restricted position where they are vulnerable to exploitation, but equally, if a person has to cover the cost of the minimum income package at a later date, then this negates the incentives that people may have to secure surplus unearned benefits from the provision of these goods and services.

This now brings us back to the argument in Part 1 of the thesis in which I considered the problems with the existing approaches to exploitation. What have I tried to show is that because each of the existing approaches is incomplete, they miss a fundamental type of exploitation. I do not mean to suggest that I have given a competing account of exploitation, one that is more plausible than the rest. My chief purpose has been to reveal that the existing approaches do not tell the whole story. Exploitation may indeed arise when we enter into sexual and reproductive contracts, when we are victims of rights violations or a prior injustice, when we pay a non-standard price for goods and services or when we fail to protect or respect the vulnerable. All of these features fall within the domain of exploitation. This thesis has been concerned to give a deeper, more complete account of exploitation by eschewing the idea that it necessarily involves a prior injustice or wrongdoing and showing that it can, rather worryingly, arise another way: from a just background, via just steps, when we are simply exercising our moral rights.

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