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Exploitation, Commodification, and Equality

Anne Phillips¹

In a recent article on global surrogacy, Vida Panitch takes up the challenge of identifying what is exploitative in the global trade in reproductive services. In particular, she examines what is exploitative about the reliance on countries like India, where solutions to the infertility problems of wealthier couples are met by women who are poorer ‘both relatively and absolutely than surrogates in the USA’.² India has been known, for some time, as the transnational hub for the global trade in surrogacy, to the point, indeed, where its reputation began to embarrass the government: in 2012, same-sex couples were banned from using India’s surrogacy services; in 2015, the government announced that clinics could no longer accept clients who were resident outside the country. The effect of the latter announcement remains to be seen, but for the moment, Panitch’s argument is still pertinent. Surrogates in India are paid much less than their counterparts in wealthier countries; they are also subjected to tighter bodily surveillance, often including having to live for the duration of the pregnancy in highly regulated hostels attached to the infertility clinics.³ Under Indian legislation, they have no right to change their mind about relinquishing the child (or children) after the birth. Reported payments range between \$1,500 and \$10,000 per pregnancy, though averaging around \$3,000. This is both considerably less than the total price paid by the clinics’ clients (closer to \$50,000), and considerably less than the \$25,000 to \$40,000 typically paid to US surrogates. (Clients in the US are likely to pay \$100,000 in total). In these circumstances, we might feel agnostic about whether US surrogates are exploited, but pretty clear that Indian surrogates are. If the fairness of an arrangement is at least partly judged by reference to what people in other parts of the world receive for a service (Panitch argues that it is), then Indian surrogates are significantly underpaid. If we compare, moreover, the relative capacity of women in India and those in the US to negotiate better terms, the former are at a serious disadvantage. If the potential Indian surrogate attempts to bargain, ‘the offer will just be made to someone who will not.’⁴ By criteria of both justice and consent, Panitch argues, these women are exploited.

In defending her claim of exploitation, she addresses objections that have come out of a number of ethnographically informed studies of the Indian surrogacy industry, which mostly refuse the normative question (‘what, if anything, is wrong with commercial

surrogacy?') to focus on the experience of women's lives as revealed through their own narratives. Amrita Pande, one of the leading figures in this move, has said that 'where surrogacy work is rapidly becoming a survival strategy for many women, it makes little analytical sense to battle about the morality of surrogacy'.⁵ 'The market for wombs is not good or evil. It simply exists.'⁶ From this perspective, the preoccupation with ethical judgement – and presumption that there is a universal standpoint from which to make such judgements – has been said to reflect a Western 'occidentalising' gaze.⁷ It imports the confidence of its ethical assumptions without bothering to engage with how the practice is experienced and lived, or what would happen to the women if it were banned.

Panitch is sympathetic to these objections, but addresses them by drawing a firm line between what she calls the commodification and the exploitation view. On her account, the moralising that the ethnographers object to is mainly associated with the first of these: with the view, that is, that in selling one's reproductive services, one is making a commodity of something that should not be regarded as such, 'reduc(ing) a human agent to the dollar value of her body parts', and engaging in a sale that is, in some important sense, the sale of a self.⁸ It was this critique, she claims, that underpinned the arguments of those Western feminists who wrote about surrogacy in the wake of the notorious Baby M case, and she cites Elizabeth Anderson, Christine Overall, Carole Pateman and Mary Warnock as examples. The same kind of moralising, however, does not bedevil the exploitation critique. '*We can deny the commodification view and still make an exploitation claim.*'⁹ Both critiques clearly involve claims of moral harm, but it is only the first, she argues, that treats the findings of ethnographic studies as irrelevant, proceeding by way of a 'purely conceptual, and indeed conceptually Western, analysis of agency, value, and self'.¹⁰ The second takes seriously the views of the Indian surrogates about their own lives, and grounds its analysis of exploitation in their accounts of feeling disposable and lacking bargaining power.

Part of the appeal of this distinction is that it promises to disentangle what can be very different reasons for worrying about the development of commercial surrogacy. In the process, it should help clarify whether objections refer to the specific conditions under which surrogacy is practiced (excessively low pay to surrogates, intrusive regulation of the body, coercive background conditions), or to the practice per se. It then parallels arguments that have been made as regards the permissibility of markets in live human organs. In one illustration, Charles Erin and John Harris have suggested that the main concern underlying popular resistance to markets in human kidneys, stem cells, or gametes is the perception that

the rich buy while the poor and desperate sell. But what if the only organisation licensed to purchase this material were something like the UK's National Health Service? What if organs were allocated to patients, not on the basis of purchasing power, but strictly according to medical need? What if the purchasing zone were restricted to neighbouring countries with comparable income levels so as to reduce the prospect of people in rich countries preying on those in poor?¹¹ With these conditions in place, they argue, it would no longer make much sense to talk of exploitation, and the ethical objections would fall.

If one regards *commodification* as the problem, this kind of reform provides no solution, but if *exploitation* is the problem, we can look to changes in conditions that will make the exchanges non-exploitative. As regards commercial surrogacy, this would suggest focusing attention on conditions in the more overtly problematic Indian industry, where it is pretty clear to most observers that there is room for reform, rather than continuing to question the legitimacy of the equivalent industry in the USA. The typical surrogates in the US are working class, but they are not the poorest of the poor: apart from anything else, fertility clinics will not recruit women who are on welfare benefits. Though they take up surrogacy for reasons similar to their Indian counterparts (to raise money to build a house, pay off a debt, or finance a child through education), studies rarely indicate them as 'driven' by economic necessity. Relationships with commissioning parents are generally good, and in a range of empirical studies carried out in recent years, few of the women who have acted as surrogates report difficulties in relinquishing the baby after birth.¹² Given some of the alternatives available in the US economy, working conditions for surrogates are reasonably good. The language of exploitation certainly strikes an odd note as applied to the woman who gave birth to two children for Elton John and David Furnish, who continues to see the couple and their children in a seemingly amicable arrangement, and who was (presumably) well paid for her reproductive services.

In the immediate aftermath of the Baby M case, it was the enforceability of surrogacy contracts that was the sticking point for most feminist commentators. The weight of feminist opinion was against commercial surrogacy, though there was always a significant minority (this may now be a majority) who were swayed by arguments about women having the right to do as they chose with their own bodies, or thought it inconsistent to treat the exchange of money for reproductive services as significantly different from the exchange of money for any other bodily service. Some further argued that it was an insult to women's rational capacities to suggest that they could not make enforceable contracts about the use of their

bodies,¹³ but mostly, this was a step too far even for those torn between competing arguments.¹⁴ The idea of holding a woman to a contract undertaken before the pregnancy began was felt to ignore the nature and intensity of the experience, and to treat the pregnant woman, not as a person in a relationship to a growing foetus/ baby, but as the container for someone else's child. It was this, rather than claims about exploitation, that most dominated discussion. This does indeed sound closer to a commodification critique.

Since then, surrogacy has been increasingly normalised in the US, amidst neo-liberal celebrations of market rationality and individual choice that make it seem terribly old-fashioned to object. The vast majority of arrangements no longer use the eggs of the surrogate, thereby breaking the genetic connection that had been an important component in the Baby M case. The language of exploitation suggests a comparison between the ordinarily troublesome and the exploitative unfair (not everything we dislike about our work counts as exploitation), and on most comparisons, working as a surrogate in the US looks a relatively favourable way to earn one's living. Meanwhile, the language of commodification can sound absurdly exaggerated in a world where pretty much everything has been commodified. Perhaps, as Panitch suggests, we should focus on what it is about conditions in the *transnational* surrogacy trade that might justify the term exploitation, rather than continuing with moralistic claims about how terrible it is to be 'selling oneself'?

I have written previously about commercial surrogacy, in the context of a critique of underlying models of self and body ownership that help legitimate markets in bodily services and body parts.¹⁵ I argued there that treating labour simply as property normalises what remains a power relation, and that argument continues to inform the arguments in this essay. But I want now to take a different tack, I want to challenge the now commonly invoked distinction between exploitation and commodification critiques (a distinction almost always introduced to diminish the power of the second); and argue that it is not so easy to separate out these two, because both are closely aligned to notions of equality. I take issue with the suggestion that commodification critiques deal in absolutes while exploitation critiques deal in continuums, and argue that both involve a point at which the ordinarily troubling turns into the seriously problematic. Both, that is, acknowledge a range running from the more benign to the thoroughly unacceptable, and both draw on intuitions about what it is to treat others as equals in their assessments of when that line has been crossed. The standard we implicitly apply in making that distinction is, I claim, a standard of *what we normally owe to those we regard as our equals*. If so, it is not so easy to sustain a contrast between exploitation and

commodification, for elements of both are implicated in the critique. I end with an argument that relocates the debate about commercial surrogacy away from the individuals participating in it to the more systemic level. As well as asking whether X is being exploited or Y is being commodified, we need to consider the implications of commercial surrogacy for relations of equality as a whole.

Is Commodification More ‘Absolutist’ Than Exploitation?

I start with the suggestion that an exploitation critique is to be preferred to a commodification critique because it is less inherently moralised. The contrast represents commodification critiques as absolutist, independent of context, unresponsive to conditions, and unresponsive to the participants’ perceptions of these conditions. For a commodification critic, we are told, there are just certain categories of thing or being that should not be for sale. Now, it is true that a commodification critique does often involve a substantive claim about inherent value, which then provides the dividing line from other things or beings or activities that can more legitimately be bought and sold. We don’t (nowadays) think it legitimate to buy and sell people, though most still think it legitimate to buy and sell animals. This suggests a distinction between the inherent value of human and non-human animals. We don’t think of love as something that can be bought and sold, though many are quite happy to buy sex; this too seems to rely on a distinction between love and sex. For the followers of Henry George, it was land that should not be commodified, and while George himself was too much of a realist to think we could stop people treating the land as a commodity, he argued that any increases in its ‘value’ should be returned to all of us in the form of a land tax. For many indigenous peoples, the land has spiritual as well as productive significance, and for this reason cannot be treated as a commodity.

I accept, then, that there is a category of commodification critique that takes a more absolutist form, and regards it as inherent in the nature of X that it either cannot or must not be traded. The charge is less convincing, however, when applied to those who have explored the commodification of bodily services, including the development of commercial surrogacy. Much of this literature starts from the corporeal nature of *all* work, and is then very much alive to the difficulties of employing ‘the body’ to distinguish what can and cannot be sold. There is no employment on earth that does not, in some sense, require us to put our bodies to the service of our employers, nothing so entirely cerebral that we can do it without bringing our body along, and there are many occupations in which the body is not just incidental but

almost the entire point.¹⁶ If we were to argue that there is something about the body that makes it ethically unacceptable to take payment for bodily services, we would have to rule out a good deal more than commercial surrogacy. The point I would stress is that most people who write about the commodification of body parts or bodily services are well aware of this continuum, and do not just wade in with highly moralised assertions about what should or should not be allowed.

In her critique of surrogacy contracts, for example, Carole Pateman quite explicitly associates these with ‘other’ wage contracts, all of which, in her analysis, involve some level of personal subordination, and all of which involve a subordination that is experienced through the body. Her analysis is framed by an understanding of persons as embodied and of labour as embodied labour.¹⁷ Whatever it is that distinguishes commercial surrogacy from being a professional athlete or a miner or an office worker, it cannot be said that in surrogacy we are paid for the use of our bodies. What can be said, more plausibly, is that surrogacy is an ‘extreme example’ of the corporeality of all work, one in which (to quote here Amrita Pande) ‘the body of the worker is the fundamental and ultimate site, resource, requirement, and (arguably) product’.¹⁸ In this framing, surrogacy occupies the extreme edges of a continuum that in its lesser forms we barely even notice. Pateman has sometimes been held to account – including by Pande – for her suggestion that a woman’s reproductive labour is ‘more integral’ to her identity than other kinds of labour,¹⁹ but the notion of a continuum, in which some forms of labour are more expressive of who we are than others, strikes me as relatively uncontroversial. It would be contentious, certainly, to claim that what is most integral to female identity is the same for all women; but a more modest claim about some forms of labour being more integral to identity than others, and some forms of employment therefore experienced as more controlling and intrusive than others, goes almost without saying.

In her critique of commodification, Margaret Radin also rejects a compartmentalised approach that seeks to divide up the social world into things that can be marketised and those that should be off limits. She criticises what she terms universal commodification, and argues that ‘systematically conceiving of personal attributes as fungible objects is threatening to personhood because it detaches from the person that which is integral to the person’.²⁰ But she does not think we can address this, as it plays out, for example, in the sale of sexual and reproductive services, simply by banning particular kinds of market. In her argument, there are many things we quite normally and happily think of as marketable commodities – houses,

cars, and wedding rings figure among her examples – that *simultaneously* have important non-market significance to our lives. What we need is not so much a separation of the world into those things that can be bought and sold and those that must not, but regulatory measures (in pretty much *all* markets) that block the possibility of full commodification, and keep alive a more humane vision of the significance goods and activities have for people.

There is, in other words, much more of a continuum in Radin's and Pateman's arguments (and, I think, my own) than one might associate with a commodification critique, and on this score, less to choose between the exploitation and commodification arguments. In exploitation critiques, the continuum is more self-evident, for in most usages, the focus is on differentiating between the fair and the exploitative, with the assumption that the majority of market transactions escape the latter label.²¹ When people charge that working conditions in clothing factories in Bangladesh are exploitative, they recognise many common features with conditions in Birmingham or Bristol, but claim that in some respect or other, the conditions in the Bangladesh factory have crossed the line. So while Robert Goodin is probably right when he says that exploitation is not a scalar notion – 'people are either exploited or they are not'²² – we typically employ the term when examining a range of broadly similar situations and transactions, some of which, in our assessment, are to be deemed exploitative. The point is that *both* commodification *and* exploitation critiques grapple with continuums rather than absolutes, that both lend themselves to degrees (a practice can be more or less exploitative, a commodification can be full or partial), and that within this continuum, both involve some notion of crossing a line.

Crossing the Line: What Counts as a Reasonable Deal?

What provides the basis for this? Most of those writing on exploitation agree that you can be exploited and yet better off materially than you would otherwise have been, so it does not appear that this is the crucial divide. Indeed it can often be said that the person being exploited gains more from the deal than the person exploiting. As Allen Wood has put it, 'someone who is propertyless and starving has a lot to gain by striking a deal with an employer who is willing to offer bare subsistence in exchange for long, hard labour under dangerous conditions – and a lot to lose (namely, life itself) if no such exploitative bargain is in the offing.'²³ With commercial surrogacy, the gain to the surrogate may be the life of a sick child whose medical costs will be covered by the payment, and once we put that into the balance, we might well say that the 'exploited' gains more than the 'exploiter'. We cannot

identify exploitation just by counting up the respective costs and benefits of the parties to the agreement; a fortiori, we cannot identify commodification in this way.²⁴

There is also increasingly a consensus that one cannot identify exploitation simply through the existence or otherwise of consent: a recognition, that is, that one can be exploited in an arrangement to which one has given one's informed consent; and a queasiness about defining 'free consent' so strictly that *any* amount of economic or emotional pressure turns it into coercion.²⁵ So far as employment is concerned, most of us do things we would prefer not to do because we have to pay the bills. If this were to count as coercion, it covers too large a swathe of our working lives. We also do many things we would not otherwise choose to do because we fear losing face or losing friends or losing love. Again, if this were to count as coercion, it covers too much of human life. Anyone not on a desert island is continually pressured by the needs and emotions of others, and some of this pressure may well be unfair, if, for example, it fails to take account of our own needs and vulnerabilities. But feeling unfairly pressured is not the same as losing the capacity to say 'no', so what is the point at which we might want to say we are being exploited?

One of the compelling contributions Alan Wertheimer has made to our understanding of exploitation is his distinction between *taking advantage of unfairness* and *taking unfair advantage* (of unfairness).²⁶ In this framing, it is not necessarily exploitative to take advantage of other people's relative poverty to persuade them to agree to a transaction they would prefer to avoid. The exploitation comes in (the line is crossed) at the point where 'particular defects' in decision-making capacities lead people to agree to a transaction without fully realising what a bad deal it is, or 'special vulnerabilities' in their situation lead them to accept a much lower payment than would otherwise have been the case. There is plenty of unfairness around, but not all of it is exploitation. We arguably take advantage of (social) unfairness and (individual) vulnerabilities whenever we pay someone less than we earn to do a job both we and they would prefer not to do. When I pay someone to clean my house, I take advantage of a socially validated pay scale that I personally regard as unfair. I also take advantage of the individual vulnerability of the cleaner, who has fewer educational qualifications and limited alternative ways of making a living. As I read Wertheimer, it is when I take *additional* advantage of that unfairness and vulnerability to pay her below a living wage that I exploit her. To apply this to surrogacy, whatever US surrogates might claim about the pleasure they take in giving 'the gift of life' (this being the favoured discourse of the recruiting agencies), they would not offer their services if they earned as much

as the commissioning clients. But while their choice of occupation reflects income inequalities that we or they might think generally unfair, that need not make it exploitation. In the case of the Indian surrogates, by contrast, if the urgency of their needs means they cannot even begin to negotiate their terms of employment, we might want to say (with Panitch) that the agencies are taking not just advantage, but *unfair* advantage.

The question remains: how and on what basis are we drawing this line? There are two main offerings in the existing literature: either some version of a ‘fair price’, usually a derivative of existing market prices; or some version of fair conditions of negotiation, a derivative of reasonably equitable rather than ideal equality between the negotiators. Wertheimer finds the relevant criterion in the first of these— in a hypothetical market price. This is a market price, but hypothetical, because if there is some constraint on competition, it might be higher than we find in existing markets; and it is a test of normality rather than an ideal of fairness, the ‘price at which neither party takes *special* unfair advantage of particular defects in the other party’s decision-making capacity or *special* vulnerabilities in the other party’s situation.’²⁷ Note that the argument depends on some rough consensus about what is normal. It therefore works reasonably well with my cleaner example. Lots of people work as cleaners, in both public and private employment, and this gives us some idea of the ‘normal’ range of pay. Lots of people employ cleaners, and therefore have to grapple with questions of what counts as fair payment. Apart therefore from those who think it per se exploitative to pay someone else to clear up our mess after us, we can mostly make sense, in this context, of a distinction between taking advantage of unfairness and taking *unfair* advantage of unfairness. None of us can single-handedly solve all the inequalities of distribution, but we can try to pay what, within general conditions of inequality and arguably unfairness, is a ‘fair’ price.

The hypothetical market price works less well with body trades. First, where body trades have been subject to legal restrictions or bans, there is no globally competitive market to suggest the fair price. There is not even a nationally competitive one, for the work may be associated with levels of stigma that significantly affect the supply. From Pande’s work on India, for example, we know that the stigma attached to surrogacy leads many to conceal their work from their neighbours, and sometimes from their children. (In the latter case, they then have to avoid seeing their children for the duration of the pregnancy.) Even with the payment set at ten times the median monthly income, the demand for surrogates is now higher than the supply. In the classic cases discussed in the exploitation literature – the person

who exploits your desperation for a cooling drink on a hot day, or your desperation for a lift when stranded on top of a mountain pass – the lack of competition means you end up paying a grossly inflated price for the commodity or service. If one were to transpose this model to the payment for surrogacy services, one might have to say that the supply of surrogates has been artificially held down by legal restrictions and social stigmas, leading to a market price that is inappropriately high. This does not seem right.

The above points to a problem with hypothetical prices in transactions where the commodification is recent and still highly contested. We could perhaps use payment rates in other countries to establish the hypothetical market price, by which measure we might conclude that US surrogates are overpaid and Indian ones underpaid. Panitch argues that we can think of exploitation ‘not only within but across contracts’,²⁸ and that cross country comparisons are relevant in identifying exploitation, and this fits with many common-sense views about the exploitative nature of contracts in factories in low-wage countries. But precisely what ‘price’ one derives from this remains unclear. Realistically, the Indian surrogacy industry will only continue to attract business if it operates by a minimum wage considerably lower than that in the USA (this is the classic dilemma as regards improving conditions in low wage economies), but also, as Panitch argues, if the wages for surrogacy in India were set by US standards they could become almost impossible to refuse.²⁹ The industry would then be doing better on her justice condition – ending under-payment – but much worse on her consent condition. We could perhaps establish the ‘fair’ price by tracking the wages paid to workers with comparable levels of skill and hours of work. But here too, comparability on what axis? If we think of pregnancy as working 24 hours a day, seven days a week, for a total of nine months, then even by the standards of the low wages otherwise paid to women in rural India, \$3,000 looks very much like taking unfair advantage of unfairness. If we think, instead, of pregnancy as a state of being for nine months, with variable discomfort over that period and some very hard labour at the end, the price might begin to look relatively favourable. We might still say it is taking advantage of global unfairness, but not itself exploitative. If, as a third alternative, we think of pregnancy as giving up your normal existence for nine months – as it increasingly means in India’s surrogacy trade - it is hard to know what price to put on it. We seem to have moved into the realm of putting a price on life.

It is hard, that is, to mobilise a notion of fair payment as regards commercial surrogacy services. A potentially more promising way of identifying what counts as a

reasonable, non-exploitative deal is to focus on conditions of employment and conditions of empowerment: some version, that is, of fair conditions of negotiation. This is more central to Panitch's recommendations, and also figures in Jeffrey Kirby's discussion of exploitation in the transnational surrogacy trade.³⁰ Kirby recommends a process of recruitment that enables women to make fully-informed decisions about whether to become a surrogate, aided by advocate-navigators with no vested interest in whether they sign up; enhanced protection against harm, including protocols about hormone injections and the number of embryos transferred, and guarantees of counselling and health care; and participatory engagement of core stakeholders in decisions about terms and conditions. Panitch recommends a state enforced standard contract, with minimum wage guarantees, legal representation, housing, health, and leave standards, and opt-out clauses; and a tax on surrogacy revenue to fund initiatives for female empowerment. She regards the first only as interim measures, because the main burden of her argument is that Indian surrogates need to be empowered to negotiate their own terms with the brokers and clients – to decide for themselves what counts as a reasonable deal – since what makes their current conditions exploitative is that they are not yet in a position to do so. 'The genuine acceptance of an offer... depends on the ability to negotiate its terms. Authoritative consent is possible only where one is able to consent to the terms of the offer, and consenting to the terms of an offer depends on the ability to bargain for preferable terms.'³¹ I am not entirely convinced by this formulation, for focusing on consent tends either to understate the agency of those living in unfavourable conditions (suggesting they did not really mean it, or did not really understand the offer), or else gives the impression that anything we have consented to is thereby legitimate. Focusing on conditions of empowerment has the advantage, however, of turning attention to what I regard as the central issue: whether the transaction recognises or denies the status of the parties as equals.

Exploitation, Commodification, and Inequality

If my account of social justice leads me to think the current distribution of income and power is unfair, what is that extra that leads me to mark some sub-set of the distribution as exploitative? My claim is that when we assess an arrangement as exploitative, we are mobilising our perceptions of whether what is being asked of others, or paid to them for their services, would be acceptable to us under similar circumstances.³² When the transaction is a market one, that perception of what is acceptable will be informed by market prices, but in all cases, is *also* informed by a sense of what it is to treat another as an equal. I do not present

this as an objective measure, for the meaning attached to ‘treating others as equals’ shifts through time, varies between societies, and can indeed vary significantly from one individual to another. The very idea that others *should* be treated as equals is itself a recent phenomenon, associated with the American Declaration of Independence (1776) - ‘we hold these truths to be self-evident, that all men are created equal’ – or the French Declaration of the Rights of Man and the Citizen (1789) - ‘men are born and remain free and equal in rights’ – and was self-evidently limited even in those bold announcements to exclude at least half the human race. The subsequent extensions of the that equality, to include freed slaves, women, non-citizens, were achieved only through lengthy contestations; and it is worth recalling that, even in 1948, when the Universal Declaration of Human Rights finally abandoned the restrictive language of men to declare that ‘all human beings are born with equal and inalienable rights and fundamental freedoms’, the rights and equality were still not extended to colonial subjects.

That all humans should be regarded as equals is a recent and fragile achievement, and the actual content we give to that equality remains deeply contested. Some would say that it implies complete equality in income and wealth; others that it has no material implications, and yet others that it sets determinate limits to the permissible social and economic *inequalities*. These are not matters that can be settled by fiat or logic. The content of equality can only be filled through argument and contestation; it is not and cannot be ‘self-evident’. I am not, then, claiming some objective measure of what it is to treat others as equals. My argument is only that our sense of what it is to behave to others on a basis of equality helps set the floor to what we regard as acceptable treatment. It helps establish that point at which an ordinary ‘taking advantage of’ slides into something exploitative.

Exploitation is very much about inequality, and not just inequality in bargaining power or inequality in outcomes, but *the inequality that is at stake when one party to an arrangement treats the other as a being of lesser significance*. In a paradigm case of economic exploitation, where I pay you at a level that makes it impossible for you to live what I would regard as a decent existence, I am treating you as a lesser being, with lesser needs and sensibilities than myself. Yet if I were your neighbour, living at the same subsistence level, the pitiful hourly wage I pay you for fixing my roof would not so obviously be exploitative. In my view, this is because I would not then be treating you any differently from the way I treat myself. It is not the level of payment that makes it exploitation (how closely, for example, it tracks the hypothetical market price), nor even what it tells us about

your capacity to refuse the deal, but what it asserts about our status as equals. In a paradigm case of inter-personal exploitation, where I exploit your emotional dependency on me to get you to put up with my bad temper, sneering manner, and endless affairs, I treat you with contempt, as someone of no standing, someone whose needs and feelings can be ignored. If we were reciprocally unpleasant to one another, with no obvious inequality of standing, this would be a disastrous relationship but, again, not so obviously exploitative. The irrelevance of exploitation in these cases of *mutual* vulnerability helps highlight what is at stake. In exploring when the ordinarily unfair treatment of the vulnerable becomes the exploitative unfair, my claim is that this is the point where it crosses our equality line. Our views about what constitutes a fair price, or what counts as fair conditions of consent, reflect our views about what it is to treat another as an equal.³³

One implication is that exploitation and commodification begin to merge into one another, to the point where neither alone fully captures what is at stake. Consider here the scenes in Nepal during the 2015 earthquakes that killed an estimated 8500 people and destroyed much of Kathmandu. While rescue teams were rushing around trying to save lives and provide makeshift shelter, babies born to surrogates in Nepal were also being rescued, and flown to the safety of their new homes in Israel. Surrogacy has long been legal in Israel, but practised under strict government regulation, including a requirement that the surrogates are Jewish, married, and have had at least one child. Potential clients are also strictly regulated, and at this point in time, gay male couples were not permitted to employ surrogates. India had become the favoured alternative destination, but this door was closed by the 2012 restriction of surrogacy to married heterosexual couples, and the trade then moved to Nepal instead.³⁴ At the time of the earthquakes, there were thirty or so newly born babies awaiting transfer to Israel, as well as a hundred or so, mostly Indian, surrogates still awaiting birth.³⁵ The unease generated by pictures of babies flown out of an earthquake zone to scenes of celebration in Tel Aviv resonates with what Judith Butler has explored in her notion of a 'grievable life':³⁶ a sense that some lives are precious and countable (in this case, the babies and their future parents) whilst others are treated as negligible, of no great concern. The conditions that lead Vida Panitch to talk of exploitation in the surrogacy industry – Nepal as a cut-price destination, the surrogates as in a weak position to bargain better terms – certainly contribute to this sense of unease, but do not entirely explain it. There is also a powerful sense of a differential weight being given to different human beings. Borrowing more from

the commodification lexicon, there is a sense that some people's bodies are being valued primarily as a means to meet the needs of the more significant others.³⁷

The additional twist as regard commercial surrogacy is that it is only women's bodies that can be deployed in this way. One cannot plausibly represent surrogacy as a practice in which women are exploited *by men*, for the clients are still mostly heterosexual couples, and the agencies are often run by women, but if one thinks of the practice in terms of the weight it gives to different bodies, the fact that only women can be surrogates assumes particular significance. In her analysis of surrogacy, Debra Satz argues that 'contract pregnancy places women's bodies under the control of others and serves to perpetuate gender inequality'.³⁸ As this suggests, it is not just that some people's bodies are being valued primarily as a means to meet the needs of more significant others; it is that *only* women's bodies can perform this function. The practice positions women, and of necessity *only* women, as tools for satisfying the needs of others.

At this point, it becomes hard to disentangle the exploitation from the commodification critique. The unease we may feel about the practices of global commercial surrogacy shares with the first a concern with fair prices and defensible conditions of employment, but it shares with the second a concern that some people (some women) have become the means of resolving the problems of the (by implication, more important) others, in a non-reversible relationship that underscores their inequality. That the women fall out of the picture after the moment of giving birth is especially troubling when we think of the surrogacy relationship from the perspective of the children born through this process. It is increasingly recognised that adopted children need information about their birth parents, that they need to be able to see them as real people, and ideally to develop a relationship with them. Yet the way commercial surrogacy is organised, it is virtually impossible to sustain that sense of the birth mother as a person of equal importance in the world: the process is organised in such a way as to write her out of the child's life. This is not something sufficiently captured by the language of either exploitation or commodification, though it contains elements of each.

From the Individual to the Systemic Level

Critics of surrogacy are often taken to task for a failure to recognise, or even bother to find out, how the work is experienced by the surrogates themselves. They are said wrongly to presume that all women experience pregnancy as a bonding with the growing child (this is a

common critique of Elizabeth Anderson);³⁹ or wrongly to presume that the capacity to give birth is central to a woman's identity (recall Pande's critique of Pateman); or wrongly to presume that relinquishing a child after birth will always be traumatic. In my previous writing on surrogacy, I made my own, somewhat doubtful, generalisations. I argued that some, at least, of the current social division of labour reflects variations in skills and preferences that lead us to specialise in different activities, such that even in our deeply inegalitarian world, we can tell plausible tales about *some* divisions of labour that do not depend on one person being rich and another poor. I claimed, however, that the appeal to differential skills and preferences does not work for surrogacy, hence that this is a division of labour that can *only* be explained by reference to social and gender inequality. Yet as I knew even at the time of writing, this was overstated. It is not entirely absurd to say that some women might have a 'preference' for being pregnant, and might choose this as their occupation even in the absence of pressing economic need. Women vary in the ways they experience pregnancy, in their sense of who they are, in their capacity for emotional detachment, and when objections to commercial surrogacy depend on unsubstantiated claims of a general nature, they are inevitably vulnerable to critique. This, indeed, was very much Panitch's starting point: the need to ground any claims about exploitation in what the surrogates themselves say about their lives and experiences.

There is, however, a sense in which the assessment of transnational commercial surrogacy *is* independent of individual experience. If a surrogate says she feels well paid for her work, we cannot yet take this as definitive evidence that the price is fair, for she may not know how much surrogates in other countries are paid, or how much the clients are paying, or she may be someone who sets a low value on herself. Similarly, if a commissioning couple forms a friendship with a surrogate and takes a genuine interest in her life, this does not yet establish that the relationship is an equal one, for the claim about inequality is structural, not reducible to individual 'niceness'. The problem with surrogacy is not just that the women may be badly treated, or work in poor conditions, or are paid less than their counterparts elsewhere; and the inequality I am claiming in the transaction is not to be understood simply in terms of how the various participants feel towards one another. The problems with commercial surrogacy have to be understood at a systemic as well as individual level.

One key component of this is that surrogacy can only be a solution to infertility problems within a very narrow range; the recent transformation into a global industry makes this even clearer than before. We can envisage a global solution to malaria or HIV/AIDS, one

that ultimately aids everyone around the world, but we cannot plausibly represent surrogacy as a solution to global problems of childlessness. When poorer women face infertility or poorer gay men wish to become parents, the development of surrogacy techniques offers them no respite. The opportunities opened up by these developments are only available to the relatively wealthy – and *can* only be available to that limited few, for there would never be enough women of child bearing age in the world willing and able to act as surrogates for all the world's childless. The industry depends, intrinsically not just contingently, on global inequalities, both to generate the supply of surrogates and to keep the demand to a manageable level. Were the price to drop to a point that made surrogacy a genuine alternative to the many millions who face childlessness, it would have to be to a level at which few woman would agree to work as a surrogate.⁴⁰ Were the price were to rise to a point where the conditions of employment no longer appear exploitative, this could only further remove the possibility of using surrogacy services from the vast majority of the world's childless people. Commercial surrogacy is a luxury good that depends on treating some people's childlessness as a matter of more consequence than that of others. Unlike global solutions to malaria or HIV/AIDSs, it can never be generalised.

Amrita Pande makes a similar point, with a further ironic twist, when she describes

the new subtle form of eugenics whereby the neoliberal notion of consumer choice justifies promotion of assisted reproductive services for the rich and, at the same time, justifies aggressive anti-natal policies by portraying poor people (often in the global south) as strains on the world's economy and environment. Moreover, as the surrogates align their own reproduction, through decisions about fertility, sterilization, and abortion, in order to (re)produce children of higher classes and privileged nations, they ultimately conform to this neoliberal global imperative of reducing the fertility of lower-class women in the global south.⁴¹

In one poignant illustration, Parvati (not her real name) discovered that she was pregnant with what would have been her second child whilst undergoing the medical checks to become a surrogate. Though she and her husband wanted a second child, they 'needed the money more than a baby', and she elected to have an abortion. As one of the oldest surrogates, however, she knew this could mean she would never have her own second child. Here, the desire of

one couple for a child very directly cancelled the possibility for the other – and did so, not because the clients were unkind or consciously rated their own needs above hers, but because the arrangement was systemically unequal.

There are many luxury trades in the world that cannot be generalised: I cannot imagine a future world in which everyone can drive an Aston Martin or every student receives the one-to-one attention of world ranking academics that supposedly characterises studying at Oxford. But these are not goods that are as generally desired as having children, nor are they ones whose unequal distribution marks out some people as of lesser significance than others. Having children is also not universally desired, in that not everyone wants to be a parent, but it is universal in another sense, in that it cuts across all countries and income brackets. And while the owners of Aston Martins or beneficiaries of elite educations sometimes convince themselves that they are indeed of superior significance, their high self-esteem is rarely endorsed by those who ride bicycles or were educated elsewhere. With surrogacy, by contrast, the focus on the anguish of infertility and childlessness, combined with the impossibility of generalised access to the proposed solution, establishes a hierarchy of significance in which some people's pain matters more than the pain of others.

In making this point, I am shifting the focus of the argument from inequalities in the relationship between surrogate, commercial agency, and commissioning couple, to include the further inequalities between those able to use surrogacy arrangements and those who will never be in a position to do so. This moves us beyond the level of individual experience and perception. There is no relationship – or only the most formal of relationships – between those able to turn to surrogacy to provide themselves with a child and those with no chance of this, and while one can assume that commissioning couples spend quite a lot of time thinking about their chosen surrogate, it is unlikely that they give much thought to the many not pursuing surrogacy. I am not, to repeat, claiming that they actually think of themselves as more important, or consider it desirable that only a small proportion of the childless should ever get this opportunity. This part of my argument is systemic, not individual, and does not depend for its validity on expressed feelings or views.

Conclusion

In this article, I have queried the distinction between exploitation and commodification critiques, and have argued that both derive their force from notions of what it is to treat others as equals. This then blurs the distinction between the two. The further implication, which

becomes particularly apparent when we look to the systemic level, is that neither is able, either singly or in tandem, fully to capture the challenge posed by the development and globalisation of commercial surrogacy. Both exploitation and commodification point to harms done to specific individuals. There are indeed such harms, as Vida Panitch among others has demonstrated, and in exploring these, it is important to draw on what individuals themselves feel about their situation, not presume in advance that we know how they 'must' feel. But in analysing why the commercialisation and globalisation of surrogacy is so problematic, we should also look to the systemic level, where inequality is built into the nature and practice of the industry, and cannot be resolved by improvements in the terms and conditions of the trade.

Footnotes

¹ I am grateful to participants at the UK Analytic Legal & Political Philosophy Conference (2015), the Theoretical Reflections on Exploitation in Practice Conference (2015), the Oxford Political Theory Seminar (2016), and Frankfurt Political Theory Colloquium (2016) for very helpful comments on an earlier draft. My thanks also to Mary Shanley for her written comments.

² Vida Panitch, "Global Surrogacy: exploitation to empowerment," *Journal of Global Ethics* 9/3 (2013), 332.

³ The leading study is Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (New York: Columbia University Press, 2014).

⁴ Panitch, "Global Surrogacy", 333

⁵ Amrita Pande, "Commercial Surrogacy in India: Manufacturing the perfect mother-worker," *Signs* 35/4 (2010), 972.

⁶ Amrita Pande, "Commercial Gestational Surrogacy in India: nine months of labor?" In Kenji Kosaka and Masahiro Ogino (eds) *A Quest for Alternative Sociology* (Nishinomiya, Japan: Trans Pacific Press, 2008), 74.

⁷ See also Alison Bailey, "Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy," *Hypatia*, 26 (2011).

⁸ Panitch, "Global Surrogacy", 340.

⁹ Panitch, "Global Surrogacy", 340.

¹⁰ Panitch, "Global Surrogacy", 34.

¹¹ Charles A Erin and John Harris, "A monopsonistic market: or how to buy and sell human organs, tissues and cells ethically". In *Life and Death under High Technology Medicine* ed. Ian Robinson (Manchester: Manchester University Press, 1994).

¹² Karen Busby and Delaney Vun, "Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers," *Canadian Journal of Family Law*, 26/1 (2010).

¹³ For example, Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminist". In Kenneth D Alpern (ed) *The Ethics of Reproductive Technology* (New York and Oxford: Oxford University Press, 1992); Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven and London: Yale University Press, 1989).

¹⁴ For example, Rosemarie Tong, "The overdue death of a feminist chameleon: taking a stand on surrogacy arrangements," *Journal of Social Philosophy*, 21 (1990).

¹⁵ *Our Bodies, Whose Property?* (Princeton: Princeton University Press, 2013)

¹⁶ This point is made forcefully in Martha C. Nussbaum, “‘Whether From Reason or Prejudice’: Taking Money for Bodily Services,” in *Sex and Social Justice*. (New York and Oxford: Oxford University Press, 1999). See also Debra Satz, “Markets in Women’s Sexual Labor,” *Ethics* 106 (1995); Satz, *Why Some Things Should Not Be For Sale: The Moral Limits of Markets* (Oxford and New York: Oxford University Press, 2010).

¹⁷ Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); and “Self-ownership and property in the person,” *Journal of Political Philosophy* 10/, (2002).

¹⁸ Pande *Wombs in Labor*., 106. See also Mary Shanley, for a depiction of surrogacy as a ‘extreme’ form of the alienation of the self that potentially occurs in all employment. “‘Surrogate Mothering’ and Women’s Freedom: A Critique of Contracts for Human Reproduction,” *Signs* 18 (1993).

¹⁹ Pateman, *The Sexual Contract*, 207. Pande criticises this formulation as suggesting that ‘women’s reproduction belongs to a sacred, special realm’, but this seems to me an overly free rendering of Pateman’s point. *Wombs in Labor*: 7.

²⁰ Margaret Jane Radin, *Contested Commodities: The trouble with trade in sex, children, body parts and other things* (Cambridge, Mass: Harvard University Press, 1996), 88.

²¹ There are exceptions to this. In Marx’s account, *any* extraction of surplus labour, understood as the difference between what is needed to reproduce the worker and his/her conditions of existence, and what that worker actually produces, counts as exploitation. On this account, the whole damn system is unfair. Though this might seem to deprive the notion of exploitation of its usefulness, the key analytic question for Marx was not whether this transaction or that was exploitative, but what was happening to the *rate* of exploitation.

²² Robert E Goodin, “Exploiting a situation and exploiting a person”. In *Modern Theories of Exploitation*, ed. Andrew Reeve (London: Sage, 1987),181.

²³ Wood, ‘Exploitation’: 149

²⁴ This has become very much the consensus in the literature since the publication of Alan Wertheimer’s *Exploitation* (Princeton: Princeton University Press 1996), which focuses on mutually beneficial exchanges that are nonetheless commonly regarded as exploitative.

²⁵ There has been an especially close attention to questions of consent in recent feminist literature, where there is resistance both to uncritical celebrations of free choice *and* to versions of consent that represent women as simply coerced by circumstances. See, for example, essays in *Gender, Agency and Coercion*, edited by Sumi Madhok, Anne Phillips, and Kalpana Wilson (London: Palgrave Macmillan, 2013).

²⁶ Wertheimer, *Exploitation*, 95.

²⁷ Wertheimer, *Exploitation*, 232.

²⁸ Panitch, ‘Global Surrogacy’, 331.

²⁹ Panitch, ‘Global Surrogacy’, 336.

³⁰ Jeffrey Kirby, ‘Transnational Gestational Surrogacy: Does it Have to Be Exploitative?’ *The American Journal of Bioethics* 14/5 (2014).

³¹ Panitch, ‘Global Surrogacy’, 333.

³² This not to say *accepted* by us under similar circumstances: there are some offers I would always refuse, but I wouldn’t necessarily describe those who do accept them as exploited; and there are some offers I can imagine accepting while still regarding them as, in principle, unacceptable.

³³ This is the point at which some theorists would introduce the notion of our inherent dignity as human beings. However, for reasons I have developed elsewhere, I do not find the language of dignity helpful, or think it adds anything significant to what is already captured by equality. See Anne Phillips, *The Politics of the Human* (Cambridge: Cambridge University Press, 2015), ch 4.

³⁴ Nepal has since banned surrogacy, concerned – like India - about the reputational damage to the country.

³⁵ In a further development of the transnational trade, the surrogates still tend to be Indian, but now live for the duration not just in hostels attached to clinics, but in ones situated in another country.

³⁶ Judith Butler, *Frames of War: When is Life Grievable?* (London: Verso, 2009).

³⁷ In fairness, it should be added that the Israeli planes ‘rescuing’ the babies were also among the first to fly medical supplies and personnel to Nepal; and that critics within Israel called on the government to fly the surrogates to safety as well as the babies. However, none of the subsequent offers of assistance has applied to those surrogates who had already given birth, and are now therefore ‘disposable’.

³⁸ Debra Satz, 133

³⁹ Elizabeth S. Anderson, ‘Is Women’s Labor a Commodity?’ *Philosophy and Public Affairs* 19/1 (1990). See Pande, *Wombs in Labor*, 7, for a common criticism.

⁴⁰ I recognise this as another ‘unsubstantiated claim of a general nature’, but it seems plausible in this context.

⁴¹ Pande, *Wombs in Labor*, 23

