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### Global surrogacy: exploitation to empowerment

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## Global surrogacy: exploitation to empowerment

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Commercial surrogacy has gone global in the last decade, and India has become the international centre for reproductive tourism, boasting numerous high-quality and low-fee clinics. The growth of the surrogacy industry in India raises serious concerns of global gender justice, in particular whether the option is inordinately enticing for women who lack other remunerable options and whether the conditions are adequate and the compensation fair. In this paper I argue that the moral harm of global commercial surrogacy lies in the exploitative nature of transactions involving unequally vulnerable parties. More specifically, I argue that the practice exploits Indian surrogates on the basis of an inter-contractual failure of both justice and consent. I go on to consider an important objection to my use of exploitation as the relevant conceptual tool of analysis. The ethnographic challenge holds that the exploitation lens Occidentalizes surrogacy by conceptualizing the practice in universalizing terms, thereby eclipsing the particularities of the global surrogate's lived experience. I respond by showing that in fact the exploitation and the ethnographic models are not so at odds as they might seem. Provided we are careful in our use of the former to nuance our analysis by appeal to narrative evidence supplied by the latter, we are thereby best situated to identify and address the moral difficulties generated by commercial surrogacy under conditions of global injustice.

**Keywords:** commercial surrogacy; exploitation; justice; reproductive rights

### Introduction

Commercial surrogacy, either a criminal offense or prohibitively expensive for many first-world citizens, has gone global in the last decade. India has become the international centre for reproductive tourism, boasting numerous high-quality and low-fee clinics. The growth of the surrogacy industry in India raises serious concerns of gender justice, in particular whether the option is inordinately enticing for women who lack other remunerable options and whether the conditions are adequate and the compensation fair. The growing trend of global commercial surrogacy has thus compelled many feminists to reopen the moral debate that surrounded the domestic practice some 30 years ago in the wake of the infamous Baby M trial. But what is clear this time is that the practice must now be assessed alongside the additional moral dimension of global injustice.

In this paper I argue that the moral harm of global commercial surrogacy lies in the exploitative nature of transactions involving unequally vulnerable parties. More specifically, I argue that the practice is exploitative of Indian surrogates due to a failure of consent within the contract and of justice across contracts. The upshot of my argument is that this type of exploitation is made possible by an act of omission on the part of the Indian state, specifically that of failing to protect the negative reproductive rights of its female citizens. This is a failure the state

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need not rectify not by criminalizing the practice, I suggest, but by investing the profits of commercial surrogacy in female empowerment goals geared to the promotion of women's agency.

I go on to consider an important objection to my use of exploitation as the relevant conceptual tool of analysis. The ethnographic challenge holds that the exploitation lens Occidentalizes surrogacy by conceptualizing the practice in universalizing terms, thereby eclipsing the particularities of the global surrogate's lived experience. I respond by showing that in fact the exploitation lens and the ethnographic model are not so at odds as they might seem, provided we are careful in our use of the former to nuance our analysis by appeal to narrative evidence supplied by the latter. This is precisely the approach I attempt to take in this paper, as this approach best enables us to identify and challenge the moral difficulties generated by commercial surrogacy arrangements carried out against the backdrop of global injustice.

### Global surrogacy

Recent statistics show that 1 in 10 (first world) couples are experiencing trouble conceiving a child naturally and are turning to various forms of assisted reproductive technology (ART), surrogacy prominent among them (Twine 2011). Commercial surrogacy is, however, a criminal act in many countries, including but not limited to Canada, the UK, France, Norway, and Italy. Although it is perfectly acceptable that a surrogate be reimbursed for costs associated with her diet, clothing or medical needs, it is illegal that she receive payment for her reproductive services specifically. This is a serious deterrent for many potential surrogates given that the process is, pun intended, quite labour intensive. And in the USA, where commercial surrogacy is legal (except in a few jurisdictions), it remains a luxury of the wealthy, ranging in cost anywhere from \$50,000 to \$120,000 (Busby and Vun 2010, 34).<sup>1</sup>

Women for whom other forms of ART have proven ineffective, who cannot find a friend or relative willing to act as an altruistic surrogate, and/or who cannot afford the rates charged by American clinics, are turning in growing numbers to the global surrogacy market. India in particular has become a transnational hub for reproductive tourism, with the city of Anand in the Western state of Gujarat as its nerve centre. Although California remains the destination of choice for wealthy reproductive tourists seeking gestational surrogates, clinics such as the Akanksha Clinic in Anand provide equivalent services for a fraction of the price. Dr Nayna Patel, who founded the clinic in 2003, has alone employed 167 surrogates who have given birth to 216 healthy babies (Twine 2011, 45). Wider estimates suggest that 100–150 babies are born to surrogate mothers in India each year (Gupta 2012, 32). The total cost to prospective parents is around \$10,000, and reproductive tourism is estimated to be a \$445 million business in India, with the potential to grow in the near future to anywhere from \$2.3 to \$6 billion (Gupta 2012, 43; Nolen 2009; Subramanian 2007).

The question is whether global commercial surrogacy is morally defensible. It might be regarded as such by appeal to the liberal freedom of contract, which protects the rights of adults of sound mind and full information to contract for the performance of services they desire at a price they are willing to pay, or to offer services for a fee they find compensatory. It might also be defended on the grounds that it provides a source of independent income to developing world women whose economic options are otherwise quite limited. And finally, it might be defended on the grounds that it satisfies the reproductive rights of first-world women who have chosen to delay child-rearing to pursue a career or other projects of interest to them and who would otherwise be biologically, legally, and economically prevented from exercising that right. But there is a decidedly more pressing reason to be concerned with the practice, namely that it exploits the reproductive labour of developing world women.

### Exploitation, justice, and agency

In what manner might global commercial surrogacy be viewed as exploitative? Typically exploitation is thought to occur when one party to an exchange takes advantage of the other's vulnerability to deny her a share of the cooperative surplus. But this account does not seem to capture the reality of global commercial surrogacy. The contracting parents bear a financial cost, but gain a child; the surrogate endures insemination, pregnancy, and labour, yet can earn a significantly higher wage than her other opportunities afford. This is obviously not a case where benefits only accrue to the non-vulnerable party. Rather it seems that if we want to identify global commercial surrogacy arrangements as exploitative, we must be prepared to do so as cases of what Wertheimer (1996) calls mutually advantageous exploitation.

Mutually advantageous exploitative transactions need not necessarily be prevented, according to Wertheimer (1996, 207). What is relevant to assessing their wrongfulness, on his view, is how much each party benefits relative to where each began, as compared to the other. If both parties benefit relative to where they respectively began but Party A gains enormously while Party B only gains marginally, we might well think that B has been wrongfully exploited by A. What is equally relevant on his account is whether B fully consented to the transaction. If Party B was vulnerable in some sense such that her rationality or agency was impaired, we must deny that her consent was properly authoritative. We should therefore assess the permissibility of mutually advantageous exploitative transactions on the basis of whether they meet two conditions: (1) The Justice Condition: that the distribution of benefits and harms between Party A and B is not unfair in A's favour. And (2) The Consent Condition: that B's consent is valid (Wilkinson 2003, 173).

Let us take a closer look at the Justice Condition first. With respect to global surrogacy arrangements, we must presumably assess the satisfaction of this condition on the basis of whether the surrogate is under compensated relative to the gains enjoyed by the contracting parents. But it is immensely difficult to compare the value of a wage to a surrogate with few other financial options and the value of a child to an infertile couple. This difficulty might be due to the fact that we seem to be comparing vastly different kinds of goods. But even if we hold that the real value of the surrogate's wage lies in the fact that it enables her to provide for her own children, and thus take the value of children as the point of comparison, both parties seem to do decidedly better by it as compared to where they began, so injustice does not appear to be done by the exchange.

However, while comparing gains enjoyed by the specific parties to an exchange is definitely an important way of evaluating fairness, it is not the only way. Consider the example most often given in colloquial discussions of transnational exploitation, namely that of the multinational corporation that 'exploits' its developing world workers. The intuition we encounter when this example is voiced as paradigmatic is that developing world workers are exploited by multinationals who deny them the minimum wage guarantees, pensions, health benefits, work week standards, work place safety regulations, and union bargaining rights they afford their first-world employees. What this intuition points to, and what those who raise this example are in fact decrying as unjust, is not simply that the multinational walks away with a greater benefit share than its developing world workers, but that its *developing world workers enjoy so many less benefits than their first-world counterparts, despite taking on all the same burdens*.

This example is, of course, not totally analogous to global surrogacy arrangements (assuming we deny the claim that corporations are persons). But I offer it here not so much as an analogy as to tap into the widely shared intuition that when assessing transnational exploitation our considered judgments instruct us to look not only within contracts but also across them. In order to properly evaluate whether a transaction satisfies the Justice Condition it strikes us as intuitively necessary to make comparisons not just between parties to a specific contract but

also between parties across contracts of a relevantly similar sort. What we are looking to see is whether the vulnerability of one party to an exchange is being used as grounds for denying her what a less vulnerable party, performing the same contractual service in a different geographical region, receives in exchange for her services. We feel we must compare the fairness of B's benefit share *inter*-contractually and not just *intra*-contractually. Let us attempt this type of comparison with global surrogacy.

In the USA, surrogates are typically high-school graduates, often college graduates, between the ages of 22 and 38, who earn anywhere from \$25,000 to \$40,000 (Twine 2011, 45). According to a series of empirical studies, they opt to become surrogates not due to an absence of other equally remunerable options but because this type of work allows them to help others, and provides them the time to pursue other interests (such as furthering their education or caring for their own children). They come from working class or middle-class families, and have never except in a few rare cases been on social assistance. Indeed they are screened out by surrogacy clinics if they articulate primarily financial motives. On the whole, American surrogates report having chosen the role willingly, against the backdrop of other reasonable options. They enjoy a post-birth grace period, a pre-birth opt out clause, compensation for expenses, quality medical care, legal representation, and the opportunity for an ongoing relationship with the child and its adoptive family (Busby and Vun 2010, 40–45).

In India, surrogates are typically between the ages of 18 and 45, with limited education and often illiterate, have two or more children, and can expect to earn between \$1500 and \$5000. In lieu of expenses, surrogates in Anand are housed in clinical compounds where all of their meals and activities are monitored, and from which they are not permitted to leave (nor indeed go downstairs) without clinical permission. Indian surrogates are poorer both relatively and absolutely than surrogates in the USA, almost all are living below the poverty line as defined by the Indian government, and the payment they receive is often unavailable to them via other forms of work in their communities (Pande 2009, 2010; Twine 2011). They have no legal representation and no rights under the contract: they do not have a grace period following birth within which they can change their mind, and they are guaranteed no compensation should they fail to produce a child (Busby and Vun 2010; Pande 2010). The Indian surrogate's motivation is almost exclusively financial, and her decision is, as Gupta (2012, 46) puts it 'generally made in a context of limited possibilities for self-expression or development, rising unemployment, lack of financial resources . . . low education levels, poverty, marginalization in labour and job markets, and patriarchal social and family structures'.

This comparison confirms that there is indeed a further dimension to consider when assessing the Justice Condition of an exploitation claim as it pertains to global surrogacy arrangements. Underpayment, or unfairness of benefit sharing, must be assessed not just relative to what the other party to the contract gains but relative to what other people performing the same type of work in other parts of the world receive as compensation. This is consistent with the widely shared intuition that people should not, for arbitrary reasons (including their geographic location) be denied parity of benefit for party of burden – or equal pay for equal work. When we evaluate fairness not simply within contracts but across them, or *inter*-contractually (Party B to another Party B) as opposed to just *intra*-contractually (Party B to Party A), it seems warranted to say that the Indian surrogate's benefit share does not satisfy the Justice Condition.

One challenge to this is, of course, that while the wages of Indian and American surrogates may be asymmetric, the purchasing power of their wages may not be; \$3000 in Gujarat might make available similar kinds of opportunities as \$30,000 does in California. But supposing we grant this (despite how unlikely it seems, and without a proper digression on purchasing power parity), we have not necessarily established satisfaction of the Justice Condition. Along with a wage, the benefits to an American surrogate include the freedom to pursue other interests while under contract, health care, travel and dietary expenses, legal

representation, a post-birth opt-out clause, and the potential for a rewarding relationship with the adoptive family (Busby and Vun 2010). If we view these additional considerations alongside income as matters of benefit, I think we can safely reassert our conclusion that the Justice Condition currently goes unfulfilled in Indian commercial surrogacy arrangements.

A second challenge is whether my view implies that American surrogates cannot be exploited. On my account, how can we make such an assessment if there is no better-situated Party B against which to evaluate their benefit shares? To effectively answer this challenge, we must appeal to the distinction between ideal and non-ideal justice. To determine whether American surrogacy arrangements fail the Justice Condition, we would have to look to an ideal form of this type of arrangement, which might be established either by an enumeration of the kinds of goods morally appropriate for exchange with the kind of good a surrogate provides, or by appeal to the share of benefits ideally placed transactors would agree to under perfectly just conditions. Ultimately, I think the latter would be the right and possibly the necessary move to determining the genuine justice of surrogacy arrangements. But I do not think we need to make this move in order to claim that *global* surrogacy arrangements are unjust. As a claim of non-ideal theory it is enough to say that they are quite obviously *less fair* than first-world arrangements, and that first-world surrogates enjoy a share of benefits closer to the ideal, whatever it may be.

I have tried to show so far that we can only properly evaluate the Justice Condition of global surrogacy arrangements if we engage in inter-contractual as opposed to simply intra-contractual benefit comparisons. I now want to show with respect to the Consent Condition that, once again, we must look beyond the arrangement itself to appreciate its coercive nature. To do so, let me again take Wertheimer as my point of departure. On his view, surrogacy arrangements are consensual because the contracting parents do not threaten to make the surrogate worse off than she would otherwise have been if she refuses their offer. His view is that so long as they do not threaten her if she refuses, they do not coerce her. That their offer is extended to someone who is likely to accept it given her circumstances does not in and of itself entail coercion, he claims; their offer would only be coercive if they had a pre-existing obligation to improve her circumstances without demanding anything in return.

Wertheimer gives the example of a passerby who offers to save a drowning swimmer in exchange for \$10,000. This scenario is coercive, he claims, because the passerby has a duty to perform easy rescues without demanding payment (1996, 111). But, he continues, this type of example is of no use in evaluating surrogacy arrangements, because prospective parents have no such duty, and so do not coerce the surrogate by offering to improve her circumstances only if she provides them with a child. Wertheimer is of course right that where no duty is owed, no duty can go unfulfilled, and no coercive offer can be made to fulfil the duty only in exchange for some good. But to properly assess the satisfaction of the Consent Condition in global surrogacy, we must again look beyond the contract itself.

Consider for a moment the very reason that American and Indian surrogates command such differential benefits. The prospective parents who contract the services of an Indian surrogate do so precisely because they can get away with offering her less. And they can get away with offering her less because the Indian surrogate is not in a position to demand better terms. The genuine acceptance of an offer, I propose, 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. If the prospective Indian surrogate attempts to bargain for better terms, the offer will just be made to someone who will not. She cannot really be said to be in a position to bargain if any attempt to do so will result in the offer's disappearance. An inability to demand better terms, I am suggesting, is thus morally equivalent to an inability to refuse.

If a prospective surrogate wants to participate she must accept whatever terms are offered to her, no matter how meagre, how much more she might want, or how much more she might be entitled to. This is precisely the point we must be concerned with when assessing coercion: not whether the offer threatens to make her worse off, but whether she is able to negotiate for a fair share of benefits. The extent to which an Indian surrogate is forced to accept the terms as presented to her depends on the quality of her bargaining power. For Kabeer (1999, 436) this 'amounts not only to the ability to define one's goals, but to negotiate for what one wants', and where this ability is lacking, she avows, agency is thereby impaired. A surrogate's bargaining power can be assessed on the basis of her fungibility, her lack of alternative options, and the urgency of her own and her family's needs. I will provide evidence in the next section that Indian surrogates are indeed unable to negotiate for these reasons. For now suffice it to say with normative purposes in mind that insofar as an Indian surrogate cannot negotiate her arrangement's terms, the satisfaction of the Consent Condition is in doubt.

Wertheimer would respond that although the Indian surrogate may not be able to bargain for better terms, this is not the fault of the contracting parents. I am in agreement with him on this point. But this does not settle the matter. Reconsider his drowning example, and let us call it 'Drowning 1' or (D1). In (D1) the passerby who offers to save a drowning swimmer for \$10,000 is flouting a duty to perform easy rescues without demanding anything in return, while parents who contract a global surrogate's services are not. But this conclusion is not so straightforward. On the one hand, prospective parents may indeed have obligations of rescue, or rather, of restitution to members of the third world for returns they have already enjoyed as members of the first world (Pogge 2001). And on the other hand, passersby may not have duties of easy rescue at all (and even if they do, rescuing someone from drowning is rarely very easy).

Let us therefore change the case to (D2): in which the person making the offer is a lifeguard. In this case the offer is coercive because lifeguards have an undeniable duty to rescue swimmers (on their beach during their shift) without demanding anything in return. But this version of events is not all that analogous to surrogacy either, because prospective parents clearly do not have the same duties of rescue as lifeguards. So let us change the scenario one more time to (D3): in which the lifeguard falls asleep, whereupon a passerby offers to save the drowning swimmer for \$10,000. It is this last scenario that is most analogous to global surrogacy arrangements according to Wilkinson (2003, 174). And he is correct that the scenario is clearly coercive.

The parents in (D3) are not represented by the lifeguard but by the passerby. And in this case the moral blame lies, as it does in (D2), with the lifeguard. Here the passerby makes an exploitative offer, but is only able to do so because the lifeguard is flouting his duty of rescue; had he performed his duty no such offer could have been extended. This constitutes a case of what Wilkinson calls third-party omissive coercion (2003, 177). The right of rescue owed to the drowning man in (D3) is going unmet by the relevant duty-bearer, who is thus an omissive third party to the exploitative arrangement that is struck between the passerby and the swimmer. By analogy, the parents are able to demand whatever they want from the surrogate in return for the benefit they provide her precisely because the person (or institution) that bears a duty to provide her such benefits without demanding anything in return is failing to do so. Since what matters from the point of view of the Consent Condition is whether something to which the surrogate has a right is going unfulfilled, such that her ability to negotiate the terms of the offer is impaired, we can conclude that the arrangement fails to satisfy the Consent Condition as a result of third-party omissive coercion.

### **From exploitation to empowerment**

Where both the Consent Condition and the Justice Condition are unmet, wrongful albeit mutually advantageous exploitation occurs. Both of these conditions, I have endeavoured to

show, currently go unmet in global commercial surrogacy contracts. Both analyses, however, depend on looking beyond the arrangements themselves. With the Justice Condition, we must make inter-contractual distributive comparisons. With the Consent Condition, we must take account of a third-party coercive omission. The correct solution, I will now propose, depends on holding this third party to account. It is only in ensuring that this third party satisfies its obligation to improve the conditions of the surrogate's bargaining power that we will thereby be able to promote satisfaction of both the Consent and the Justice Conditions. The task now is to identify the relevant third party and the nature of its omission.

Insofar as the Indian surrogate is not able to negotiate, her right to make reproductive decisions free of coercion is going unmet. The United Nations and the World Health Organization recognize this when they assert

the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and to have the information and means to have a family if and how they so desire . . . this includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence. (UN 1994; WHO 2010)

On this account, negative reproductive rights carve out a sphere of autonomy within which the individual must be free to make, exercise and authorize genuine procreative choice.

The right not to be coerced is a central component of reproductive freedom, and it is insofar as a surrogate lacks adequate bargaining power that she is coerced, and insofar as she is coerced that she is exploited. Her exploitation thus depends on a violation of her negative reproductive rights. The point, to be clear, is not that her exploitation *constitutes* a rights violation, but that her exploitation is *made possible* by a rights violation. The surrogate's lack of bargaining power is attributable to some third-party omission, and the omission we must be concerned with, I suggest, is a failure to ensure the content of her negative right not to be reproductively coerced, an omission which itself amounts to a violation of that right. Negative rights are not rights we hold against other persons but against the state. They insulate a sphere of protection against interference by the state, its laws and its agents, and assure us state protection against those who seek to transgress our rights. Insofar as the surrogate's negative reproductive right is going unfulfilled, the Indian state is thus the relevant third party whose omission creates the coercion that enables her exploitation.

The Indian state could address the surrogate's right by criminalizing the commercial practice. Criminalization is not the only option available, however, nor necessarily the most effective, insofar as it would treat the symptom not the cause. Gupta (2012, 47) concurs with my assessment that

the problem lies . . . with the lack of a powerful welfare state that fails to ensure the basic needs of its citizens and protect them from exploitation . . . Empowerment of vulnerable people to meet their basic needs and strengthen the capabilities and rights of vulnerable women . . . [is a thing for which] the state is accountable and must take action.

She concludes from this that the Indian state must ban commercial surrogacy. But if the true problem lies in the state's failure to secure the material and social conditions of Indian women's empowerment, the solution would seem to lie with a concerted effort on its part to satisfy their reproductive rights by securing the social and material conditions of their empowerment.

I propose that Indian women therefore have a right against their state that it employ a share of the profits of surrogate tourism to address the conditions of vulnerability that affect their bargaining power and make them open to exploitation at the hands of surrogate tourists.<sup>2</sup> A significant portion of the state revenue from commercial surrogacy in India ought to be invested in female empowerment goals, as measured by resource, agency, and achievement gains. These gains depend crucially on investment in women's education, literacy, health, employment options, and general resource shares (Kabeer 1999, 437). Foreign nations (especially those whose

citizens take part in the surrogate tourism market), and aid agencies both domestic and global committed to empowering women and girls in the developing world, should exert what pressure they can on the Indian state to invest in these areas. And the Indian state must come to see this investment as necessitated by the reproductive rights of its female citizens.

It may be asked at this point whether the prospective parents themselves have no duty to the surrogate. Surely a passerby who sees a lifeguard asleep in his chair ought to jump into the water and save the drowning swimmer without demanding payment. But why should he do this if he can instead simply wake the lifeguard? Would the passerby then be morally culpable if, once the swimmer had been brought to shore safely by the party charged with this task, he asks to rent the swimmer's goggles for less than the going rate at the surf shop? Presumably not, so long as the swimmer is able to make a counter offer which the passerby is free to accept or decline. I do not want to take this analogy too far, but the point, I hope, is clear. It may well be wrong for the contracting parents to make an exploitative offer to the surrogate, knowing they can get away with doing so because the state is failing to satisfy her rights. But were the state performing its duty this offer would not be wrong to the extent that it could be turned down.

A further challenge, however, is that even if measures are taken by the relevant third party to improve the bargaining power of global surrogates, achievements in this regard will be years away. What should surrogate tourists do in the mean time? Should they offer more, or desist altogether? If they offer more, they might make the deal not only unreasonable but actually impossible to refuse. If they desist, they would deny an economic option to women with few others, and deny the state resources I am now proposing it use to fund empowerment goals. I suggest, again, that the correct response is an institutional one. As a short-term measure the state might consider drafting and enforcing a standard contract, with terms which could include legal representation, an opt-out clause, and standards pertaining to housing and leave. The terms might also include minimum wage guarantees, although these could continue to be considerably lower than in the USA as a means of maintaining foreign interest and preventing the problem of increased coercion. This contract would be mooted once Indian surrogates are in a position to demand better terms for themselves, but in the mean time it would accord them some protection, and demonstrate to them a commitment on the part of the state to secure their interests and on the part of the adoptive parents to fair dealings.

A standard contract of this sort could be included in the ART (Regulation) Bill and Rules, currently under consideration by the Indian Government. The current bill proposes regulations, for example, on the age of surrogates, the number of children they can bear, the conditions in which they are housed, on the installation of payments, etc. The standard contract I propose – along with a tax on surrogacy revenue to fund female empowerment goals – would address some of the key concerns that Indian women's groups have voiced with respect to the inadequacies of current bill which, in their view, constitutes a move in the right direction yet pays insufficient attention to improving the bargaining power of surrogates and to protecting women's reproductive rights in an ongoing way (SAMA Women's Health 2010).

I have tried to show in this section that the omissive third party in global surrogacy arrangements is the state, who is neglecting a duty to satisfy the rights of its female citizens, and who ought to rectify this failure by investing in female empowerment goals. This solution has the virtue of addressing not only the Consent Condition by calling to account the negligent third party, but of promoting satisfaction of the Justice Condition by empowering surrogates to demand terms more proximal to those enjoyed by their first-world counterparts. I have tried to address various challenges to my version of the exploitation argument as I have proceeded, but before concluding I want to consider the challenge that exploitation itself is a problematic conceptual tool for analysing global surrogacy.

### The ethnographic challenge

The exploitation model I have employed for assessing and critiquing the practice of global commercial surrogacy is not without challenges. Indeed, a number of contemporary feminists working in the area of global and reproductive justice have argued that insofar as this lens is borrowed from earlier discussions of domestic commercial surrogacy it reflects the inherently Western nature of these discussions, thereby Occidentalizing in theory something that is increasingly non-Occidental in practice. This challenge has been voiced in diverse ways, but can be summed up with the claim that the Western ethical paradigm offers only two possible analyses of surrogacy. On the one hand, there is the standard interpretation of reproductive liberalism, of the sort represented by Wertheimer. On this view, surrogacy is a contract entered into freely by two parties who believe it will promote their well-being; it is thus an expression of reproductive autonomy and as such a morally defensible practice. On the other hand, there is the exploitation critique of the sort I have offered. On this view, the Indian surrogacy contract is rife with power imbalances and coercion; it is thus exploitative of women's reproductive labour, and as such a morally harmful and condemnable practice.

According to Banerjee (2010) both views are equally flawed and for the same reason. Reproductive liberalism holds that 'insofar as women have the right to decide whether and how to procreate, they have the right to do so by contract and against payment' (Fabre 2006, 192; quoted in Banerjee 2010, 109). The exploitation critique counters that 'Legal surrogacy contracts . . . coerce women into making a choice they do not prefer, yet cannot refuse because the price of refusal is too high' (Damelio and Sorenson 2008, 274). Banerjee argues that these two positions are essentially flip sides of the same coin, as the language of choice that both employ is itself the problem. The liberal lens ignores the power imbalances and socio-political conditions that can mar or impede the exercise of reproductive autonomy. But while the exploitation lens addresses these issues, it does so by treating the surrogate as a passive victim, at the mercy of superior forces external to her and in need of rescue by Western saviours. Claims Banerjee (2010, 111): 'Each of the perspectives . . . confines its attention to the active or the passive dimension of human existence. However, agency and passivity often do not constitute a dichotomy within our lived experience. We realize this further as we begin to listen to the voices of the transnational surrogates.'

This critique underlies the 'ethnographic turn' that surrogacy scholarship has taken in recent years, in response to increasing trans-nationalism. The ethnographic model focuses on narrative evidence supplied by global surrogates themselves, with the view to highlighting not the universal vice or virtue of the practice, but lived, complex, and concrete realities. As Bailey (2011, 723) puts it, the ethnographic model

highlights the dangers of assuming *a priori* that Western moral considerations can be exported to account for the lived experience of surrogates in third-world settings . . . [It shifts attention] from questions about the moral status of new reproductive technologies . . . to an examination of their culturally specific meanings as part of lived, contested and negotiated relations.

According to Bailey, ethnographies steer clear of normative master narratives that reduce surrogacy into the two binary logics wherein contract pregnancy is either characterized as a free choice with a win-win outcome or an exploitative practice from which Indian women must be rescued (2011, 724).

The ethnographic turn owes much to Amrita Pande's scholarship, which centres on interviews she conducted in 2006 and 2007 with surrogates working in the Akanksha clinic in Gujarat. For her, conceptualizing the practice in terms of right or wrong is simply not consonant with the fact that surrogacy has become a reality for many Indian women, one that Western moral categories cannot help them negotiate or navigate. Pande (2009, 145) argues that

Eurocentric portrayals of surrogacy cannot incorporate the reality of a developing country setting – where commercial surrogacy has become a survival strategy and temporary occupation for some

poor rural women . . . in such a setting, surrogacy cannot be seen through the lenses of ethics or morality but as a structural reality, with real actors and real consequences . . . If we are able to understand how surrogates experience and define their act . . . it will be possible to move beyond a universalistic, moralizing position and to develop some knowledge of the complex realities of women's experience of commercial surrogacy.

While Bailey embraces the ethnographic critique of Occidental master narratives, she nonetheless cautions that we should be wary of the 'weak moral absenteeism' of ethnography, arising from the fact that it asks moral questions only when interviewees do so themselves (2011, 724).<sup>3</sup> She argues that to avoid a kind of paralysis in both theory and action we must employ ethnography in our moral work, but not take it as a replacement for our moral work. Banerjee concurs, and holds that Pande's observations should not be seen as obstacles to future moral thinking, but as central points to consider in future normative discussions (2010, 117). We need not, according to both Banerjee and Bailey, respectively, set aside normative responses to Indian surrogacy, but simply proceed cautiously by listening carefully to Indian women's voices and being mindful of the ways that Western normative tools can have harmful effects when exported (Bailey 2011, 726; Banerjee 2010, 111).

Let us therefore consider some of the findings of Pande's ethnographic research, and see whether the account I have offered here has indeed proceeded 'cautiously' enough – or rather, whether it has been consonant with the surrogate's own narrative experience. Consider the following sample of statements from Pande's interviews, and whether the narrative themes that emerge support my earlier assessments of both the Justice Condition and the Consent Condition:

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Salma:	Who would do this? This is not work. This is <i>majboori</i> (a compulsion). Where we are now, it can't possibly get any worse. In our village we don't have a hut to live in or crops in our farm. This work is not ethical – it's just something we <i>have</i> to do to survive. When we heard of this surrogacy business, we didn't have any clothes to wear after the rains – just one pair that used to get wet – and our house had fallen down. What were we to do? (2009, 160)
Anjali:	I am doing this basically for my daughters. Both will be old enough to be sent to school next year . . . I don't want them to grow up like me – illiterate and desperate. I don't think there is anything wrong with surrogacy. But of course people talk. They don't understand that we are doing this because we are compelled to do so. People who get enough to eat interpret everything in the wrong way. (2009, 161)
Pushpa:	They said they don't care how long they have to wait – I can rest for 1–2 years, as much as I want but they only want me to carry their baby . . . Almost everyone who comes here for a surrogate wants me. Doctor Madam says to me, 'Why can't you get me 10–15 more Pushpas?' (2009, 163)
Salma:	Will (the adoptive father) said: 'You will make us happy and we'll make you happy.' His wife has become like an elder sister to me so I do just want to see them happy. They said they would build a house for us wherever we want to build it and however big we want it to be. I am having twins so perhaps they will build us two rooms instead of one. But I don't want to ask. (2009, 165–66)
Raveena (former surrogate, current surrogate counsellor and hostel matron):	My task is to make sure the clients don't get fooled – they get the best deal possible. After all they are investing all this money in my surrogates . . . I teach my surrogates: don't treat it like a business. Instead treat it like God's gift to you. <i>Don't be greedy</i> . (2010, 979)

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Let us consider these statements first from the perspective of the Consent Condition. The first two statements point to the narrative theme of *majboori*, or compulsion – a theme that reappears consistently throughout Pande’s interviews (2009, 160–63). She observes that the surrogates have a sense of moral non-responsibility for their work, insofar as they do not feel free to refuse it given their and their family’s more immediate needs. The mere existence of the offer exerts such a force given their circumstances that they do not feel as though they have either the luxury of assessing its morality or of turning it down even if they do find it to be morally lacking. The second two statements highlight the narrative theme of non-disposability, according to Pande (2010, 976–78). The surrogates emphasize their unique bond with the adoptive parents as a means of coming to terms with their actual fungibility. This narrative theme is evidence that the surrogates are themselves aware of their own disposability, but deny it in order to bolster their sense of self-worth.

Pande affirms the correlation between fungibility and a lack of bargaining power when she observes that since the surrogates cannot negotiate due to their disposability, they simply deny its relevance by seeing the arrangement as a gift relationship. Thus, in attempting to bolster their sense of self-worth, the surrogates downplay their own role as ‘workers’ entitled to a wage and fair contractual terms (Pande 2009, 163–66). The final statement reveals that the surrogates are discouraged from seeing themselves as workers. Whilst on the one hand being told that they are gift givers, they are on the other hand reminded of their disposability by the contract, the clinic rules, and their counsellors, who reaffirm repeatedly that they are just wombs that can easily be replaced. But the underlying instruction in both cases, according to Pande, is ‘not to negotiate the wages’ (2010, 977). Both the themes of *majboori* and disposability are consistent with, and indeed lend considerable support to my earlier assessment of the Consent Condition; they are in fact the very reasons I gave for being concerned about the Condition’s (non) fulfilment in Indian surrogacy arrangements.

And what do ethnographies tell us with respect to the Justice Condition? Most of the information we have about Indian surrogates comes from Pande’s studies. This information substantiated my earlier discussion of the motivations, conditions, and benefits enjoyed by Indian surrogates as compared to their American counterparts. That Indian surrogates are for the most part illiterate, living below the poverty line, and ineligible for other work that might pay a comparable wage is made plain by Pande’s research, as are the restrictive conditions under which their work is performed and the few protections they are afforded as workers. That I was able to engage in the type of inter-transactional comparative analysis necessary, on my view, to a proper assessment of the Justice Condition, was only made possible by paying close attention to the results of her ethnographic research.

I hope to have at least suggested from this that my analysis has endeavoured to be sensitive to the lived and concrete realities of surrogacy work in India. In this regard my analytic lens, albeit one of exploitation, satisfies Bailey’s instruction that we ought to only engage in normative discussions of the practice in a global context so long as these discussions are centrally informed by ethnographic research. Of course, having tried to suggest here that my argument is properly sensitive to, and indeed depends on, the output of Pande’s studies, I may not have yet satisfied the concern(s) Banerjee articulates. My focus is, of course, still very much on choice, and thus, in her view, as equally culpable as reproductive liberalism of endorsing a Western master narrative that denies autonomy by casting surrogates as helpless victims incapable of making sound judgments about their own identities (Banerjee 2010, 110).<sup>4</sup>

There are two responses I would like to offer here. On the one hand, I want to deny that my account depicts Indian surrogates as victims, at least in the sense that I think Banerjee understands the term. What I have argued is that, in being unable to bargain, Indian surrogates do not enjoy the kind of control over their work that would enable them to demand their just

share. But in identifying the problem as one of third-party omissive coercion, I have not cast them as victims of anything other than an institutional failure on the part of the state to satisfy their rights. And insofar as anyone suffers a rights deprivation that leaves them open to exploitation, they are not so much helpless victims as citizens who bear entitlements that have gone unfulfilled. Our task is thus not one of rescue (despite the possibly misleading drowning example borrowed from Wertheimer) but of demanding that the relevant institutions ensure the satisfaction of their rights.

The other response I would like to offer is that I think the exploitation lens is not in fact the appropriate target of the ethnographic challenge. Banerjee claims it is the flip side of the liberal coin, and thereby equally insensitive to ethnography. But Pande herself employs the exploitation lens. She argues that we, and the surrogates themselves, must come to appreciate that they are not providing a gift but performing a type of ‘gendered, exploitative, stigmatized labour’ (2009, 169). Pande also claims (2010, 972) that it is only by

identifying commercial surrogacy as labour, susceptible to exploitation like other forms of labour, and by simultaneously recognizing the women as critical agents, [that] we can deconstruct the image of the victim that is inevitably invoked whenever bodies of third world women are in focus.

Since Pande is adamant that surrogacy is a type of exploitable labour, what does she have in mind when she chastises ‘Eurocentric’ master narratives that depict the practice in black or white terms as universally right or wrong?

I think that what she actually has in mind, and so too Banerjee and Bailey, is in fact the *commodification* critique of surrogacy, which is unfortunately all too often misread as indistinguishable from the exploitation critique. Banerjee herself highlights the extent to which these two critiques are blurred when she says (2010, 109) that:

one of the dominant western ethical arguments against surrogacy is the exploitation argument that is frequently linked to the commodification argument. It is argued by this camp of ethicists that surrogacy . . . ends up reducing women to their wombs and defining them in terms of their reproductive capacities. Based on this aspect of commodification the surrogate is exploited because her labour and her body are judged on the basis of their use value.

Banerjee does not differentiate the two views, but it would be helpful to do so here.

The commodification argument is central to the views of many Western feminists who wrote on the ethics of surrogacy in the wake of Baby M (Anderson 1993; Overall 1987; Pateman 1998; Warnock 1985). The argument basically runs that commercial surrogacy is wrong because it involves the assignment of a market value to a good of inherent worth, and thereby reduces a human agent to the dollar value of her body parts. The deepest articulation of the view is offered, to my mind, by Elizabeth Anderson, who contends that when a woman contracts away control over her own body (as in a surrogacy or prostitution contract) she thereby also sells her agency, because in selling her body she sells the thing she requires to be agential with respect to. In selling control of her body, the surrogate sells her agency because she becomes something that can only be moved at, or by, the will of whomever has her under contract. If she cannot move except at the direction of this other, she is inert, inanimate, objectified. In this respect what she sells is too valuable to be sold: she sells her *self* (Anderson 1993, 168).

The commodification critique is often assumed to entail an exploitation claim in the sense that since one cannot possibly be fairly compensated for the sale of one’s *self* no terms of exchange could ever possibly be just. What I want to insist here is that *we can deny the commodification view and still make an exploitation claim*. That is, an appeal to exploitation does not have to depend on, nor presume the conceptual or moral veracity of the commodification argument. We can and indeed should deny, with Pande, that what is being sold is a good (physical or conceptual) as opposed to a type of labour. And we can deny, with Banerjee, that agency is

inevitably and irrevocably undermined by the very act of sale. We can then go on to deny that surrogacy is universally wrong in every case based on the nature of the good being sold, but is instead morally problematic (and in some cases more so than others) based on the degree to which the choice is coerced and/or the labour unjustly compensated.

I suggest that when Banerjee singles out the exploitation view as the thorny Western counterpoint to reproductive liberalism, and when Pande rejects Eurocentric views that depict surrogacy arrangements as universally right or wrong, they in fact have the commodification view in mind. This view is the true flip side of the liberal coin, insofar as it asserts that agency is universally lost in the act, just as the liberal asserts that it is universally exercised in the act. Moreover, ethnography is essentially irrelevant to the commodification view's purely conceptual, and indeed conceptually Western, analysis of agency, value, and self. Because the view sees all surrogacy arrangements as equally morally problematic for the same conceptual reason, it denies that the concrete realities of women's lives and labours in developing parts of the world can or should affect our assessment of the harms they face as surrogates (Panitch 2013).

Thus, insofar as proponents of ethnography are concerned with Occidentalizing master narratives that ignore surrogates' lived experiences, focus exclusively on yet deny the very possibility of their agency, and deem all such arrangements equally morally impermissible for the same reason, it is the commodification view that is their best and presumably their intended target. But this type of view must not be mistaken for the one I have endeavoured to offer here. While the commodification view denies the very possibility of surrogate autonomy and thereby of just contractual terms, mine seeks to understand the realities of choice making under conditions of inequality, and to promote Indian women's autonomy as a means of enhancing the justice of transnational contracts. I conclude that the exploitation argument I have offered, properly distinct from the commodification view, is indeed part of the ethnographic turn, as it addresses the concrete realities of Indian surrogacy and focuses on women's empowerment.

## Conclusion

In this paper I have argued that the moral harm of global commercial surrogacy lies in the exploitative nature of transactions exhibiting a failure of both justice and consent, made possible by a failure on the part of the Indian state to protect the negative reproductive rights of its female citizens. This is a failure, I argued, that it ought to rectify by investing the profits of surrogacy in female empowerment goals geared to the promotion of women's agency and bargaining power. I went on to show that my account is properly sensitive to, and indeed depends on, information about the concrete, lived realities of Indian surrogacy, and in this regard differs from the commodification critique which should be understood as the true Occidental opponent of ethnography.

## Notes on contributor

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## Notes

1. This fee includes wages along with brokerage and legal fees. Only three US states impose criminal sanctions on payment: Michigan, New York, and District of Columbia.

2. The idea here is a tax levied on the profits of surrogacy to generate revenue for addressing empowerment goals. The tax should not be paid directly by the consumer, and would thus not be a luxury or sales tax, as surrogacy arrangements must not be viewed as involving the purchase of a commodity (see Panitch 2013). The tax would be levied, rather, on those whose income derives from surrogacy transactions, such as physicians, clinicians, brokers, and matrons (and possibly the surrogates, but an infinitesimal rate). It might thus be a form of graduated income tax (or possibly a value-added tax). The cost would be transferred to the consumer, but would not come close to paralleling first-world surrogacy rates nor thereby undercut the state revenue earmarked for empowerment.
3. A perhaps more troubling concern is the seeming impossibility of genuine impassivity on the part of the ethnographer herself. While she may resist ethical judgments in her scholarship, is she truly capable of complete benignity in her choice of questions (which can have a leading quality), or in her reactions during the interviews themselves (which may in turn influence what interviewees to further choose to confide)?
4. This is only a partial response to Banerjee, whose concern is also that the exploitation lens shares in the same dualistic (mis)conception of relational power as the liberal, wherein a surrogate either has it or does not. Banerjee proposes a turn to ethnography precisely so as to enrich our understanding of what it might mean to 'empower' (2010, 110 and 117–119), but her nuanced discussion of the distinction between 'power-over' and 'power-with' is unfortunately beyond the purview of my project to consider in depth here.

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