EXPLOITATION

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INTRODUCTION

Consider the following cases:

1) A dance hall studio persuades a desperately lonely and depressed widow to purchase $50,000 in dance lessons by convincing her that she has a talent for dancing. The payment for the lessons requires her to sell everything she owns, including her home.1

2) A ticket scalper outside a sold-out Bruce Springsteen concert charges a fan $150 for a ticket that he purchased for $25.

3) A quack physician convinces the distraught father of a dying son that she can cure the son by an unorthodox method. In desperation, the father pays for the treatment, which is ultimately ineffective.

4) A pimp first seduces a young girl and then entices her into a life of prostitution.

5) A poor, uneducated woman enters an agreement to purchase some household furniture on an installment contract with a clause granting the seller a cross-collateral security interest in the furniture. Over a period of years, the buyer purchases $1200 worth of furniture. With $164 in payment outstanding, she purchases another item and then defaults on the payment for this item. The seller then repossesses all of the furniture.2

6) A migrant farm laborer from El Salvador picks oranges at a rate well below market value, but higher than that paid for similar work in the laborer's homeland.

7) An educated young woman's daughter is dying of a curable disease that requires an expensive operation. After exhausting all alternatives, she becomes the mistress of a lecherous millionaire, in return for which he will pay for the operation.3

All of these scenarios exemplify situations that might be called "exploitative" under the common usage of the term. The ambiguous

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1 This example is loosely based on Bal-Pel, Inc. v. Boyd., 503 S.W. 2d 673 (Tex. Civ. App. 1973) (contract voidable on grounds of common law fraud).
2 These were the facts in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (remanded to determine whether the agreement should be voidable on grounds of unconscionability).
3 See JOEL FEINBERG, Noncoercive Exploitation, in PATERNALISM 201, 208-09 (Rolf Sartorius ed., 1983).
and ill-defined concept of exploitation has been widely applied, taking on an open-textured and almost all-encompassing meaning illustrated in the seven cases above.

Exploitation is sometimes defined in economic terms. Marxist analyses of exploitation, and those influenced by Marxist critiques of society, typically emphasize this strand of meaning to describe the relationship between workers and the elite owners of capital or between the worker and society generally. Marxist claims maintain that workers in the capitalist state are not free to seek adequate compensation for their labor. The capitalist's profit defines the extent of the worker's undercompensation. This economic claim is typically combined with a philosophical claim that, in working for another, the worker is forced to alienate and to objectify his own labor, a process with devastating psychological consequences. Such Marxist analyses of exploitation may illuminate cases such as (5) and (6) above.

Other considerations, however, appear more relevant in rendering the other cases "exploitative." Cases (2) and (7) result from disadvantageous economic conditions, broadly defined, but (2) involves the voluntary purchase of a scarce luxury. Thus, the exploitative nature of the bargain has little to do with the buyer's status as a member of the working class. Moreover, case (7) appears to be exploitative not simply because an expensive medical procedure is difficult to obtain,

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4 The contractual analogue for exploitation is the doctrine of unconscionability. ALAN P. WERTHEIMER, COERCION 40 (1987). Although the doctrine that the law will not inquire into the adequacy of consideration prevents courts from predicated the unconscionability defense on the substantive terms of the contract, courts have recognized the economic basis of unconscionability through two conditions. First, a flaw in the market eliminates reasonable alternatives and, second, the bargaining process itself goes awry. The second condition apparently includes fraud and gross disparities in the parties' bargaining power. The first condition recognizes flaws in the economic system itself. See generally Jones v. Star Credit Corp., 298 N.Y.S. 2d 264 (N.Y. Sup. Ct. 1969) (holding that the sale of a freezer for over $1,000, which is valued at $300, to welfare recipients is unconscionable). For a discussion of the doctrine of unconscionability, see P.S. ATYAH, ESSAYS ON CONTRACT 132-33 (1986); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 92-93 (1981) (disparaging unconscionability because even contracts freely and knowingly entered into may be held unenforceable). But see JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 147 (1991) (indicating that the doctrine is utilized, "not because a bargain was unequal, but because the harshness of its terms was evidence of fraud").


7 Id. at 30 ("Exploiters are agents who can command with their income more labor embodied in goods than the labor they performed . . .")

8 Id. at 36.

9 Id. at 32.
but because of the desperation of the mother, the willingness of the millionaire to take advantage of her situation and because of our assessment of the moral nature of the bargain itself—that is, the wrongfulness of alienating one's affection and sexual attractiveness for money.10

Finally, cases (1) and (3) are even less "economic" in nature. In case (1), the widow has struck a bad deal. This is not because of an unfairness in the value of the exchange itself—presumably, unlike cases (2), (5) and (6), the goods are worth the amount paid—but because the dance company took advantage of her psychological state and because she failed to consider the significant cost of the lessons. Case (3), while obviously unfair because of the doctor's fraud, does not result from an economic exigency. Rather, the desperate father of a dying son has been duped into purchasing treatment that, under normal circumstances, he would probably recognize as ineffective.

Additionally, even to the extent that exploitation is essentially an economic concept, economic considerations appear to be potentially exploitative in two very different ways. First, an offer may be exploitatively low, as in the instance of the migrant worker in case (6). Exceedingly bad offers, such as those embodied in boiler-plate installment contracts similar to case (5) are also characteristic of this genre of economic exploitation. The contract doctrine of unconscionability recognizes this type of exploitation by providing a defense under limited circumstances.11

Alternatively, exploitative offers may be exploitatively high. This variant of the term "exploitation" often involves claims of psychological compulsion or coercion.12 The person may not be reasonably able to resist the offer, as in scenario (7). If exploitation indeed embraces both meanings, not only does this indicate an inherent ambiguity in the concept itself but, equally clearly, exploitation involves something more than economic considerations as such.13

10 In this case, exploitation may coincide with commodification. Commodification, however, is a distinct concept entailing the alienation of some aspect so intrinsic to human personhood that it should never be sold. See Margaret J. Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987) (arguing that commodification occurs in alienating, selling or transferring personal capacities or attributes which are so integral to the sense of self that they should not be subject to marketability).

11 Wertheimer, supra note 4, at 40 (arguing that unconscionability is a form of exploitation). Compare Gordley, supra note 4, at 147 (supporting unconscionability as a remedy for fraud). See also Arthur A. Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967) (discussing the origins of unconscionability in the U.C.C.); S.M. Waddams, Unconscionability in Contracts, 39 Mod. L. Rev. 369 (1976) (providing an overview of the philosophical basis for the unconscionability doctrine).

12 See infra notes 206-18 and accompanying text.

13 Those opposed to surrogate mother arrangements make the seemingly contradictory claim that exploitation can result from offers that are either too low or too attractive. This suggests definitional ambiguity in the concept of exploitation. Is exploitation the
Exploitation may also be analyzed in terms of social and educational class differences, rather than in terms of economic inequality *per se.* In this sense, exploitation exists only if there is a significant disparity in social class between the parties to the agreement. This social-domination variant of the term is arguably present in cases (5) and (6). Although the consequences are economic in both cases, the domination view of exploitation attributes the underlying evil of exploitation in the inequalities of social caste and in the disparity in the distribution of power among different groups in society. Most basically, even if we could ascertain the relative priority of persons of different classes with the requisite facility to determine whether a particular instance of exploitation was the result of social inequality, this understanding of the term might exclude situations similar to cases (1), (2), (3), (4) and, possibly, (7), where the victims of the allegedly exploitative arrangements were not socially disadvantaged at all.

Another view is that exploitation is a function of one's emotional or psychological state. The lonely widow in case (1) and the distraught father in case (3) are both victims of their emotional circumstances: they may have acted under psychological compulsion. The young mother in case (7) not only represents the emotional desperation of a parent with a dying child who has no alternative, but she also must confront her potential sense of guilt if her child were to die because of her rejection of the millionaire's offer. In contrast, cases (2), (4), (5) and (6) arguably do not, on their face, involve the same kind of psychological compulsion although the situation in case (4) is likely to become coercive at a later point.

result of being under compensated or is it a function of being tempted by attractively large offers? See infra notes 28-64 and accompanying text.

14 Procedural unconscionability requires a disparity in bargaining power, which may itself be the result of socioeconomic inequality. One author argues that this requires a flaw in the bargaining process. *ATYAH,* supra note 4, at 132-33. Conceptualizing the problem as lack of consent may not be helpful. See Waddams, *supra* note 11, at 381-82. Waddams argues that the problem is one of inequality in bargaining power. Id. at 392. This commentary suggests that socioeconomic inequality underlies the doctrine of unconscionability.

15 Social class is not defined exclusively in terms of economic power. Education, political power and other extra-economic factors are also relevant. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATIONS (A.M. Henderson & Talcott Parsons trans., 1947).

16 Social domination is an important aspect of the Marxist theory of exploitation. Roemer, *supra* note 6, at 31, 38.

17 For the domination doctrine, the question is whether exploitation is relative or absolute. Does any significant difference in social class suffice, or must the victim fall below a certain socioeconomic level? For example, in the seventh scenario, is there exploitation even if the young woman is a well-educated member of the upper-class?

18 See infra notes 185-205 and accompanying text (discussing external and intra-psychic coercion).
Alternatively, exploitation is sometimes equated with other concepts such as enticement, as in the example of the ticket scalper in case (2);\textsuperscript{19} seduction, as in the example of the girl in case (4);\textsuperscript{20} or commodification, the process by which one alienates one's most essential qualities (e.g., one's love), as in (7) above.\textsuperscript{21} These variations appear both over-inclusive and under-inclusive in scope; for example, one can be seduced without being exploited, and one can be exploited without being seduced.

Questions fundamental to the moral psychology of human behavior permeate all of these strands of meaning. In some cases, the language of compulsion, coercion or involuntariness implies that the victims of exploitation are somehow not free in acting as they did.\textsuperscript{22} In others, exploitation raises issues concerning the rationality of the victim's decision.\textsuperscript{23} In still other cases, vacillation between the language of freedom and the language of rationality suggests an uncertainty based on the underlying ambiguity of the concept of exploitation.\textsuperscript{24} These questions of freedom and rationality ultimately yield to an even more fundamental issue concerning human identity—whether socially conditioned motives are authentically "our own."\textsuperscript{25} For example, are women frequently victims of exploitation, as some feminists claim, because their actions, although free in some superficial sense, are ultimately the result of socially imposed values and beliefs?\textsuperscript{26}

In sum, no clearly defined necessary and sufficient conditions govern the application of the concept of exploitation. Nor is there an adequate theoretical basis for understanding exploitation or its exculpatory function in the law. Yet, exploitation, or one of its legal analogues,\textsuperscript{27} increasingly forms a basis for social and legal policy determinations with respect to a wide range of issues.

\textsuperscript{19} See infra notes 206-18 and accompanying text.
\textsuperscript{20} See infra notes 211-12 and accompanying text (discussing seduction).
\textsuperscript{21} See generally Radin, supra note 10 (discussing commodification).
\textsuperscript{22} This Article argues that exploitation is an attempt to take advantage of a cognitive, rather than a volitional, impairment. See infra part III.A.5.
\textsuperscript{23} See infra part III.B (suggesting that exploitation affects the rational process in subtle, but empirically demonstrable, ways).
\textsuperscript{24} For example, is the primary reason against prisoner research concern about the involuntary nature of prisoners' decisions? See National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Report and Recommendations, Research Involving Prisoners 12 (1976), reprinted in 42 Fed. Reg. 3079 (1977) [hereinafter National Commission]. Or is it the prisoners' inability to assess the risks and benefits? This is the rationale suggested by the regulations ultimately adopted by the Department of Health and Human Services (HHS). 45 C.F.R. § 46.305(a)(2) (1992).
\textsuperscript{25} See infra part II.
\textsuperscript{26} See infra notes 43-46 and accompanying text.
\textsuperscript{27} The doctrine of unconscionability differs significantly from the theory of exploitation suggested here. At best, some instances of unconscionability may also be instances of exploitation.
This Article proposes a theory of exploitation and applies it to three areas of current legal controversy: surrogate parenting arrangements, the voluntary sale of organs by living donors, and consensual, non-therapeutic medical experimentation on prisoners. It argues that exploitation, although generally over-extended and conflated with a number of other distinct concepts such as coercion, commodification and seduction, has a core meaning that warrants legal recognition.

Part I discusses surrogate parenting, organ sales by living donors, and voluntary experimentation on prisoners, along with claims made by opponents of each of these practices that they should be prohibited as exploitative. Part II argues that exploitation should operate in a manner similar to that of excuse in criminal law and related exculpatory defenses in contract and tort law. Part II first analyzes the theoretical distinctions underlying excuse, justification and other policy defenses. Part II next argues that Anglo-American law, following the Aristotelian tradition, recognizes two kinds of excusing conditions: those predicated upon compulsion and those resulting from ignorance (or, in the language of modern psychology, volitional and cognitive problems, respectively). Part II also develops the proposition that exploitation does not fit neatly into either the volitional or cognitive category of excuse.

Part III examines in greater depth the underlying theoretical difficulties with fitting the concept of exploitation into either the paradigm of compulsion or the paradigm of ignorance. Because the claim of exploitation typically involves an offer of an additional choice to the offeree, the situation is arguably not “coercive.” Moreover, the offeree may act with full information; thus, the claim of ignorance may not apply. Nevertheless, we often feel that the victim should be relieved of the consequences of a decision made under exploitative circumstances. Part III first considers various claims that exploitative offers render the resulting decision involuntary, unfree, or in some sense a product of psychologically constraining circumstances. Exploitation is distinguished from coercion using the notions of “intrapyschic coercion,” “intrapsychic compulsion,” and exploitation by social conditioning.

Part III also argues that exploitation is the result of a cognitive, rather than a volitional, impairment. This section considers empirical evidence which demonstrates that the cognitive and the volitional aspects of human nature are not easily disentangled, and that perturbations on the volitional side (e.g., intense desires) powerfully influence our cognitive states (e.g., beliefs or perceptions). This section contends that certain offers are exploitative because they take advantage of the destabilizing influence that these volitional influences have upon reason.
With this theoretical foundation in place, Part IV defines exploitation. Part IV considers some preliminary questions. For example, must the offeror or the offeree be aware of the exploitative nature of the offer? Does exploitation require that the victim occupy a socially inferior position vis-a-vis the offeror? Must the exploitative offer always be immoral in some sense in order to be considered exploitative? Then, Part IV outlines the conditions necessary for an offer to be deemed exploitative. Most essentially, I argue that exploitation is a psychological, rather than a social or an economic, concept. For an offer to be exploitative, it must serve to create or to take advantage of some recognized psychological vulnerability which, in turn, disturbs the offeree's ability to reason effectively. In the absence of some adverse affect upon the capacity to reason, no offer can reasonably be deemed "exploitative."

Finally, Part V applies this theory of psychological exploitation to the three practices discussed at the outset of the piece: surrogate parenting, voluntary organ sales and consensual experimentation on prisoners. This Article argues that only the third of these practices may be generically exploitative.

I
EXPLOITATION IN SURROGATE ARRANGEMENTS, VOLUNTARY ORGAN SALES, AND CONSENSUAL, NON-THERAPEUTIC EXPERIMENTATION ON PRISONERS

In each of the following three areas of controversy, claims of exploitation are often made notwithstanding the fact that each represents a situation in which the actor has been presented with an additional alternative: to freely become a surrogate, sell an organ or participate in a medical experiment. Each case presents the following question: How can an additional alternative, where the actor is free to pursue that alternative or to disregard it, ever be exploitative or otherwise bad? How can giving people an additional choice, vis-a-vis their previously existing situation, necessitate prohibition? This section examines the claims that these scenarios are inherently exploitative.

A. Surrogate Parenting Arrangements

Since the first reported surrogate arrangement in 1976, surrogate gacy has become increasingly popular. To date, there have been perhaps four thousand births from surrogate arrangements in the United

Most of these have been full genetic surrogate parenting arrangements, where the surrogate is the genetic mother of the child, as opposed to the more expensive form of surrogate arrangement known as gestational surrogacy, where the intended mother, and not the surrogate, is the genetic mother.

Although a majority of the public favor the legalization of surrogate arrangements, particularly some feminist scholars, oppose surrogacy on a variety of grounds, raising various moral and legal objections. Although these objections have diverse theoretical foundations and types of harms at their crux, they often fall under the unifying rubric of exploitation.

One of the most frequent bases for the claim of exploitation in surrogate parenting arrangements is the fear that women may feel compelled for economic reasons to become surrogates. Poor women in particular may decide to bear children for others in order to aug-

See infra notes 35-63 and accompanying text.
ment their family income. For example, in *The Mother Machine*, Gena Corea points to instances where women entered into surrogate arrangements under what may have constituted conditions of economic duress: one involved a penniless 18-year-old widow, and another, the 23-year-old wife of a terminally ill man. The danger is obvious: economic exigency may force some women to enter surrogate agreements when they might otherwise never have entertained the idea.

Another strand of the exploitation argument involves the fear that surrogacy may foster an atmosphere that commodifies women and children—that women will be hired as surrogates for their beauty, intelligence or race. One commentator portends the rise of a "product quality" mentality in the choice of a surrogate, and another argues that couples seeking surrogates already evaluate the eye color, hair color, I.Q. and other physical and intellectual characteristics of prospective surrogates. As part of its report on infertility, the Office of Technology Assessment suggests that consumers of the new reproductive technologies, such as surrogacy, typically look for the best "specimen." The report cites an example of two sperm banks that refuse samples from donors who fall below average height or who possess less than a superior I.Q. and education. In essence, in contrast to exploitation as a kind of economic duress, this view holds that surrogacy exploits through instrumental, means-end expectations or through reduction of the individual to her physical or mental characteristics.

Another argument gaining currency, particularly among feminists, is the claim that the surrogate is unfree, coerced or compelled in some significant sense. This compulsion is not viewed simply as the function of economic factors, but rather as an inescapable result of the entire complex of social influences in a patriarchal society that serve to mold the personality, beliefs, motives, intentions and desires of women. Although a woman may choose to enter into a surrogate agreement, the argument runs, the decision is only superficially voluntary. Because she has grown up in a male-dominated society, which has conditioned her to view her primary function in that society in

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35 Corea, supra note 32, at 228-29.
37 Corea, supra note 32, at 219.
38 OTA, supra note 28, at 228.
39 See generally Corea, supra note 32, at 166-83 (a woman's choices are unfree insofar as they are a product of patriarchal society).
40 Id. at 227-28. See also Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978) (discussing the social construction of the maternal image and its effects upon women's reproductive choices).
largely sexual, procreative and maternal terms, her choices are the legacy of this socio-psychological framework of social conditioning.\(^{42}\)

Corea, for example, argues that women will never truly be free in the present culture because their very wills are a social construction of male-dominated society.\(^{43}\) As such, the only freedom left for women is the freedom to "prostitute oneself."\(^{44}\) Similarly, Martha Field argues:

> Another social interest that might support anti-surrogacy legislation is preventing exploitation—of women, of children, of the poor. . . . [T]he exploitative aspects of surrogacy . . . suggest that surrogacy contracts may not be sufficiently "voluntary" to deserve enforcement.\(^{45}\)

Additionally, Field claims that "[t]he fear of men and the institutions they dominate wrestling control of childbearing from women is a powerful theme in feminist literature and enforceable surrogacy contracts could be a giant step toward establishing that control."\(^{46}\) Thus, not only might the decision to become a surrogate be a product of compelling social forces, but also the advent of commercial surrogacy might itself contribute to this prevailing, gender-biased social framework.

The presumably dubious moral nature of the surrogate agreement has also been considered exploitative. Although there are similarities to the argument from commodification, concerns about the morality of surrogacy do not emphasize the objectification of personal attributes as such, but focus on the impermissible act of selling a human substance or capacity, regardless of considerations of its quality. For example, in discussing surrogate arrangements, one legal commentator suggests that "[w]hen money animates the transfer of a human substance, the issue of exploitation arises."\(^{47}\) Similarly, another contends that surrogacy is morally more objectionable than the forced removal of a woman’s kidney because of the broken bond between mother and child:

> In my opinion, it is immoral to buy and sell the flesh of a living human being for profit; to trade organs (or whole humans) as if they were sugar, coffee, bananas; to act as if living human flesh, once cornered, slaughtered, or contractually acquired, can, with im-

\(^{42}\) Id.
\(^{43}\) See Corea, supra note 32, at 213-45.
\(^{44}\) Id. at 227.
\(^{46}\) Field, supra note 45, at 200 (footnote omitted).
\(^{47}\) O'Brien, supra note 36, at 142.
purity, be turned into soap or lampshades or used for industrial, scientific, or consumer purposes.

The removal of a child from his birth mother—against her will and for profit—is even more heinous than the forced removal of a woman’s kidney. A birth mother (her body and her mind) is connected to and remembers her missing baby more vividly than she remembers her missing kidney.48

Here, the importance of maternal-fetal bonding49 is the basis for the charge that surrogate arrangements are morally unacceptable.

What appears to be important to this vein of meaning is not simply the economic disadvantage of the surrogate, nor even the purportedly contingent nature of the motives which lead the surrogate to agree to bear a child for another, but instead a fundamental moral wrong in allowing such agreements in the first place. If economic and social considerations were sufficient to render an agreement exploitative, then the same eighteen year old widow who decided to become a nurse (another traditionally female career choice) would similarly be a victim of exploitation. Thus, at least some of the claims that surrogacy is exploitative appear to be motivated by antecedent convictions that the activity is, for some other reason, morally wrong, regardless of economic or social considerations.50 This explains the frequent comparisons of surrogacy to organ selling, baby-selling and prostitution.51

The allusion to prostitution is particularly telling.52 Both the prostitute and the surrogate mother are frequently perceived as victims of exploitation. Both are (usually, in the case of prostitution) women. Both may have chosen their roles as a response to economic exigency. And both have chosen roles which require the exercise of traditionally limiting, feminine functions—sex and procreation. And yet, in both cases, the subjective psychological experience of the victims and the objective economic realities of their situations may not differ significantly from those of women in other, presumably more acceptable, occupations. At least part of what renders these situations more “exploitative” than, for example, the case of a similarly situated

49 See generally Hill, supra note 30, at 394-400 (discussing maternal-infant and infant-maternal bond and evaluating the claims for their existence and significance).
50 Here the specter of circularity looms large. Opponents of surrogacy, who seek to demonstrate that surrogacy is morally impermissible because it is exploitative, cannot implicitly assume that it is exploitative because the practice is morally impermissible. See Hill, supra note 30, at 126-27.
51 See id. at 123-26 (discussing the comparisons between surrogacy and these other practices).
52 See Corea, supra note 32, at 227; Lars Ericsson, Charges Against Prostitution: An Attempt at a Philosophical Assessment, 90 Ethics 335 (1980) (claiming that prostitution is not inherently exploitative). But see Carole Pateman, Defending Prostitution: Charges Against Ericsson, 95 Ethics 561 (1983) (claiming that prostitution is exploitative).
woman who decides to take a job cleaning bathrooms, appears to be the intuition that surrogacy and prostitution are morally wrong.

As lawmakers across the nation have slowly begun to regulate surrogate arrangements, the concern about exploitation may have led to decisions to criminalize surrogacy or to hold surrogate contracts unenforceable.\(^5\) At least three states have outlawed surrogacy\(^5\) while a growing number of other states have passed laws prohibiting the enforcement of surrogate contracts.\(^5\) This movement stems in part from the fear that women who become surrogates are exploited by the intended parents with whom they contract, by those who facilitate surrogate arrangements for profit, and by society in general.\(^5\)

Some courts have also voiced concerns about surrogate exploitation. In the first case to address the enforceability of a surrogate contract, *In the Matter of Baby M*,\(^5\) the New Jersey Supreme Court held surrogate contracts unenforceable as violative of a number of state statutes and public policies.\(^5\) The court elaborated on a number of the various strands of meaning of the concept of exploitation in hold-

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\(^5\) Broadly speaking, legislators have three options. At one extreme, they may criminalize surrogacy, providing for a fine or imprisonment. At the intermediate position, they may simply refuse to recognize surrogacy, neither sanctioning nor enforcing surrogate contracts ("legislative nonrecognition"). If the surrogate changes her mind, the court will assign custody to the intended (genetic) father or to the surrogate as in other child custody determinations. Finally, legislators may enforce surrogate agreements, even over the objection of the surrogate mother, making the intended mother the legal mother of the child, even when there is no genetic connection.


\(^5\) This is particularly clear in states, such as Virginia, which make it a crime for third parties to broker surrogate arrangements while permitting surrogates to enter such contracts. *Va. Code Ann.* § 20-165(A) (Michie 1993). A rationale for the distinction is a concern that women may be unfairly induced into such agreements.

\(^5\) *109 N.J. 396, 537 A.2d 1227 (1988).*

\(^5\) *Id.* at 1240-50.
ing that surrogacy violated state public policy, although the opinion did not explicitly discuss exploitation.

First, and most generally, the court stated that the "essential evil" inherent in surrogacy is the "taking advantage of a woman's circumstances," most particularly her need for money, "in order to take away her child."

Second, the opinion adverts to the carrot of monetary enticement and the stick of legal compulsion by holding that the decision of the surrogate is not truly voluntary:

She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary.

Additionally, the Court invoked the specter of class differentiation and social domination:

Intimated, but disputed, is the assertion that surrogacy will be used for the benefit of the rich at the expense of the poor. . . . [I]t is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. Put differently, we doubt that infertile couples in the low-income bracket will find upper-income surrogates.

Finally, the transaction is tainted by impermissible motive, the profit incentive, a mark that evinces the morally questionable quality of the surrogate arrangement. The court noted that "[i]n the scheme contemplated by the surrogacy contract in this case, a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction."

Ensconced within the same two pages of the opinion, these passages demonstrate that the many nuances of the concept of exploitation produce a seemingly powerful response to the claim that the surrogate's consent is informed, understanding and voluntary. Thus, claims that surrogate parenting is essentially exploitative draw upon the varying definitions of exploitation. For some, exploitation is synonymous with economic duress. For others, it emphasizes the ob-

59 Id. at 1249. But see Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) ("Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.").

60 537 A.2d at 1248.
61 Id. at 1249.
62 Id.
jectification of the surrogate's physical and mental characteristics or procreative capacity. For still others, it refers to the claim that the decision to become a surrogate is essentially unfree, a product of the (male-dominated) social construction of the will of women. Finally, the charge of exploitation is sometimes simply the result of a pre-analytic intuition that the practice in question is wrong, and that anyone who would decide to engage in such activity must be doing so involuntarily or as the result of some failure of the rational process. Most often, however, these views overlap. Financial enticement and economic duress, economic duress and social domination, social domination and commodification, commodification and claims of moral impermissibility—often, these views undergird and reinforce one another, each another layer in the fabric of the conceptual understanding of exploitation. There appear, however, to be no necessary or sufficient conditions defining exploitation. In sum, although surrogate agreements may be exploitative, it remains unclear exactly what it is that renders them so.

B. Voluntary Organ Sales

Since the early sixties, organ transplantation has been a viable medical alternative for those dying of end-stage renal failure and other conditions. Over the past thirty years, with the development of tissue typing, new surgical techniques, and the immunosuppressive drug cyclosporine, which combats the body's rejection of transplanted organs, organ transplant surgery has become increasingly successful. The survival rate for kidney transplants is now ninety percent or higher in some hospitals. The success of liver, heart, cornea and other transplants has similarly increased.

Notwithstanding these successes, however, the supply of available donor organs falls significantly short of the demand. Each year in the United States alone, hundreds of people who might be saved if the necessary organ were available die from conditions of the liver, kid-

63 Others have warned of the potential harm to children and intended parents. The child born of the arrangement is viewed as a means to the economic ends of the surrogate and to the psychological ends of the intended parents. Krimmel, supra note 33, at 37. The intended parents may also be exploited, if the surrogate demands more money under threat of refusing to relinquish custody. John J. Mandler, Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenting Act, 73 Geo. L.J. 1283, 1285-87 (1985).


65 Id. at 74.
66 Id.
67 Id. at 74-75.
neys or other organs.68 Thousands of others remain on kidney dialysis awaiting a suitable kidney.69

A number of proposals to meet the shortage of available transplantable organs permit donation, salvaging, or even the posthumous sale of cadaver organs.70 The most controversial, however, proposes to create a market in organs from healthy, living donors: live donors would be permitted to sell organs not required for survival (e.g., one kidney) for a negotiated price.71 For some years now, there have been reports of such black market organ sales or offers to sell. From advertisements in South American newspapers offering to sell a kidney or a cornea, to accounts of wealthy foreign recipients arriving at American hospitals accompanied by sellers with doctored proof of familial consanguinity, the willingness of some to sell their organs for a large sum appears almost as great as the need of those seeking an organ.72

Like the surrogate mother who risks the possibility that she may change her mind and wish to retain custody of the child she bears, the relinquishment of an organ is not without its risks. At least sixteen people have died on the operating table in the course of donating kidneys to relatives.73 Additionally, the donor faces health risks: the seller may one day need the extra kidney, either because the remaining kidney has failed or because of other health conditions.

Heading the list of objections74 to a market in organs from living donors is the fear of exploitation of the seller.75 First and most paramount is the issue of economic duress. As a report by the Council of

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68 Only about half of the 10,000 people who await an available kidney each year receive one. The rest remain on dialysis. Dozens die waiting for an available liver. Id. at 1-2.
69 Id. at 1. The kidney transplant waiting list was 10,000 in 1987, but as many as eight times that were on dialysis. Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 GEO. WASH. L. REV. 1, 4 (1989). Because many on dialysis know they have little chance of receiving a transplant, the official number of needed kidneys is probably artificially low. Id.
72 See The Council of the Transplantation Society, supra note 70, at 716 (recounting attempts of some citizens of developing nations to sell a kidney or a cornea).
73 Note, supra note 71, at 1035.
74 Other objections include "a dilution of altruism, a less dependable product, the pricing of a priceless gift, the tendency to view human body parts as commodities that may lead us to view human beings as things, and the general unsavoriness of a market in body parts." George J. Annas, Life, Liberty and the Pursuit of Organ Sales, 14 HASTINGS CENTER REP. 22, 23 (1984).
75 Id. at 23.
the Transplantation Society maintained, "it seems clear that when pa-
tient care is relegated to the laws of the market place, particularly
when the less privileged can be exploited to improve the health of the
more privileged, all in society are diminished." Perhaps more point-
edly, as another author put it:

[S]cientific research and medical education should no longer
be pursued at the physical cost of the economically and socially de-
prived, nor should it exploit the needs of the vulnerable. . . Equally,
the poor should not be induced by money to offer the material re-
sources of their bodies, and to convert their own health into a salae-
ble commodity in the market place of human replacement parts.77

The fear that developing countries would become the reservoir of
needed body parts for the wealthy in developed nations bolsters the
claim of economic duress.78 Here, the apparently ghoulish nature of
such a market significantly augments the taint of pecuniary motive.

Some commentators have distinguished the sale of blood from
the sale of organs, arguing that the former is morally permissible,
while the latter is not.79 With respect to the sale of blood, "[t]he seller
is not imperiled, the buyer pays a nominal fee, and the commodity
sold is fungible and regenerative."80 Conversely, with the sale of an
organ, "the seller experiences pain and substantial risks, the buyer
may pay a hefty or even an extortionate fee, and the commodity sold is
unique and irreplaceable."81 In essence, while issues of commodifica-
tion and improper motive support claims of exploitation in the con-
text of organ sales, the themes of social domination and economic
duress are weightier considerations.

In 1984 President Reagan signed into law the National Organ
Transplant Act, a sparsely worded provision that made it a criminal
offense for anyone to transfer or receive human organs for valuable
consideration.82 This followed a number of state statutes with the
same effect.83 Motivated in large part by concerns that those who

76 The Council of the Transplantation Society, supra note 70, at 716.
77 Bernard M. Dickens, The Control of Living Body Materials, 27 TORONTO L. REV. 142,
166 (1977) (footnote omitted).
78 See Note, supra note 71, at 1020-22 (for a discussion of Jacob's intention to solicit
organs from citizens of developing countries).
79 O'Brien, supra note 36, at 142.
80 Id. (footnote omitted).
81 Id. at 143.
82 42 U.S.C. § 274e (1988). The provision reads in full:
It shall be unlawful for any person to knowingly acquire, receive, or
otherwise transfer any human organ for valuable consideration for use in
human transplantation if the transfer affects interstate commerce.
83 See, e.g., VA. CODE ANN. § 32.1-289.1 (Michie 1992) (passed in response to the Ja-
cobs' proposal but expired July 1, 1993). See also MD. CODE ANN., Health-Gen. § 5-408
choose to sell an organ are victims of a particularly pernicious form of exploitation, the federal act prohibits the sale of organs throughout the fifty states.

C. Consensual, Nontherapeutic Medical Experimentation on Prisoners

The third paradigmatic example of exploitation occurred within United States prisons. In exchange for participation in medical experimentation, typically involving drug testing, inmates received certain privileges ranging from reduced work schedules to additional conveniences such as color television or higher quality food rations. In some cases, agreement to participate may have brought favorable recommendations for parole. The experiments themselves were typically nontherapeutic: they were not intended to benefit the test subjects themselves or even prisoners generally; rather, the beneficiaries were both the companies seeking to market the products tested and the commercial consumers of the drugs.

Medical experimentation increased dramatically during World War II to test antimalarial drugs necessary to the war effort. After the war, with the expansion of the economy and particularly the drug industry, prison subjects continued to participate widely in drug testing. In 1962 the Kefover-Harris amendments to the Food and Drug Act further encouraged the use of prisoners as subjects in the testing of drugs. By 1969 eighty-five percent of all new drugs were tested on prisoners in forty-two prisons throughout the United States.

By the 1970s, however, the mood of policymakers had changed considerably. Perhaps as a result of the popular association of experimentation on prisoners with the atrocities perpetrated by the Nazis and the equally troubling, although less far-reaching, legacy of the Tuskegee syphilis experiments on a number of Southern blacks in

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84 The possibility that the sellers might be the poor of developing nations greatly exacerbates moral issues raised by a market in human organs. H. Rep. No. 575, 98th Cong., 1st Sess. 8 (1983).
85 While the federal statute is limited in scope by the phrase "if the transfer affects interstate commerce," even intrastate transactions will be considered to meet this test under the Commerce Clause cases. See Note, supra note 71, at 1025 (providing an overview of Commerce Clause jurisprudence affecting such transactions).
87 This is evinced by the fact that pharmaceutical companies utilized prison experimentation to test products they wished to market to the general public. Id. at 971.
88 Id. at 971.
89 Id.
90 Id.
our own country, the propriety of medical experimentation on prisoners began to be questioned seriously.

In 1977 the Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, which was established by Congress to make recommendations on issues involving biomedical research, reported on experiments involving prisoners. The Commission maintained that "although prisoners who participate in research affirm that they do so freely, the conditions of social and economic deprivation in which they live compromise their freedom." The Commission strongly discouraged all nontherapeutic medical experimentation on prisoners. Its rationale was that prisoners are subject to coercion by virtue of the circumstances of their environment. "[W]hen persons seem regularly to engage in activities which, were they stronger or in better circumstances, they would avoid, [the principle of respect for persons] dictates that they be protected."

Following these recommendations, what is now the Department of Health and Human Services delegated to the Food and Drug Administration (FDA) the power to promulgate regulations that effectively prohibit all nontherapeutic drug-testing on prisoners. Additionally, an institutional review board must approve all proposals for other research involving prisoners. All projects must conform to a number of criteria designed to ensure that prisoner-subjects are not unduly influenced to participate. These conditions include the requirement that the inducement not be of such a magnitude that the prisoner is unable to weigh adequately the risks and benefits of participation, that the risks must be similar to those undertaken by non-

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92 In the "Tuskegee experiments," rural African Americans suffering from syphilis were untreated by researchers who sought to observe the effects of full-blown syphilis. GEORGE J. ANNAN S ET AL., INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT’S DILEMMA 259-60 (1977).
93 See Schroeder, supra note 86, at 971 n.19.
94 National Commission, supra note 24.
95 Id. at 3078.
96 Id.
97 Id.
98 Id. Professor Patricia King of Georgetown University, a member of the Commission, continues to be a strong opponent of research on prisoners, maintaining that the prison environment is inherently coercive. Roy Branson, Prison Research, National Committee Says ‘No, Unless . . . ’, 7 HASTINGS CENTER REP. 15, 17 (1977).
100 Id. at 46.103(b) and 46.109(a).
101 Id. at 46.305.
102 Id. § 46.305(a)(2) (requiring researchers to guard against disproportionate benefits). The report added that:

Any possible advantages accruing to the prisoner through his or her participation in the research, when compared to the general living conditions, medical care, quality of food, amenities and opportunity for earnings
prisoner subjects,\textsuperscript{103} and that the prisoners must be aware that participation will have no effect on their prospects for parole.\textsuperscript{104}

Notwithstanding the determination of the National Commission or the effect of the subsequent regulations, evidence suggests that prisoners' decisions were in fact informed, understanding and voluntary.\textsuperscript{105} Indeed, some prisoners themselves brought an action after the FDA ban, challenging its constitutionality and demanding reinstatement of such testing.\textsuperscript{106}

There are a number of apparent similarities among the three practices discussed here. Prisoners, like prospective surrogate mothers and potential organ sellers, may be seen as a disadvantaged class. While gender bias and economic exigency may characterize the situation of the typical surrogate, economic motives undoubtedly animate the desire to sell a kidney or a cornea, and the obvious limitations of their restricted freedom disadvantage prisoners. Moreover, all three practices involve the sale of some bodily capacity (e.g., reproductive capacity), or body part (e.g., a kidney or cornea) or one's body as a whole (e.g., its use for experimental drug testing). Although there are definite benefits from all three practices, each is accompanied by some claim of a moral taint—the economic motive or the unsavoriness of the transaction itself. It is easy to see why exploitation, as it is colloquially understood, arises in each case.

Apart from the social reasons for prohibiting these practices, the predominant rationale for finding exploitation (or one of its proxies—coercion, duress, or enticement) focuses on the presumably fallible decision of the individual subject. The claim of exploitation either implicitly assumes or explicitly declares that the practice must be condemned on the ground that true and voluntary consent of the subject has not been—and perhaps cannot be—obtained. If these scenarios do involve instances of behavior which are, on some level, in-
The following section examines the inadequacy of the traditional legal paradigm for human decision-making to account for this exculpatory dimension of exploitation.

II
THE TRADITIONAL MORAL-PSYCHOLOGICAL PARADIGM

The charge of exploitation is made in two varying ways, functioning differently depending on context. In some cases, exploitation is raised as an affirmative defense to a particular bargain or contract. The proponent thereby claims that the terms of the bargain are unfair and should be ameliorated. Here exploitation functions as an excuse, a defense to a particular bargain predicated upon the allegedly irrational or involuntary nature of the victim's decision. In other cases, exploitation is raised as a general argument against a broad class of practices; for example, all surrogate arrangements should be prohibited because surrogacy is an inherently exploitative arrangement. In this context, exploitation functions not as a defense to a particular bargain, but as a policy argument marshalled in opposition to the practice *sui generis*. Even in this context, however, exploitation operates as an excuse by declaring that parties to such agreements act, in some sense, involuntarily or irrationally. Consequently, this Article is primarily concerned with exploitation as a policy argument raised in opposition to broad classes of activities. Nevertheless, it will be important to understand the exculpatory nature of exploitation.

A. Exploitation as An Excuse

In various areas of the law there are two broad genres of affirmative defenses, \(^{107}\) "external policy defenses" and "internal exculpatory defenses," respectively. \(^{108}\) External policy defenses provide some general social reason for permitting a defense. Strictly speaking, the external policy defense does not morally excuse or justify a civil or criminal defendant for her behavior; rather, it provides a defense independent of the wrongfulness of the defendant's conduct. Internal exculpatory defenses, on the other hand, serve to exonerate the defendant because of some extenuating aspect of the defendant's situation: the circumstances of the defendant's conduct serve either to

\(^{107}\) The affirmative defense assumes all facts in the complaint to be true, but relies upon some substantive limitation of the cause of action in a civil case, or the prosecution in a criminal case. BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

negate the wrongfulness of the conduct, thereby justifying it, or to excuse the conduct by virtue of the actor's mental state.\footnote{See Kent Greenawalt, *Distinguishing Justification from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 91 (1986). The Model Penal Code is more skeptical concerning the prospect of differentiating between justification and excuse. MODEL PENAL CODE, art. 3, intro. (1985).}

For example, a variety of immunities in tort law serve as an external policy defense to conduct that is wrongful and for which, in other circumstances, the defendant would be liable.\footnote{See W. PAGE KEETON, PROSSER AND KEETON ON TORTS 1032-75 (5th ed. 1984) (discussing immunities generally).} The immunity of legislators for defamatory statements made on the floor of the chamber is one example of this.\footnote{See, e.g., Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956) (effect of immunity). The legislators' immunity from defamation suits for statements made during the course of legislative proceedings is often construed as an absolute privilege. KEETON, supra note 110, at 820.} The social policy of valuing a free and open forum for legislative debate justifies this broad immunity. External social policy grounds also underlie immunities based on the status of the defendant, such as governmental, interspousal or parental immunities.\footnote{KEETON, supra note 110, at 1032-75. The historical basis for the interspousal immunity was the presumed unity of husband and wife. The public policy of minimal intrusion in domestic disputes also supported interspousal and parental immunities. See id. at 901-07.} Similarly, in contract law, the statute of frauds acts as an external policy defense. The social policies of preventing perjury, promoting certainty of the contractual terms, and underscoring the seriousness of the contract, among others, justify non-enforcement even when an oral contract may have existed.\footnote{JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 775 (3d ed. 1987).} The illegality of a contract functions similarly to void all constraints which violate public policy.\footnote{RESTATEMENT (SECOND) OF CONTRACTS, § 178 (1981). The term embraces all bargains which are against public policy.} Finally, in criminal law, external policy defenses include the statute of limitations, grants of prosecutorial immunity, and various procedural and evidentiary defenses for the violation of a criminal defendant's constitutional rights.\footnote{See Stephen A. Saltzburg, *American Criminal Procedure* 417-22 (2d ed. 1984) (discussing prosecutorial immunity). Fourth Amendment rights against unlawful search and seizure are the paradigmatic example of external policy defenses. See Katz v. United States, 389 U.S. 347, 357 (1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.").} External policy defenses do not represent absolution for the moral wrongfulness of an act, they merely provide a legal defense based on certain social policies.

In contrast, the internal exculpatory defenses serve to negate or ameliorate the moral taint of the act. They can operate either as a justification or as an excuse. In criminal law, for example, self-defense
functions as a justification.\textsuperscript{116} Even though harming another is generally condemned, the defendant may be justified when the defendant is the victim of an unprovoked attack.\textsuperscript{117} The justification claims, in essence, that the act of harming another was not morally wrong in this instance. In tort law, the privileges of necessity, recapture of chattels, self-defense, and defense of others similarly justify conduct that would otherwise be tortious.\textsuperscript{118}

The second type of internal exculpatory defense is the excuse.\textsuperscript{119} Unlike justification, excuses operate by providing a defense because of the subjective psychological conditions under which the defendant acted. In criminal law, for example, the insanity defense acts as an excuse,\textsuperscript{120} as do involuntary intoxication,\textsuperscript{121} diminished capacity\textsuperscript{122} and a variety of similar excuses.\textsuperscript{123} Although justifiably harming another is not considered morally wrong, harming another for an excusable reason is still wrongful—the actor is just not held accounta-

\noindent\textsuperscript{116} See, e.g., United States v. Peterson, 483 F.2d 1222 (D.C. Cir. 1973).
\textsuperscript{117} Id. at 1224 (but to be justified, there must be no other plausible alternative).
\textsuperscript{118} See Keeton, supra note 110, at 109 (defenses to intentional torts, today called “privileges,” are “applied to any circumstance justifying . . . a prima facie tort, such as battery, assault or trespass . . .”).

To say that someone’s conduct is ‘justified’ ordinarily connotes that the conduct is thought to be right, or at least not undesirable; to say that someone’s conduct is ‘excused’ ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it.

\textit{Id.}

\textsuperscript{120} A full overview of the insanity defense is beyond the scope of this Article. Daniel M’Naghten’s case provided the first formulation of the insanity defense in Anglo-American law. 8 Eng. Rep. 718 (H. L. 1843) (permitting the defense where, due to mental disease or defect, the defendant does not understand the nature and quality of the act, or does not know that the act is wrong). Parsons v. State added the “irresistible impulse” test. 2 So. 864 (Ala. 1887). While the M’Naghten test covered cognitive flaws, the Parsons test embraced situations in which the defendant could not help doing what he did, a volitional flaw. The broadest formulation of the insanity defense was the Durham rule. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The Durham court excused criminal acts that were the “product of mental disease or defect.” Id. at 875. This was overruled in 1972 with the author of the Durham opinion concurring. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Brawner adopted the “substantial factor” test, permitting the defense when mental illness or defect was a “substantial factor” in the commission of the crime. Id. at 991. For an excellent philosophical critique of the insanity defense, see Joel Feinberg, \textit{What Is So Special About Mental Illness?}, in \textit{DOING AND DESERVING} 272-92 (Joel Feinberg ed., 1970).

\textsuperscript{121} Voluntary intoxication is no defense to a general intent crime. United States v. Meeker, 527 F.2d 12 (9th Cir. 1975) (assault). Compare State v. Kramer, 114 N.W.2d 88 (Minn. 1962) (involuntary intoxication is a defense) \textit{with} Burrows v. State, 297 P. 1029 (Ariz. 1931) (coerced intoxication is a defense).

\textsuperscript{122} See, e.g., State v. McVey, 376 N.W.2d 585 (Iowa 1985) (diminished capacity).

\textsuperscript{123} See, e.g., Wayne R. LaFave, MODERN CRIMINAL LAW 514-26 (2d ed. 1988) (discussion of duress as an excuse).
ble for the act. The action is not considered wrongful in the sense that it is not blameworthy.

In contract law, the defenses of incapacity, infancy, duress and unconscionability operate as excuses, based either upon the incapacity of the individual or the coercive circumstances under which the contract was made.124 Excuses such as these render a contract voidable, on the other hand, external policy defenses, such as illegality, which render the contract void ab initio.125 Thus, with an excuse such as incapacity, the contract may be avoided only by the party who possesses the excuse.126 There are no excuses as such in tort law; rather, the same result is achieved by adjusting the standard of care in the plaintiff's prima facie case to account for the exigencies of the defendant's situation.127

The lines between external policy defenses, justifications and excuses are not always clear. For example, in tort law, persons who act reasonably but mistakenly in self-defense are not really justified in doing what they have done: the act committed is still wrong. Thus, while self-defense usually acts as a justification, reasonably mistaken self-defense appears to operate more like an external policy defense. Society has put such a high priority on the right to defend oneself that doing so will be permitted even in cases of reasonable mistake.128

Similarly, the line between justification and excuse is sometimes fuzzy. For example, self-defense is generally considered socially desirable, thereby rendering its use a form of justification. In some cases, however, the rationale that self-defense is a natural act of self-preservation—i.e., that the defendant could not help but act as he did—trans-

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124 See Calamari & Perillo, supra note 113, at 306-23 (infancy); id. at 324-31 (incapacity) and id. at 336-50 (duress). Unconscionability may not necessarily fall into either of these categories.
125 Id. at 324.
126 Courts will leave parties to illegal contracts as they find them, refusing to enforce an illegal contract. Id. at 888. "Although there is older authority to the effect that the contracts and executed transactions of the mentally infirm are void, the overwhelming weight of modern authority is to the effect that they are merely voidable." Id. at 324.
128 Adding to the confusion, the Model Penal Code treats reasonable mistake in self-defense as a choice between justification and excuse. The actor is excused, by this rationale, because the mistake was reasonable. Model Penal Code, art. 3, intro. (1985). If the law seeks to encourage or, at least, condone reasonably mistaken actions taken in self-defense, then the proper categorization should be justification. This confusion illustrates the ambiguity in the use of the term "excuse."
forms the defense into a kind of excuse.\footnote{129} Again, it is the underlying exculpatory rationale that determines the characterization of the defense.\footnote{130}

Finally, the distinction between an excuse and an external policy defense is tested in situations where it is unclear whether the exculpatory policy has more to do with general social considerations or with the extenuating circumstances of the actor. For example, the contract defense of misrepresentation can be characterized either from the standpoint of the wronged party as an excuse—the victim of fraud is excused from the contract because of the lack of full or accurate information—or as an external policy defense from the standpoint of the wrongdoer—the person who has obtained a contract by fraud or misrepresentation will not be permitted to enforce it.\footnote{131}

To the extent that exploitation is legally recognized, this Article argues that it should operate as a type of excuse. While there may be external policy reasons for barring the activities discussed here—that surrogacy may constitute baby-selling, which is illegal in every state, or that organ sales result in a social mentality which believes that anything can be bought—exploitation does not function as an external policy defense. The exculpatory nature of exploitation has to do with its effect upon the subjective ability of the party to reason and to act freely and voluntarily.

Thus, while there are many kinds of contracts that are unenforceable because of compelling social policy reasons which have little or nothing to do with the subjective rationality and voluntariness of the parties,\footnote{132} exploitation operates differently. Insofar as the theoretical basis for the charge of exploitation concerns notions of involuntariness, coercion, or the inability of the party to rationally weigh her alternatives, exploitation functions as an internal exculpatory defense. Thus, there is a distinction between contracts that are void and unenforceable due to paternalistic policy defenses and those that are voidable due to exploitation.\footnote{133}


\footnote{130} See \textit{id.} (discussing reasonably mistaken necessity and self-defense as excuses).


\footnote{132} For example, bargains not enforceable under the Statute of Frauds.

\footnote{133} See Anthony T. Kronman, \textit{Paternalism and the Law of Contracts}, 92 \textit{YALE L.J.} 763 (1983) (discussing three paternalistic justifications for prohibiting certain forms of contracts). The law might void a contract on paternalistic grounds even though the parties entered the contract voluntarily. For example, the proscription against the enforceability of contracts to marry is not predicated upon the claim of coerced or uninformed consent. Rather, the law refuses to enforce such agreements out of concern for personal freedom and integrity. \textit{Id.} at 776.
A similar distinction must be made between exploitation and justification: the conduct of the exploited party is not necessarily morally condoned. Prospective surrogate mothers or sellers of kidneys may be protected as victims, but their behavior is not necessarily justified. When the law excuses on the basis of exploitation, it is not because the conduct of the victim was justifiable, as in self-defense, but because the exploitative nature of the offer has adversely affected the decision of the victim.

Why does the classification of the defense matter at all? If the primary rationale for the charge of exploitation is that there is some kind of interference with the process of decision-making, then exploitation should be permitted to prohibit an activity only when such interference can be demonstrated. The defense of exploitation should function in a manner similar to the insanity defense, the defense of diminished capacity, and duress, which require an individualized determination of the actor's psychological state. It should not become a general, paternalistic presumption that all cases of a certain category are exploitative.

B. The Traditional Paradigm: A Theory of Excuse

The intellectual roots of the traditional moral-psychological paradigm underlying the theory of excuse in Anglo-American law can be traced to Aristotle. Aristotle argued that acts are involuntary, and therefore excusable, when they are performed either "under compulsion or owing to ignorance." In their various latter-day manifestations, compulsion and ignorance serve as the two underlying theoretical foundations for virtually all forms of legal excuse in contemporary law. Each exculpatory condition affects a different aspect of human personality necessary to decision-making. Compulsion affects the ability to freely choose and to act voluntarily (human will),

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134 See sources cited supra note 120 for a discussion.
135 Those who adopt a "social dominance" view of exploitation, see supra notes 6, 14-16 and accompanying text, tend to merge these two categories. If exploitation is a function of socially disapproved uses of one party's socioeconomic status vis-à-vis another party, then there may be yet another theoretical basis for prohibiting such agreements on paternalistic grounds.

It is possible, of course, to (paternally) presume that all who enter certain agreements have acted involuntarily. This is the likely approach of opponents of surrogacy, organ sales, and consensual experimentation on prisoners who attack such practices sui generis. Proving that such a presumption is justified, however, is another matter.

136 The term "moral psychology" denotes questions at the nexus of psychology and moral theory. When does a person act freely? What does it mean to act involuntarily? And what does it mean to be compelled against one's will?

138 Id.
while ignorance affects the capacity to know what to do (human reason).

According to Aristotle, compulsion occurs when "the moving principle is outside, being a principle in which nothing is contributed by the person who is acting or is feeling the passion." According to this model of behavior, the excused actor must be motivated by circumstances and conditions external to the self. Various terms approximate this notion of external motivation, including compulsion, coercion and duress.

The second general exculpatory condition occurs when an act is performed by reason of ignorance. Essentially, a person cannot be considered to have acted "voluntarily" with respect to a particular set of circumstances if the person was ignorant of some important aspect of those circumstances. Aristotle distinguished acting by reason of ignorance, which is excusable, from acting in ignorance, which is not pardonable. For example, a drunk acts in ignorance, not by reason of ignorance, and so is not excused for his conduct. Actors may be ignorant with respect to who they are, what they are doing, upon what or whom they are acting, what the instrumentality of their action is, how they are actually performing the action, or to what end they are striving. Aristotle argued that in these instances the act is not voluntary, and so is excusable.

In large part, Anglo-American common law has incorporated this dichotomy between the volitional and the cognitive aspects of a theory of exculpation. In criminal law, the dichotomy between compulsion and ignorance emerges in a variety of defenses. For example, compulsion is the basis for the defense of duress. Additionally, a person may use the defense of not "acting" at all, as in the case of unconsciousness. Partial defenses to specific intent crimes, such as provo-

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139 Id.
140 The modern philosophical and legal definition of voluntariness requires a mental state and a corresponding bodily act. One voluntarily fires a gun, but one intentionally shoots at a particular target. See KEETON, supra note 110, at 33-37 (distinguishing voluntary and intentional acts). Translations of Aristotle use the word "voluntary" as the law uses the term "intentional." See, e.g., ARISTOTLE, supra note 137, at 966-67 (discussion of ignorance). He maintains that one has not acted voluntarily when one is ignorant of certain features of an action related to its consequences. Under the modern legal lexicon, this is unintentional action.
141 ARISTOTLE, supra note 137, at 966.
142 Id.
143 Id.
144 See LAFAVE, supra note 123, at 419 (discussing duress as a defense to criminal prosecution).
145 Unconsciousness negates the mens rea required for a crime. See, e.g., State v. Caddell, 215 S.E.2d 348, 360-63 (N.C.1975) (discussing unconsciousness, also referred to as automatism, as a complete defense to a criminal charge). The moving principle behind an
cation\textsuperscript{146} or diminished capacity,\textsuperscript{147} are a result of the intuitive notion that a person may be partially overcome by emotion or by other conditions surrounding the act.

It should be noted that Aristotle would have dismissed the increasingly popular notion of internal compulsion as a self-contradictory concept.\textsuperscript{148} Similarly, an Aristotelian scheme would not encompass the irresistible impulse version of the insanity defense.\textsuperscript{149} In both cases, because the moving condition arguably arises from within the person, a true Aristotelian scheme would permit no such defense. More recently, however, philosophers have found that defining what is "outside" and what is "inside" a person, metaphysically or psychologically, is a particularly intractable problem.\textsuperscript{150}

The paradigm instance of compulsion is found in cases of duress. In contract and tort law, coercion provides the legal basis for relieving a party of liability. Contract law generally excuses a party from a contract obtained under duress, although it limits the scope of duress.\textsuperscript{151} Tort law recognizes various degrees of involuntariness, but treats it more subtly. Thus, the person who acts under constraining circumstances may be held to a lower standard of care for negligence, as in the doctrine of emergency.\textsuperscript{152} The rationale for the lower standard is that, in the interest of self-preservation or some equally irresistible condition, the person could not help but act in that way.\textsuperscript{153}

Ignorance as a defense is considerably more problematic, but it continues to represent the second general exculpatory condition in certain areas of the law. Although in criminal law it is generally recog-

\textsuperscript{146} See People v. Washington, 130 Cal. Rptr. 96, 99 (Cal. Ct. App. 1976) (applying the "reasonable man" test to the defendant's "heat of passion" defense, which reduces second degree murder to voluntary manslaughter if successful).

\textsuperscript{147} See State v. McVey, 376 N.W.2d 585, 588 (Iowa 1985) (holding that the diminished capacity defense is available only for specific intent crimes).

\textsuperscript{148} See infra part III (discussing intrapsychic coercion and intrapsychic compulsion). For Aristotle, compulsion must come from without rather than from "within" the individual. \textit{Aristotle}, supra note 137, at 964.

\textsuperscript{149} See \textit{Aristotle}, supra note 137, at 964. The irresistible impulse test applies when a person cannot resist performing a particular act due to internal psychological processes. Parsons v. State, 2 So. 854, 863 (Ala. 1887).


\textsuperscript{151} The test for duress in contract law is whether the wrongful act or threat overcomes the free will of a party. Kaplan v. Kaplan, 182 N.E.2d 706, 709 (Ill. 1962). The question, of course, is: what is required to overcome free will? The test is objective—whether the coerced party had a reasonable third alternative. \textit{Calamari & Perillo}, supra note 113, at 337.

\textsuperscript{152} Cordas v. Peerless Trans. Co., 27 N.Y.S.2d 198 (1941) (no liability for cab company after cab driver exits moving cab in response to a gun at his head).

\textsuperscript{153} \textit{Id.}
nized that ignorance of the law is no excuse,\footnote{154 LaFave, \textit{supra} note 123, at 164.} ignorance of law may occasionally constitute a defense, particularly where the offense statutorily requires proof that the defendant knew that the act was illegal.\footnote{155 See, e.g., Liparota v. United States, 471 U.S. 419, 425 (1985) (concluding that a conviction under a foodstamp fraud statute requires proof that the defendant knew that possession of food stamps was unauthorized by the statute).} In other cases, ignorance of fact may also provide a defense to general intent crimes\footnote{156 See, e.g., State v. Elton, 680 P.2d 727, 731 (Utah 1984) (allowing the defendant to rely on a mistake of fact defense as to the victim's age under an unlawful sexual intercourse statute). But see Braun v. State, 185 A.2d 905, 906 (Md. 1962) (representing the general rule that mistake of fact is not a defense to bigamy).} or may serve to negate the requisite mental element in specific intent crimes.\footnote{157 See State v. Cude, 383 P.2d 399, 400 (Utah 1969) (finding that the owner of a car subject to a merchant's lien had a defense to larceny, if the owner honestly believed he had a right to possession). Also, reckless rather than knowing, \textit{mens rea} will generally reduce the gravity of the crime (for instance, from murder to involuntary manslaughter).} For example, the \textit{M'Naghten}\footnote{158 \textit{8 Eng. Rep. 718; 60 All E.R. 229 (H.L. 1843).}} version of the insanity defense excuses defendants who either do not understand what they are doing or do not understand that the act is morally wrong.\footnote{159 Id. at 722-23.} Thus, the \textit{M'Naghten} test encompasses ignorance of both as the nature and the moral permissibility of the act.

Because of the growing emphasis on objective rather than subjective standards of conduct,\footnote{160 Morton Horwitz, \textit{The Transformation of American Law 1870-1960} 51-53 (1992).} tort and contract law increasingly presume that parties possess certain kinds of knowledge.\footnote{161 See, e.g., Michigan City v. Rudolph, 12 N.E.2d 970 (Ind. 1938) (driver presumed to know that automobile will go out of control when driven fast through loose sand). See Note, 23 MINN. L. Rev. 628 (1934) (providing an exhaustive collection of cases on what the reasonable person will know).} Thus, ignorance will be no excuse. Misrepresentation, mistake, incapacity and infancy, however, continue to be grounds for barring the enforcement of a contract\footnote{162 See Calamari & Perillo, \textit{supra} note 113, at 356-77 (misrepresentation); \textit{id.} at 378-91 (mistake); \textit{id.} at 323-31 (incapacity due to mental infirmity); \textit{id.} at 305-26 (infancy).} on the theory that the actor was either acting in the justifiable absence of full information or was intellectually incapable of reasoning.\footnote{163 Inability to reason due to youth or mental infirmity is not "ignorance," strictly speaking, since ignorance implies a lack of information rather than an inability to use the information through the exercise of reason. The law's recognition of a person's inability to reason as a basis for exculpation in contract law and in criminal law creates a promising point of departure from the traditional Aristotelian notion of ignorance.} Although tort law often presumes knowledge on the part of plaintiffs and defendants,\footnote{164 Note, \textit{supra} note 161 (providing an exhaustive compendium of situations involving what the law presumes that people know).} ignorance of one's circumstances may serve to reduce the level of intent (for example, from
purposiveness to recklessness),\textsuperscript{165} or to negate intent altogether.\textsuperscript{166} Furthermore, while courts generally do not consider mental illness or disability as defenses to intentional or negligent acts, they may lower the standard of care for the mentally handicapped plaintiff in the case of contributory negligence.\textsuperscript{167} Finally, courts consider age when determining the standard of care for child defendants in negligence cases because of most children's inferior knowledge and ability to reason.\textsuperscript{168}

It should be clear, even from this limited discussion, that the traditional moral-psychological model of excuse in Anglo-American law generally requires either that an actor be compelled or that the actor be justifiably ignorant of the nature of the act. Where the act is compelled, the law assumes that it is not the person, strictly speaking, who has performed the act; rather, some force outside the actor is deemed legally responsible. Similarly, courts excuse the act done by reason of ignorance because the person acted under a misapprehension of the circumstances and did not intend the result. In either case, the act is involuntary and the actor is not liable for the consequences.

Although these two excusing conditions seem omnipresent, neither compulsion nor ignorance is actually involved in exploitation. Persons may be deemed to have been exploited even when they have acted voluntarily and with full information. The next section develops the proposition that the concept of exploitation does not fit easily into either the volitional or the cognitive category of excuse.

C. The Traditional Paradigm and the Concept of Exploitation

When talking about exploitation, some writers invoke terms such as "coercion," "duress," and "overcoming of the will."\textsuperscript{169} Others speak as if the cognitive capacities of the victim of exploitation have failed by claiming that the choice offered is so enticing that the victim is unable to adequately weigh the risks and benefits of the proffered alterna-

\textsuperscript{165} See \textsc{Restatement (Second) of Torts}, § 8A, illus. 2 (1964) (defendant's ignorance that a particular consequence is substantially certain to follow will reduce the level of liability from intent to recklessness).

\textsuperscript{166} See Garrett v. Dalley, 279 P.2d 1091 (Wash. 1955) (holding that there is no intent to injure on the part of a five-year-old child if the defendant can prove that he did not know that pulling a chair out from under someone who is about to sit down would cause the person to fall).

\textsuperscript{167} See, e.g., Lynch v. Rosenthal, 396 S.W.2d 272, 277 (Mo. Ct. App. 1965) (adjusting the standard of care in a contributory negligence claim for a mentally handicapped plaintiff).

\textsuperscript{168} See \textsc{Keeton}, supra note 110, at 179-82 (discussing children as defendants in negligence actions).

\textsuperscript{169} See supra notes 19-22 and accompanying text.
In this way, modern advocates of the theory of exploitation seek to bring it under one or both of the traditional bases for exculpation. Yet, exploitation does not quite fit either category: the victim of exploitation is neither compelled nor acting by reason of ignorance.

Exploitation is distinguished from coercion or duress in that coercion inevitably occurs in the context of a threat which serves to reduce the number of available options open to the actor. Exploitation, however, characteristically involves a situation in which the actor is presented with an offer that represents an additional alternative to the choices previously available. Exploitation, then, is distinct from the traditional notion of compulsion in two respects. First, the decision to pursue the proffered choice is precisely that—a decision made by the actor. Because it is a decision and not a compelled act, the choice springs from internal motives and is not imposed by forces outside the agent. Second, an offer that creates an additional alternative can never render an action less free or voluntary than the action which would otherwise have been performed. That is, providing an additional choice is per se liberating, not compelling.

Nor does exploitation cause the victim to act by reason of ignorance. Although fraud may accompany exploitation, as in the case of the quack doctor in the third scenario at the outset of this piece, exploitation may also occur even when the alleged victim has full knowledge of the situation and the available options. If anything, the allegation of exploitation depends upon a theory of incapacitation of the rational process not recognized by the traditional Aristotelian paradigm.

A number of theories and metaphors have surfaced in the literature on exploitation as commentators have attempted to bring the concept under the traditional paradigm. The next section of this Article discusses some of these theories and metaphors, as well as the manner in which exploitation operates.

170 See supra notes 23-24 and accompanying text.
171 See supra part III.A.1.
172 Id.
173 However, it is difficult to determine what lies “inside” and “outside” the self, metaphysically or psychologically. Dan-Cohen, supra note 150, at 982.
174 See infra part III.A.1 (discussing whether an offer can ever be coercive).
175 See infra notes 247-87 and accompanying text (discussing the subtle effects of emotional disturbances on reasoning ability).
176 See supra notes 28-106 and accompanying text (discussing these theories of exploitation in the context of surrogate parenting, organ sales, and non-therapeutic experimentation on prisoners).
III

EXPLOITATION: VARIED THEORETICAL BASES

A. Exploitation as an Impediment to Free or Voluntary Acts

One way to bring exploitation under the traditional exculpatory paradigm is to argue that the exploitative offer impairs the volitional capacity of the actor. Commentators have suggested at least three different accounts of the way exploitative offers limit free choice. First, some claim that exploitative offers can be coercive. An examination of the distinction between exploitation and coercion will require an investigation of the concept of "intrapsychic coercion." Second, some maintain that attractive offers exploit by playing upon powerful or even irresistible desires that the actor cannot disregard. Extreme enticement may result in a kind of "intrapsychic compulsion," as distinguished from intrapsychic coercion. Finally, others maintain that certain bargains may exploit by taking advantage of an individual's values and beliefs, which may themselves be the product of social conditioning.

The following sections consider various claims predicated upon the notion that exploitative offers interfere with an individual's volitional capacities, creating an obstacle to the exercise of free will. This Article rejects those claims and argues that these offers represent an obstacle to rationality. That is, exploitative offers interfere with practical reasoning, a necessary prerequisite to coherent decision-making. Before considering these issues, however, it is necessary to address the distinction between exploitation and coercion.

1. Exploitation Versus Coercion

Exploitation must be distinguished from coercion. If exploitative offers limit free or voluntary choice, they operate in a different way than coercive threats. Exploitation characteristically involves an offer of an additional alternative that the actor may voluntarily accept.
or reject without sanction. Coercion, on the other hand, has been defined as requiring three individually necessary and jointly sufficient conditions. First, the coerced act must be voluntary in that the actor could have chosen to act differently. A person who performs some act which the person would not otherwise perform because there is a gun at the person's head is, nonetheless, acting voluntarily according to this definition: the person could have refused to perform that act, albeit with fearsome consequences. Second, coercion always takes place in the context of an interpersonal relationship. Neither natural nor physical conditions can coerce. Finally, and most importantly, coercion must involve the threat of harm, never the promise of benefit.

The most significant implication of this definition of coercion is that an offer is per se non-coercive. This has been the subject of considerable academic debate, but a slight majority adhere to the view that an offer can never be coercive. An offer of benefits can never be coercive in this sense for two related reasons. First, offers are freedom-enhancing insofar as they always open up additional alternatives, while threats serve to restrict the previously existing alternatives. For example, a pedestrian walking down the street with a wallet full of money may either retain the wallet or present it to the first stranger encountered. However, if the stranger forces the pedestrian to yield the wallet at gunpoint, the first option is effectively foreclosed. Robbery, of course, is a paradigm instance of coercion.

A second reason why numerous philosophers have maintained that an offer can never be coercive is that coercion necessarily involves a threat of punishment for noncompliance, rather than a promise of a benefit for compliance. For example, Bayles maintains that to call

184 Wertheimer, supra note 4, at 205-11, 226-27.
185 Michael Bayles, A Concept of Coercion, in Coercion, supra note 177, at 17.
186 Id. at 18.
187 Id.
188 Id. at 19-20.
189 Id. at 22-23.
190 Those who argue that an offer cannot be coercive include the following: Bayles, supra note 185, at 22-23; Bernard Gert, Coercion and Freedom, in Coercion, supra note 177, at 30, 32-35; Nozick, supra note 5, at 262-65; Wertheimer, supra note 4, at 225-32. But see Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 82-83 (1988); Held, supra note 177, at 57; Harold D. Lasswell & Abraham Kaplan, Power and Society: A Framework for Political Inquiry 97 (1963).

These writers are only representative of the debate. The issue as to whether inducements are coercive is fundamental to liberal political ideology. For the classical liberal or libertarian, there can be no exploitation. See, e.g., Nozick, supra note 5, at 262-65. The term carries no pejorative import because the classical liberal system is predicated upon free exchange by autonomous, self-interested individuals. Full disclosure and absence of duress signify the absence of exploitation.

191 See, e.g., Wertheimer, supra note 4, at 310 (arguing that coercion requires that the offeror's threat or proposal must leave the offeree no real alternative, and that this propo-
an offer coercive is to confuse the notions of bribery and coercion.\textsuperscript{192} Thus, the distinction between coercion and exploitation is basically the difference between \textit{causing} someone to have to make a difficult choice ("your money or your life") and \textit{taking advantage} of the existing situation.\textsuperscript{193} That is, coercion \textit{worsens} the actor's situation. An offer, on the other hand, can be rejected without making the offeree's situation any worse than it was \textit{ex ante}.

Those who argue that offers may be coercive, and for whom the concepts of exploitation and coercion overlap considerably, reject both of these arguments.\textsuperscript{194} They maintain that, at least in some cases, an offer may either limit freedom or leave a person in a worse position than before it was made.\textsuperscript{195} Those who argue that an offer is capable of limiting freedom maintain that it does so by presenting the offeree with an irresistible alternative: the offer is, in the sense of taking advantage of an overpowering desire, "coercive."\textsuperscript{196} This reliance on this alternative definition of coercion demonstrates the equivocal uses of the term.\textsuperscript{197} Because this concept of coercion has more to do with enticement than with duress, Part III considers this use of the term "coercive."\textsuperscript{198}

Others argue that an offer may be coercive (in the first and more ordinary sense of the term) insofar as some offers do indeed leave the offeree in a worsened position relative to the pre-offer situation. For example, Feinberg refers to offers like the one in the lecherous millionaire example at the outset of this Article as freedom enhancing

\begin{itemize}
  \item \textsuperscript{192} Bayles, \textit{supra} note 185, at 22-23.
  \item \textsuperscript{193} Feinberg, \textit{supra} note 183, at 208-09.
  \item \textsuperscript{194} \textit{See} Elster, \textit{supra} note 190; Held, \textit{supra} note 177; \textit{Lasswell & Kaplan, supra note 190.}
  \item \textsuperscript{195} \textit{See} Feinberg, \textit{supra} note 3 (exploitative offers sometimes leave victim in worse position); Held, \textit{supra} note 177, at 58 (limiting freedom by introducing an irresistible desire).
  \item \textsuperscript{196} \textit{See}, e.g., Held, \textit{supra} note 177, at 57 (who argues that offers "coerce" to the extent they cannot be resisted).
  \item \textsuperscript{197} Held's argument that offers can be coercive amounts to the claim that particularly attractive inducements may make it difficult for a person to refuse. "[A]s an inducement to accept an offer approaches a high level, it approaches coercion proportionately." \textit{Id.} The problem with this view is twofold. First, it suggests that actions which are motivated by desires can be the product of coercion. Indeed, the greater the desire, the greater the coerciveness of the offer. Second, it confuses coercion with involuntariness. The argument is that the offer is coercive because the offeree "could not resist." Even if this assessment is true, the offeree's inability to resist does not make the decision coerced. The coerced act must not simply be irresistible, but must also be against one's will. It is difficult to see how an act performed out of intense desire could be against one's will.
  \item \textsuperscript{198} \textit{See infra} notes 206-18 and accompanying text.
\end{itemize}
He argues that an offer may coerce by foisting an "unacceptable" consequence upon the offeree who rejects the offer. If the young woman in the lecherous millionaire example rejects the millionaire's offer, she not only faces the prospect of her child's death, which is the same consequence she confronted before the offer, but she might also experience significantly greater guilt than she would have had the offer never been made. After all, she presumably could have saved the child by accepting the offer. In this view, the lecherous millionaire's offer is exploitative to the extent that he seeks a bargaining advantage by capitalizing on the young woman's awareness of her potential guilt. At the same time, the offer is coercive to the extent that rejection may leave the woman in a worse position than before it was made. The problem with considering such situations coercive, however, is that the putatively coercive stimuli come from within. Is guilt or fear of self-inflicted intrapsychic punishment truly coercive? The next section focuses on this question.

2. Intrapsychic Coercion

As noted, although an offeree may indeed be in a worse position after the presentation of an offer, it is not due to an external condition. In the event the young woman rejects the millionaire's proposal, she is not in a worse position because of some external threat, but because of the intrapsychic effects of her knowledge of the offer itself. Thus, the lecherous millionaire example is not coercion in the usual sense; if anything, it is an instance of "intrapsychic coercion." The actor is coerced into accepting an offer by the threat of internal self-punishment in the form of guilt, fear, despair, or self-recrimination.

It might be argued that there are good reasons for rejecting intrapsychic coercion as an exculpatory condition. First, as previously argued, coercion has traditionally encompassed only situations where the threat is external. There may be sound policy reasons for the law's traditional refusal to account for internal psychological conflicts and problems that result in certain forms of behavior. Second, problems of proof and fraud have always slowed the law's acceptance of such claims.

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199 Feinberg, supra note 177, at 208-09.
200 See supra notes 183-99.
201 In tort law, for example, there is no insanity defense. See, e.g., McGuire v. Almy, 8 N.E.2d 760, 763 (Mass. 1937) (insanity no defense to intentional tort). Intrapsychic coercion is probably substantially less debilitating than insanity. Thus, even though incapacity may be a defense to enforcement of a contract, the level of mental handicap must be demonstrably severe. Incapacity by virtue of insanity, for example, requires that the person not understand the nature and consequences of the act at the time of the transaction. See Cundick v. Broadbent, 383 F.2d 157, 160 (10th Cir. 1967), cert. denied, 390 U.S. 948 (1968). Other grounds of mental incapacity are senility, mental retardation, delirium, and intoxication. Calamari & Perillo, supra note 113, at 324. Mere internal conflict or cognitive dissonance, on the other hand, will not be sufficient. Id.
of such intrapsychic considerations, such as tort law's rejection of the insanity defense to intentional or negligent torts.\textsuperscript{202}

Notwithstanding these considerations, however, intrapsychic coercion should indeed represent one important excusing condition where it results from an offer. While such offers are not coercive in the traditional sense, cases of intrapsychic coercion can be the basis for exploitation. This Article argues that these offers have been mischaracterized as essentially volitional constraints when they actually represent obstacles to rationality by interfering with a person's capacity for practical reasoning.\textsuperscript{203} This Article contends that negative intrapsychic consequences, such as guilt or fear of self-loathing, interfere with the decision-making process not by compelling an otherwise undesirable action, but by skewing the subtle emotional and cognitive foundation upon which attitudes, beliefs, judgments and goals are built.\textsuperscript{204} That is, some offers are exploitative not because they weaken the will but because they prevent clear thinking about the actor's options. Technically, this condition is not self-imposed. Where an offeror seeks to take advantage of a foreseeable, if not ubiquitous, human weakness, the offeree should be permitted a defense to the agreement.\textsuperscript{205} Intrapsychic coercion thus represents one way in which offers may be exploitative.

3. Exploitation as Enticement: Intrapsychic Compulsion

In contrast to intrapsychic coercion, in which the actor is compelled to act in fear of the consequences of refusal, intrapsychic compulsion characterizes situations in which actors are motivated by exploitatively attractive offers. Although internal motivation is present in both cases, intrapsychic coercion motivates negatively by threatening psychological consequences, while intrapsychic compulsion motivates positively by mobilizing irresistible desire.\textsuperscript{206}

Even though there is no negative sanction to refusal, some writers persist in considering enticement a form of coercion.\textsuperscript{207} For example, Held argues that "as an inducement to accept an offer approaches a high level, it approaches coercion proportionately."\textsuperscript{208} Similarly, both

\textsuperscript{202} See McGuire, 8 N.E.2d at 762-63.
\textsuperscript{203} See infra part III.
\textsuperscript{204} See infra notes 247-87 and accompanying text.
\textsuperscript{205} Although a rational impairment alone will not suffice, where this impairment is accompanied by an intention on the part of the offeror to take advantage of the offeree, the basis for exploitation is present. See infra part IV.B.2.
\textsuperscript{206} The distinction between positive motivation by desire and negative motivation by fear or guilt may not always be clear. For example, aversion is a desire to avoid a negative sanction. Conversely, desire for a positive reward may spring from fear of not attaining the desired object.
\textsuperscript{207} See, e.g., Held, supra note 177, at 57.
\textsuperscript{208} Id.
Haskar and Elster suggest that offers may coerce by manipulating a person's predominantly unconscious intrapsychic processes, taking advantage of a putatively "irresistible" desire to accept the offer.\(^{209}\)

This Article argues that intrapsychic compulsion can and should be distinguished from true coercion. Nevertheless, intrapsychic compulsion's appeal to intense desires constitutes yet another type of impediment to the process of practical reasoning.\(^{210}\) Seduction is perhaps the archetypal example: it requires genuine opposition to the sexual encounter and action contrary to the victim's most fundamental values.\(^{211}\) To consider seduction, enticement and other forms of intrapsychic compulsion simply "weakness of the will" is misleading.\(^{212}\) It is not so much that the will is overborne by desire as it is that a person's entire "evaluational" system\(^{213}\) is temporarily and dramatically altered as it is filtered through the lens of a particularly compelling desire. From the standpoint of the purported victim, the situation is experienced as a shifting of values resulting in a sometimes radically different perspective on the situation.\(^{214}\) This is fundamentally a cognitive, and not a volitional, failing.

But how irresistible must an offer be before it is considered truly compelling in the relevant sense? In terms of an obstacle to rationality, what level of reward or promise of satisfaction is necessary before the law should recognize that the actor's capacity to reason effectively has been substantially impaired?

From the volitional perspective, few conditions are absolutely irresistible in some ultimate physical sense.\(^{215}\) Although there may be

\(^{209}\) See Vinit Haksar, Coercive Proposals, 4 Political Theory 65, 68 (1976); Elster, supra note 190, at 82-83.

\(^{210}\) See infra notes 263-71 and accompanying text.

\(^{211}\) Seduction requires that the seducer "win over" the victim, "corrupting" the principles of the seduced. Webster's College Dictionary (3d ed. 1991). The victim may be overcome with desire that contravenes other fundamental values of the victim.

\(^{212}\) From Aristotle onward, this has been the prevailing moral-psychological framework by which seduction, bribery and other forms of enticement are explained. See Aristotle, supra note 137 and accompanying text. Aristotle refutes the Platonic view that all evil results from a state of ignorance—that no actor does evil knowingly. Id. He argues that incontinence is a form of weakness of will. Id. at 1039-49. This Article's view is not a reversion to the Platonic view. Rather, it follows modern psychology in holding that "will" and "reason" are not so easily distinguished. See infra part III.B.2 (discussing the supporting evidence).

\(^{213}\) See Gary Watson, Free Agency, LXXII J. Phil. 205 (1975). Watson argues that an act is free if it springs from motives (desires) that conform with the individual's evaluational system. Thus, the heroin addict is not free even though a desire for heroin motivates the addict's behavior. Id. at 217.

\(^{214}\) See infra notes 247-87 and accompanying text.

\(^{215}\) As Feinberg argues, physical irresistibility is exemplified in situations when a person jumps from a sinking ship in the middle of the ocean and swims for land until sheer physical exhaustion takes its toll, or when a person hanging from a window ledge stories above the ground loses his grip and plummets to the ground. Feinberg, supra note 120, at 282-83.
sound normative reasons for drawing the line liberally in cases of duress,\textsuperscript{216} it is unlikely that situations similar to the three practices discussed in this Article would meet the requisite level of irresistability. The woman who enters a surrogate agreement, the seller of an organ, or the prospective human test subject would presumably have considerable difficulty demonstrating psychological irresistibility. Where they are excusable, these cases provide legitimate bases for exculpation not because they are characterized by a volitional failing, but rather because they present circumstances of interference with the ability to reason objectively. Thus, the question is not: “Was the motivating desire irresistible?” Rather, the issue is whether the offer invoked desires that skewed the evaluational processes of the actor.\textsuperscript{217}

4. Social Conditioning and the Problem of the Authentic Self

Some commentators find exploitation in situations in which the purported victim’s actions may be explained in terms of social conditioning.\textsuperscript{218} As noted, some feminists maintain that women are victims of a form of social and cultural conditioning that emphasizes their role as sex objects, procreators or nurturers.\textsuperscript{219} If social conditions predispose women to want to have babies, the origin of these desires renders the surrogacy decision questionable. Similarly, where individuals act from environmentally conditioned predispositions in making certain decisions, the choice to sell an organ may be challenged as being the result of exploitation.

Intrapsychic coercion and compulsion involve internal motivation that is presumably so intense that it influences the actor’s ability to reason effectively and creates conflict between competing values, beliefs, and desires.\textsuperscript{220} In contrast, social conditioning functions in a distinct psychological manner. While radical behaviorist psychologists such as B.F. Skinner claim that mental states such as desires, beliefs, intentions, and values are illusory constructs of a pre-scientific psychology,\textsuperscript{221} others argue that social conditioning operates by setting in place the array of mental states subsumed in the term “character.”\textsuperscript{222}

\textsuperscript{216} Duress does not typically encompass physical irresistibility. Rather, the victim must make a difficult choice. Although the law excuses actions under duress, the act is not involuntary because the actor could refuse to comply with the demand. Bayles, supra note 185, at 18.

\textsuperscript{217} See Watson, supra note 213.

\textsuperscript{218} See supra notes 39-46 and accompanying text.

\textsuperscript{219} See, e.g., Corea, supra note 32.

\textsuperscript{220} See supra notes 201-17 and accompanying text.

\textsuperscript{221} B.F. Skinner, Beyond Freedom and Dignity 1-23 (1971).

\textsuperscript{222} Some commentators view discussion of “character” as unscientific because character cannot be observed; only behavior can be observed. See, e.g., id. (discussing a radical empiricist psychology). Nevertheless, philosophers and psychologists have increasingly moved beyond the theoretical and practical limitations of logical positivism to reembrace...
If the values and behavior of women, the poor, and other traditionally alienated groups have been socially conditioned by environmental contingencies established by the dominant group, then their consent is, in an important sense, superficial.\textsuperscript{223}

The counter-argument, of course, is that, if social conditioning vitiates free and consensual action, then everyone is unfree insofar as all behavior is the product of each individual's own psychological history, itself a function of the totality of the individual's interaction with the external world. From the volitional standpoint, to the extent that anyone acts from desire, even where that desire is itself a product of innate biological factors and social conditioning, that act must be "free" in the only sense that accurately reflects the meaning of the term "freedom."\textsuperscript{224} Conversely, how can a person's action ever be unfree, as it is claimed to be by proponents of the charge of exploitation, when it is motivated by her own desires, beliefs or values? The problem stems from viewing social conditioning as a form of volitional impairment—an obstacle to freedom—rather than as an impediment to the development of mature rationality. If social conditions determine all behavior, the surrogate is no less free in wishing to bear a child for another than is the corporate raider in engineering another take-over, or the artist in creating another masterpiece.

What may distinguish these situations, however, is the way in which conditioning shapes the decision-making capacity. Conditioning may either serve as a beneficial tool facilitating self-discovery, or


\textsuperscript{223} True consent requires the freedom to consider other options, to choose one alternative and to disregard others. To the extent social conditioning precludes this weighing of options, it renders choices superficially consensual.

\textsuperscript{224} In general, western philosophy has embodied two diametrically opposed positions on the relationship between freedom and desire. One school of thought, represented by the nineteenth century German idealist Schopenhauer, argues that we are \textit{unfree} to the extent that our actions are motivated by desires. Wright Neely, \textit{Freedom and Desire}, 88 PHIL. REV. 32, 36-37 (1974). Desires, which are viewed as external to the intrinsic self, may force us to act in ways contrary to our own self-interest. As such, this line of thought follows the Buddhist notion that true freedom comes with the negation of all desire. \textit{Id.}

The more prevalent view among Anglo-American thinkers, on the other hand, follows Hobbes in holding that freedom is nothing but the satisfaction of desire. One is free only to the extent that one "gets what one wants."

There are problems with both theories, when taken to the extreme. If the law adopted the Schopenhaueraian view that every decision motivated by desire is unfree, perhaps all decisions would be excused, insofar as they are products of desire. On the other hand, if the Hobbesian account of freedom is correct, then even the victim of duress is free insofar as he desires to escape the coercive threat by compliance. Freedom here is simply the quotient of $M/W$, where $M=$ the means to get what one wants and $W=$ a person's wants or desires. Freedom, therefore, can be maximized by either increasing the means at the actor's disposal or by reducing what the actor wants. On this account, death would be the ultimate state of freedom.
function as a destructive means of indoctrination precluding self-development and leaving the actor's network of beliefs, values, goals and desires immature or dysfunctional. Whether or not this is considered an impediment to rationality will depend upon the definition of rationality.

5. Is Exploitation An Impediment to Freedom of the Will?

Proponents of the theory of exploitation attempt to bring exploitation within the traditional exculpatory paradigm by applying exploitation to concepts ranging from coercion (internal or external) to intrapsychic compulsion to social conditioning. Thus, they argue, in effect, that exploitation renders the resulting decision or behavior unfree. While pre-analytic intuition indicates that there is indeed something debilitating about the kinds of situations which are sometimes thought to be exploitative, there are at least three difficulties in concluding that exploitative offers disable the will, or the capacity for free choice.

First, in all three situations, the behavior springs from internal causes: psychologically aversive conditions, as in intrapsychic coercion; powerful desires, as in the case of intrapsychic compulsion; or the socially-conditioned network of mental states. A long philosophical tradition, including the position held by soft determinists, suggests that freedom is contrary to external constraint: when behavior springs from internal motivations, whatever the source or ultimate in-

225 "A person may design a better way of raising children primarily to escape from children who do not behave well. He may solve his problem, for example, by being a martinet. His new method may promote the good of the children or of parents in general." SKINNER, supra note 221, at 150. See id. at 138-73 (for a general discussion of the different values which may motivate and underlie social conditioning and the "design of culture").

226 If rationality is subjective, requiring merely coherence between an individual's beliefs, thoughts, desires, goals, and judgments, then, as long as the decision makes sense from the standpoint of the limited goals and values of the subject, the decision would be rational. If, however, rationality requires satisfying some objective or external goal—for example, maximizing self-interest—then the decisions which result from conditioning may well not be rational. See infra notes 313-17 and accompanying text.

227 See supra notes 28-106 and accompanying text.

228 See supra notes 201-05 and accompanying text.

229 See supra notes 206-17 and accompanying text.

230 See supra notes 218-26 and accompanying text.

231 Soft determinism reconciles its acceptance of determinism with the possibility of freedom by distinguishing internal and external causation. All behaviors are causally determined. Those behaviors resulting from internal causes such as desires, goals, and beliefs, are free. See generally Determinism, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 359 (Paul Edwards ed., 1967) (discussing the soft determinism of Hobbes, Hume, and Mill). Hard determinists respond by asking what sense it makes to call an action free when the actor's desires, values and beliefs are predetermined. See John Hospers, Free Will and Psychoanalysis, in REASON AND RESPONSIBILITY 354 (Joel Feinberg ed., 1978).
fluence of such internal motivating factors, it is to be considered free.232

Second, in addition to the fact that the victim of exploitation acts from internal motives, a line-drawing problem arises. When is a mental impulse so powerful as to be considered irresistible, thereby rendering the resulting behavior unfree? Although drawing lines is not an insurmountable obstacle, very few desires or impulses are irresistible in an ultimate sense. To the extent that certain desires, which are considered irresistible, but are in fact quite resistible, albeit with unpleasant consequences,233 the term “freedom” loses some of its psychologically or morally descriptive import. Freedom ceases to describe the subjective psychological or moral experience of the actor and becomes a function of an externally imposed normative standard. Once an act is considered “unfree” because as a policy matter we think it should be excused, rather than the other way around, (i.e., an act is excused if it is not free), then why even employ the term “free” anymore? It would be easier and intellectually more honest simply to promulgate standards of behavior and exculpating exceptions, dispensing with the metaphysical issues of freedom and responsibility.

A third problem concerns intrapsychic compulsion and social conditioning. Even if internally aversive conditions render behavior unfree in some morally relevant sense, how can behavior motivated by desires, values or goals ever be unfree?

There is a long tradition in Anglo-American philosophy that equates freedom with the ability to get what one desires.234 If this is what “freedom” means, then behavior resulting from intrapsychic compulsion is free. In fact, the overpowering nature of the desire only serves to enhance the value of freedom because the actor is getting that which she intensely desires. Similarly, behavior that results from desires stemming from social conditioning must be considered free. Because intrapsychic coercion and compulsion and social conditioning cannot be shown to be freedom-limiting, it is important to examine why these influences are so troubling.

Psychological conflict may be a significant factor in intrapsychic coercion and compulsion. Intrapsychic coercion may involve motivations in contravention of the individual’s other values, beliefs and desires. Thus, the woman in the lecherous millionaire example may feel compelled by guilt to accept the offer, but she may also feel that

232 See generally DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 90-111 (Charles W. Hendel ed., 1955) (1748) (freedom is opposed to external constraint, not necessity).

233 As noted earlier, even a man with a gun to his head can resist the threat. Thus, acts committed under duress are not involuntary, strictly speaking. See supra note 187 and accompanying text.

234 This is the Hobbesian tradition discussed in Neely, supra note 224, at 36-37.
accepting the offer would be morally wrong, and perhaps even psychologically destructive of her character. Fear, guilt and other aversive emotions often motivate behavior. These aversive emotions are psychologically constraining, however, only when they conflict with equally powerful mental states and dispositions of character.

Intrapsychic compulsion operates similarly. The individual may intensely desire something, such as an addictive drug, and simultaneously recoil from it. What makes such situations tragic is not that the desire is not satisfied, but that the desires themselves fluctuate such that the satisfaction of one desire may entail the frustration of another. The problem is not one of freedom, but of psychological integration.

Social conditioning presents the inverse problem. If the conditioning has been particularly successful, the actor may feel no conflict between various goals, values and desires. The conditioning may thus prevent the individual from entertaining any options other than the conditioned ones. In essence, conditioning may serve to short-circuit the creative process by which the psychologically actualized individual constructs and integrates herself. As a result, the potential person who might have been, if the process of social conditioning had not intervened to preclude this process of self-creation, is lost. Thus, even if it is true that everyone is socially conditioned in every aspect of behavior, some conditioning may facilitate the process of self-development while other forms may hinder the same process. The problem is not a lack of freedom, but is instead a function of the impoverished psychological conditions from which the values, goals and desires of the actor spring. Instead of metaphysical and moral questions concerning the freedom of the individual, social conditioning raises questions about the psychological, emotional and intellectual predicates for be-

See Frank, supra note 222, at 181 (arguing that certain behaviors may permanently alter the actor's character by making it difficult to maintain the previous morally superior disposition). For example, acts of dishonesty do more than affect the person's present moral status: they make it emotionally more difficult to maintain a disposition of honesty in the future. The actor's entire self-image may be detrimentally changed by a particular act of dishonesty or immorality. Id.

Thus, the problem of freedom appears to involve not just getting what one wants, but harmonizing all of one's various desires. It is not simply a problem of satisfaction, but of psychological integration, coherence among one's various desires, values, and judgments. See Watson, supra note 213; Harry G. Frankfurt, Freedom of the Will and the Concept of A Person, LXVIII J. Phil. 5 (1971).

This makes the case of addiction compelling and difficult to analyze in terms of the usual association of freedom with desire.

Conditioning may pose personality conflicts or establish a limiting network of values, goals and self-assessments. See ERICH FROMM, ESCAPE FROM FREEDOM (1941). Fromm argues that character and culture are inter-dependent, and that certain cultures routinely create certain kinds of character structure among those within the culture. Id. at 304-27. Thus, certain cultures may create undeveloped selves, psychologically speaking.
behavior. The status of the behavior as voluntary or involuntary is not important. Rather, what is important is whether the psychological conditions under which the behavior originated are conducive to effective decision-making.

B. Exploitation as An Impairment of The Rational Capacity

1. The Role of Reason in The Traditional Exculpatory Paradigm

The traditional exculpatory paradigm excuses cognitive impairments when the excused party is justifiably unaware of necessary information, as with the contract defenses of fraud or mistake.\(^\text{240}\) Furthermore, a number of contract and criminal law defenses excuse on the basis of cognitive incapacity resulting from age, mental illness or mental handicap.\(^\text{241}\) These latter defenses are not instances of ignorance, strictly speaking because ignorance requires a lack of information. Rather, some systemic cognitive incapacity prevents the individual from knowing how to use this information.\(^\text{242}\)

A failure of the capacity to reason, however, may lead to a state of ignorance with respect to certain facts such that the actor cannot be said to know what he is doing.\(^\text{243}\) In other words, impairment of one’s cognitive capacity may render the individual ignorant of the nature of the act, its probable consequences or its moral permissibility. For this reason, the traditional paradigm does recognize an excuse for cognitive incapacity in some cases.\(^\text{244}\) In sum, although defects per se in the process of reasoning are not excused, there is an excuse when such defects are likely to result in ignorance of significant facts about the nature of the individual’s act or the circumstances in which the act is performed.

Modern psychology, however, has discerned more subtle ways in which the reasoning process can be influenced.\(^\text{245}\) The effects of such influences upon human behavior are far-reaching.\(^\text{246}\) They do not preclude knowledge of some external fact, but instead, serve to slant judgments in equally debilitating ways.

\(^\text{240}\) See Calamari & Perillo, supra note 113, at 355-78 (misrepresentation) and 378-92 (mistake).
\(^\text{241}\) Id. at 304-33 (discussing various forms of incapacity as a defense to contract enforcement). See also supra note 162 and accompanying text (discussing incapacity, among other defenses).
\(^\text{242}\) Thus, mental disease or handicap may prevent one from reasoning properly, even though the affected party may have all the requisite information.
\(^\text{243}\) Insanity differs from ignorance, yet insanity may lead to ignorance regarding the nature or consequences of the action.
\(^\text{244}\) For example, incapacity due to youth is not recognized. See supra note 162 and accompanying text.
\(^\text{245}\) See infra notes 247-87 for an overview of some of the ways in which this may occur.
\(^\text{246}\) See infra notes 247-87 and accompanying text.
2. Modern Perspectives on The Interrelationship Between Reason and Emotion

Beginning with the works of Plato, Western philosophy has distinguished two distinct aspects of human nature: what might be variously described as will and reason, the appetitive and the rational or, to use the terminology of modern psychology, the volitional and the cognitive aspects of human nature.\(^{247}\) While philosophers offer diverse theories concerning the nature and interrelationship of these two aspects of human personality,\(^{248}\) they generally uphold the validity of the conceptual distinction.\(^{249}\) Even where there is disagreement concerning the relative priority of will and reason, as exemplified by the contrasting views of Plato, who believed that reason was capable of providing direction concerning ultimate ends, and Hume, who argued that reason has only an instrumental capacity (i.e., that reason was a slave to the passions), the conceptual distinction between these two disparate aspects of human nature has gone unchallenged.\(^{250}\)

Although some conceptual advantage in distinguishing between will and reason may remain,\(^{251}\) modern psychology has rejected the view that reason is functionally independent of will.\(^{252}\) If will includes all the various sources of motivation (instincts, needs, desires, appe-

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\(^{248}\) According to Hume, reason can never give us knowledge of ultimate ends but has only an instrumental role in telling us how to achieve what we already value. Thus, reason is a slave to the passions. DAVID HUME, A TREATISE OF HUMAN NATURE (Pall S. Ardal ed., 1972) (bk. II). See Watson, supra note 213, at 207 (discussing the Platonic and Human views of reason).

\(^{249}\) This is evident in the fact that will and reason continue to be discussed separately. See generally 2 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY (1890).

\(^{250}\) See generally id. at 325-71 (discussion of reasoning); id. at 486-592 (examination of will or volition). As already noted, Plato, for example, suggested that reason provides ultimate ends, while Hume argued that reason has only an instrumental capacity as slave to the passion. See supra notes 247-48. Thus, the substantive distinction between the rational dimension of the personality, on one hand, and the volitional or appetitive aspects, on the other, remains throughout western philosophy. It is only with modern psychology that the functional independence of the two is challenged. See infra notes 251-87.

\(^{251}\) For example, even if radical behaviorist psychology is accurate in claiming that mental constructs such as will, reason, desire and values, etc. are merely old-fashioned ways of describing neural-physiological processes in the brain, the terms may still serve to delineate different types of processes which would otherwise be more difficult to describe.

\(^{252}\) The various approaches of modern psychology concur. First, Freudian psychoanalytic theory classifies reason as a function of the ego, which itself emerged from the id, the unconscious repository of instinctual energy. Reason is clearly the pawn of unconscious psychodynamic energies. SIGMUND FREUD, THE EGO AND THE ID 36-39 (James Strachey ed. & trans., 1961). In behaviorist psychology, reason and will are both abstract reifications for the process by which certain behavior takes place. It is not that reason and will are interdependent, but that reason and will do not exist as such. See SKINNER, supra note 221.
tite, etc.) while reason includes the human capacities that relate to knowledge (thoughts, beliefs, perceptions, etc.), then some mental states do not fall neatly into either category. More importantly, psychologists have concluded that reason is not functionally autonomous.

There are a number of philosophical problems with the concept of rationality. For example, it is difficult to define reason and rationality. Is reason substantive and result-oriented, or is it procedural in nature? Is rationality or irrationality more basic, in the sense that one is defined by reference to the other? Is rationality objective and determinate or may parallel rational processes result in contrary outcomes? Is reason universal and determinate or does it vary from culture to culture, a product of social consensus? These recurrent issues fall beyond the scope of this Article. This section addresses only the question as to whether volitional mental states—for example, emotions, desires, and needs—affect the process of reasoning.

The concept of reason as an autonomous force in human action reached its zenith in the writings of Immanuel Kant. Kant argued that human action could only be truly autonomous when it was performed according to the dictates of reason unfettered by "heterono-

Finally, modern cognitive psychology has focused upon the empirical demonstration of the cognitive and the volitional interrelationship. See infra notes 263-77.

253 For example, are moods more essentially cognitive or volitional? Are values, goals and purposes a function of the appetitive will or of reason?

254 See infra notes 261-63.

255 Neoclassical economics is the only social scientific theory that continues to define rationality substantively. The rational decision maximizes one's subjective utility. Modern psychology, sociology and other economic theories favor a procedural definition: the primary consideration is whether the process of decision making is rational. As Zey states:

Economists use the term irrationality (nonrational) very broadly to designate any behavior that cannot be construed to fit the rational choice models. Also, they use the term rationality very narrowly to exclude action based on emotion, habit, and values. The neoclassical model defines choice as rational if the outcome is rational. All behavior that does not produce the rational outcome is irrational. In the other social sciences, the conceptualization of decision making is rational because of the process it employs.


256 See Bernard Gert, Rationality, Human Nature and Lists, 100 Ethics 279, 280-81 (1990) (irrationality is basic); B.C. Postow, Gert's Definition of Irrationality, 102 Ethics 103, 105-06 (1992) (irrationality is not basic).

257 See Thomas S. Kuhn, The Structure of Scientific Revolutions (1962) (claiming that scientific revolution is as much a matter of changing social consensus as an inevitable rational development of science); Harold I. Brown, Rationality 113-33 (1988) (providing an epistemological defense of the view that rationality inevitably involves social judgments and changing social consensus). These views, of course, are radically opposed to the traditional view that rationality is objective and determinate, that different cultures should come to similar outcomes given the rationality of both processes.

258 Immanuel Kant, Critique of Pure Reason (F. Max Müller trans., 2d ed. 1907).
mous" influences such as desires and inclinations. According to Kant, reason must be free from the bondage of will in order for the person to attain genuine autonomy. This vision of unencumbered reason may remain a goal of human behavior (an issue which continues to trouble neoclassical economic theory), but modern psychology suggests that such autonomy is seldom if ever attained.

In addition to the inherent constraints of limited attention, inaccurate perception, faulty memory and imprecise calculation to which cognition is subject, factors outside the cognitive sphere may also affect reason. Disturbances on the volitional side of human nature often serve to disrupt the process of reasoning. These volitional disturbances encompass various mental states, including overpowering desires; extreme emotional states, such as grief, fear, anxiety or hatred; and a range of affective states, including depression, exhilaration, and feelings of confidence. Such volitional states may adversely affect rational decision-making in three ways: they may affect our beliefs, our values and the process of reasoning itself.

First, volitional states may affect the actor's beliefs. For example, intense desires may have easily discernible influences upon an individual's beliefs which, in turn, will affect the capacity for rational judgment. This is exemplified by situations where a person wants something so badly that the person's beliefs and judgments concerning the feasibility of obtaining it may be skewed. At the extreme is the drowning man who grasps at the proverbial floating straw to keep himself above water. A rational, unthreatened individual would give this solution no chance of success, but the drowning man's effort to

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259 Id. at 511-15.
260 Immanuel Kant, *Grounding for the Metaphysics of Morals*, in *Ethical Philosophy* 49-62 (James W. Ellington trans., 1983). Thus, no action has true moral value unless it springs from pure rationality. For Kant, even positive emotions such as sympathy and compassion are heteronomous. Actions which spring from such emotions have a lesser moral value than actions generated by reason alone. Id. at 54-55.
261 Psychologists and philosophers generally agree that rational choice theory (RCT), under which persons are presumed to seek to maximize their own self-interest, is inaccurate as a descriptive or scientific matter. Nevertheless, some argue that RCT adequately describes how people should act, even if it does not explain how they do act. See R.J. Herrnstein, *Rational Choice Theory: Necessary but Not Sufficient*, 45 AM. PSYCHOLOGIST 356, 356-58 (1990) (defending RCT as a normative theory).
262 Id. at 358-65.
grasp the straw indicates a change in his beliefs, at least insofar as he holds out some possibility that this may save him. More common are situations in which desperate people seek unlikely solutions for their troubles, such as the otherwise rational man in the third scenario who takes his dying son to a quack doctor. Similarly, the desire to believe in something may affect one’s evaluation of the evidence for its truth. Whether the proposition is the truth of some scientific theory or the existence of God, an individual’s subjective desire that it be true will have an impact upon his assessment of the evidence confirming or disconfirming its truth.

In a similar way, extreme affective states, such as moods, influence beliefs, perceptions and judgments. Studies have demonstrated scientifically what even the most mildly of introspective individuals already knows—that people adopt more negative beliefs concerning themselves or the world during depressive episodes. As they recover, they revert to more positive beliefs. This is so even when these beliefs are unrelated to their emotional states. For example, a person who is depressed because she has lost a job may adopt more negative beliefs concerning the prospect of solving the deficit or cleaning up the environment, even though these issues have little to do with the individual’s personal employment prospects. Thus, “[t]here is clear evidence that judgments are biased by emotional state[s].”

Proponents of the functionally autonomous view of reason generally employ a psychological model in which beliefs, as a function of our cognitive capacity, are derived solely from objective, external facts about the world. Beliefs are viewed to be the intellectual residue of perceptions and judgments about the world as it is. In fact, however, it is not just the external world that influences our beliefs; what individuals would like to believe has at least as compelling an influ-

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265 See James, supra note 249, at 307-11 (discussing the influence of emotions on belief).
266 A theory’s proponents tend to evaluate supportive evidence favorably. See Kuhn, supra note 257, at 77-81.
267 See Power, supra note 264, at 157-64; Irving L. Janis & Leon Mann, Decision Making 264-65 (1977) (discussing a study of elderly nursing home patients finding that feelings of loss of choice may have debilitating, even lethal, effects); Hosti, supra note 264, at 104-125.
268 Id.
269 Id.
270 See Janis & Mann, supra note 267, at 243-77.
271 Fraser N. Watts, Emotion and Thinking, in Lines of Thinking, supra note 264, at 118.
272 This is the underlying tenet of classical empiricist philosophy. See Hume, supra note 248, at 226-291 (for the seminal discussion of this view).
273 Id. at 258. For a discussion of the empiricist epistemology of Hume, see Stephen Priest, The British Empiricists 134-37 (1990) (all knowledge comes from experience). See also id. at 185-87 (providing a similar discussion of Mill’s empiricism).
ence on the structure of their beliefs. Similarly, beliefs and judgments often vary with the individual’s overall affective state. To the extent that the individual’s desires may be manipulated or moods exploited, so too, may corresponding judgments be altered.

Second, intense volitional propensities, including overwhelming emotional states, desires, and affective states, affect an individual’s values. For instance, an individual may devalue the importance of a task if convinced that it cannot be completed successfully. A more tragic instance occurs when life circumstances compel a person to engage in behavior that is inconsistent with previously existing values—for example, a morally upstanding woman who is forced to steal to survive will devalue the importance of honesty.\textsuperscript{274} One study examined the career choices of graduating college males during the Vietnam war and found a strong correspondence between survey respondents’ opinions concerning the importance of careers in theology, teaching and medicine and the probability of their being drafted.\textsuperscript{275} (Draft exemptions were permitted for those entering divinity school, teaching programs and medical school.)\textsuperscript{276} The study suggests that a desire to avoid the draft affected individuals’ values concerning career possibilities. Individuals tend to integrate values with behavioral dispositions in order to reduce intrapsychic conflict or cognitive dissonance.\textsuperscript{277}

Fluctuations in emotional states similarly affect values. For example, even though rage has traditionally been described as a (volitional) failure of individuals to control their emotions,\textsuperscript{278} the phenomenology of the experience may include the subjective, even if momentary, devaluation of nonviolent values. During periods of extreme anger, one may feel as if such values somehow do not matter so much.\textsuperscript{279} Indeed, values appear to vacillate with differing states of

\textsuperscript{274} See Frank, supra note 222, at 181 (discussing the psychological basis for this response).
\textsuperscript{275} JANIS & MANN, supra note 267, at 252-53.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} One is said to “lose one’s temper” or to be “overborne by passion.” This volitional language signifies a loss of control justifying reducing the severity of a crime for acts committed in the heat of passion. See generally Alec Samuels, Excusable Loss of Self-Control in Homicide, 34 Mod. L. Rev. 163 (1971) (discussing the circumstances under which the excuse is permitted).
\textsuperscript{279} I arrive at this claim by introspection. I would invite the reader to undertake a similar self-investigation upon the next encounter with an anger-producing stimulus. The point here is that the feeling of anger is experienced less as an overcoming of static values by emotion but rather, as a deflation of these values themselves.
mind, whether these changes are pharmacologically induced\textsuperscript{280} or are the result of more normal changes in the subject’s emotional state.\textsuperscript{281}

Thus, the traditional moral-psychological model in which reason is functionally independent of will, holds that a person’s basic hierarchy of values is relatively fixed. According to the traditional model, a failure to act in accordance with those values stems from a weakness of will rather than from changes in the underlying values themselves.\textsuperscript{282} As this section has shown, however, decisions and actions vary with an individual’s value scheme, and that value scheme varies with the individual’s moods, emotions and other mental dispositions. Thus, one person may, by offer or threat, adversely influence the decision of another by manipulating or taking advantage of these mental states.

Third, emotional disturbances may disorganize the very process of reasoning itself.\textsuperscript{283} Studies have indicated that persons in emergency situations typically act ineffectively.\textsuperscript{284} Even when the individual’s momentary values are clear, for example, to escape a life-threatening situation, and the individual’s beliefs about the means to achieve the goal are rational, the individual’s mental state may hamper organized reasoning to guide action. Thus, even from an internal point of view, behavior may be ineffective and irrational.\textsuperscript{285}

In at least these three ways—by modifying beliefs, by distorting values, and by interfering with the cognitive organization of reasoning—strong emotional and affective states may impede sound reasoning. This Article proposes that exploitation is the knowing manipulation of these processes. Intrapsychic coercion, compulsion and some forms of social conditioning are emotionally and cognitively destabilizing influences that may impair the ability of the actor to reason effectively. There may be other types of impediments to the rational process characteristic of exploitation, but these are the three

\begin{footnotes}
\footnote{281} Fatigue, stress and other routine experiences may also change values. See Power, supra note 264, at 157-64 (effect of depression); Hosti, supra note 264, at 90-139 (effect of stress).
\footnote{282} See supra note 212 and accompanying text.
\footnote{283} See, e.g., Keith Oatley, Do Emotional States Produce Irrational Thinking?, in LINES OF THINKING, supra note 264, at 121-31 (suggesting that strong emotions cause a disorganization in thinking patterns).
\footnote{284} Id.
\footnote{285} See id. (suggesting that thought patterns are disrupted in emergency situations). One evolution-based theory suggests that emotions have aided survival because they interrupt the patterns of normal thought processes and focus the actor on the threatening situation. Id. In some cases, this over-focussing can be counterproductive.
\end{footnotes}
most frequently implicated in the literature. These influences do not, however, fall under the traditional exculpatory paradigm. Exploitative offers neither render the resulting behavior involuntary or unfree, as these terms are used in the traditional paradigm, nor do they impose barriers to the actor’s knowledge of her situation, strictly speaking. Yet the obviously debilitating effects of these processes should excuse certain behavior, at least when another takes advantage of these all-too-human frailties in the deliberative process.

IV

A Theory of Exploitation

A. Preliminary Issues

In addition to the problems already discussed concerning the volitional and cognitive aspects of exploitation, a number of other threshold questions are relevant to a definition of exploitation.

1. Exploitation and Dominance

Exploitation is sometimes viewed as a function of social disparity, an endeavor on the offeror’s part, to take advantage of a socially superior position. Marxists, feminists and others argue explicitly or implicitly that a prerequisite of the exploitative relationship is that the offending party possess some social advantage over the victim.

This Article asserts that, although socioeconomic disparity is often a predicate for exploitation, it is not a necessary condition. Exploitation merely requires the taking advantage of some vulnerability of the other party. Ultimately, the victim of exploitation is psychologically vulnerable to the other party, but is not necessarily socially or economically subordinate. For example, a young female student who entices her college professor into a sexual relationship in exchange for a better grade may be exploiting a weakness of the teacher despite her inferior social position.

2. The State of Mind of Victim and Perpetrator

What state of mind must the victim and the perpetrator of exploitation entertain, respectively, before an offer may be characterized

286 Manipulation of unconscious processes has not been discussed in the literature on exploitation, but this would appear to be yet another means of exploitation.
287 See supra part IV.B.2.
288 See supra part III.
289 See supra notes 4-17 and accompanying text.
290 See supra notes 4-17 and accompanying text.
291 As already noted, seduction is not necessarily exploitation. Thus, the professor will only be a victim of exploitation if the other requirements are fulfilled. See infra part IV.B.
as exploitative? More specifically, must the perpetrator and the victim be aware of the exploitation?

This Article suggests that exploitation does not require—indeed, sometimes is altogether incompatible with—the victim’s awareness of the exploitative nature of the transaction. For example, the widow in the first scenario may be altogether unaware of the advantage taken by the studio. In some cases, a victim’s learning of the exploitative effect of an offer may itself vitiate the exploitative nature of the bargain. For example, an offer may play upon an initially unconscious mental process that can be controlled by the actor once it is made conscious. In other cases, the victim may be well aware of the exploitative predicament. For example, in situations involving intrapsychic compulsion or coercion, the victim may be all too cognizant of her psychological vulnerability. Thus, the offeree’s awareness of the effects of the lecherous millionaire’s offer may actually heighten the exploitation.

Alternatively, exploitation requires that the offeror act purposefully, knowingly or with reckless disregard for the vulnerability of the offeree. Without this knowledge or intention, an immoral offer may have the same debilitating effects upon the offeree’s ability to reason practically, but if the offeror does not intend to take advantage of a vulnerability, the offer is not exploitative.

3. Exploitation and the Immorality of the Bargain

Is exploitation dependent upon the moral status of the object of the bargain? Many putatively exploitative bargains involve a morally questionable trade of a service or commodity: exploitation is routinely claimed in the context of prostitution, organ selling, surrogacy, pornographic modeling and other presumably tainted activities. But does the inherent moral taint render the agreement more likely to be exploitative?

Imagine a woman of limited prospects who enters into a surrogacy contract for ten thousand dollars. If this same woman were to take a job washing bathroom floors for the same effort at a similar wage, would this also be exploitative? Although proponents of Marxist and neo-Marxist theories of exploitation might well answer affirma-

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292 This view of exploitation focuses on conscious mental states and processes. Exploitation may also utilize unconscious processes which skew the capacity for reasoning.

293 This is the case, for example, in the lecherous millionaire example. See supra note 3 and accompanying text.

294 See infra part IV.B and accompanying text.

295 See supra notes 40-52 and accompanying text.
tively, others would disagree. For non-Marxist proponents of the charge of exploitation, the allegedly dubious moral character of surrogacy itself distinguishes the situation of the surrogate from other bargains under similar economic circumstances.

Some purport to disregard the moral issues, claiming that anyone engaging in such activities cannot be acting from sound judgment. Yet, this merely replaces the charge of moral impropriety with a superficially objective psychological assessment of the rationality of the bargain. Minimally, it must be admitted that a portion of these bargains may make sense from an economic and even an existential standpoint. In these cases, proponents must either relinquish the claim of exploitation or admit that it is sometimes a substitute for moral condemnation.

By definition, every exploitative offer is immoral insofar as the intention of the offeror is to take advantage of the offeree. But the object of an exploitative offer need not be immoral. For example, exchanging money for dance lessons, as in the first scenario, is not intrinsically immoral, in contrast to exchanging money for sexual services. Nor is every immoral offer necessarily exploitative. Baby-selling is immoral because of its consequences for the baby, even if the parties to the agreement are not exploited. In sum, tainted bargains are immoral because they are exploitative; they are not exploitative because they are immoral.

4. Can Rational Agreements Ever Be Exploitative?

This Article suggests that exploitation, in the legally relevant sense, requires that the victim make an irrational choice. Conversely, rational choices can never be the product of legally recognizable exploitation. However, ordinary language often employs the concept of exploitation to encompass situations in which the exploited victim may nevertheless have acted rationally.

Claims of exploitation of the poor provide the best example of this problem. In the scenario involving the Central American migrant worker who agrees to work for very low wages in the United States, the worker's bargain may ultimately be rational because she can earn...

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296 For Marxists, all profit-taking is exploitative. See Crocker, supra note 5, at 201; Cohen, supra note 5, at 338. Classical liberals have a considerably more limited view of exploitation. Nozick, supra note 5, at 262-65.

297 By claiming that involvement in the practice is irrational, opponents of these practices avoid the circularity inherent in saying that the particular practice is wrong because it is exploitative, and that it is exploitative because it is morally wrong.

298 The language of moral judgment may be replaced by the language of modern psychology: for instance, that the practice is not wrong, it is just irrational. But proponents must explain why involvement is irrational. This is more difficult given modern psychology's move away from a substantive, result-oriented conception of rationality.
more here than in her homeland. It might be argued, however, that the landowner is exploiting the migrant because the migrant receives substantially less than market value and the landowner knows that the migrant’s options are limited. This appears to represent a paradigmatic instance of exploitation.

Consider another, even more difficult, example. A man lost in the desert stumbles upon some travelers who agree to provide him with water and transportation to safely, an hour’s drive from where he is found; in return he agrees to pay $10,000. The man’s desperate decision is clearly rational; without this bargain he will die. Yet the bargain appears immoral and exploitative precisely because the travelers take advantage of his desperate circumstances and because their profit is grossly disproportional to their burden. Given this scenario, why should exploitation require an irrational choice?

This Article has primarily examined the allegation of inherent exploitation in broad classes of activities such as surrogate parenting or organ sales. The migrant worker and man-in-the-desert examples, by contrast, portray concrete instances of exploitation. Exploitation functions differently in these two diverse contexts. In the case of broad classes of activities, the charge of exploitation provides a general argument against permitting the activity. For example, opponents of surrogacy urge state legislatures to prohibit all surrogate arrangements prospectively because they are exploitative. Conversely, individuals such as the migrant worker or the desert wanderer allege exploitation retrospectively, after the arrangement has been carried out. Here exploitation operates as a moral claim for additional compensation or a contract defense.

In neither context should the law deem decisions that result from rational choices exploitative. Two prevailing legal principles prevent the law from recognizing this kind of defense to particular contractual agreements. First, rational, fully informed, competent and noncompelled decisions are considered legally binding.299 In the alleged cases of rational exploitation, the decision is, by definition, neither the product of irrationality nor compulsion. Neither the migrant’s nor the wanderer’s decision is compelled in the relevant sense because the other party has not created their situation. Instead, the other party has offered an option beyond those previously existing.

The second principle limiting judicial reconsideration of these agreements is the general proscription against examining the adequacy of consideration.300 For exploitation to function as a defense in these cases, the courts would have to determine the relative values of

299 The doctrine of informed consent in tort law provides perhaps the most pointed example of this. See, e.g., Scott v. Bradford, 606 P.2d 554 (Okla. 1979).
the goods or services exchanged. In such cases, courts would have to find the bargained-for consideration so inadequate as to constitute exploitation. 301 Thus, fundamental legal principles limit the law’s giving effect to our moral intuitions that the bargain is grossly unfair. In short, although the moral concept of exploitation may include situations where the victim acts rationally, the legal concept of exploitation cannot support such a broad definition.

Moreover, if some broad class of activities such as surrogacy is perceived as exploitative without being irrational, the consequence of prohibiting such agreements is even less palatable. For example, to support the abolition of organ sales while simultaneously admitting that the bargain may be rational from both the seller’s and the buyer’s standpoints is to leave the term meaningless. Worse yet, to prohibit such transactions under these circumstances serves only to prevent prospective parties to such transactions from doing something they wish to do and which it is rational for them to do. This is worse than mere paternalism because the claim of exploitation would prohibit parties from entering agreements that make sense for them to enter, and that would presumably better their situations. Here, the case against calling rational bargains “exploitative” is at its most compelling.

Can rational agreements ever be exploitative? The answer is: yes and no. While everyday moral language permits some rational agreements to be deemed exploitative, such agreements should not be recognized in law as such. The underlying principles of our system of excuse in general, and contract law in particular, prevent legal recognition as “exploitative” of any particular agreements that are otherwise rational. Moreover, to call a particular class of activities sui generis “exploitative” while maintaining that such bargains are nevertheless rational makes little sense, both linguistically and as a matter of public policy.

B. Exploitation Defined

For a particular transaction to be exploitative in the legally relevant sense, the following conditions must be met. The putatively exploitative proposal must:

1) consist of an offer of benefit, never a threat;
2) which is made intentionally, knowingly or recklessly on the part of the offeror, such that it is likely to involve, implicate or take advantage of;

301 See, e.g., Kugler v. Romain, 279 A.2d 640 (N.J. 1971) (excessive price, combined with other factors, including misrepresentation, is exploitative).
3) a psychologically recognized vulnerability or weakness on the part of the offeree;
4) where the vulnerability or weakness characteristically results in a significant impairment of the rational-emotional capacity of the individual;
5) that the offer actually has the effect of impairing the rational-emotional capacity of the offeree;
6) such that, but for the impairment of this capacity, the offeree would not have accepted the offer.

1. Offers, Never Threats

As argued earlier, coercion typically involves a threat of harm in the event the threatened party does not comply, while exploitation involves an offer of some benefit which the offeree may, at least from an external standpoint, refuse.\(^3\)\(^0\)\(^2\) The first condition does not require that the conferred benefit be objectively beneficial to the offeree. Indeed, many offers are considered exploitative in part precisely because the offer of benefit is illusory. An offer to sell the offeree heroin does not benefit the offeree in the sense that heroin is a good thing for the user. Nor, in the case of seduction, is the seduced party benefitted, particularly because seduction requires that the victim of seduction act in contravention of his usual values. Rather, there is an offer of benefit only in the sense that the offer holds out something which the offeree subjectively desires or perceives to be a good thing at some point in the process, even if the recipient may have a different opinion at another time (as when the addict wishes to overcome the addiction or the victim of seduction regrets succumbing).

2. The State of Mind Requirement

The second condition for exploitation goes to the state of mind of the offeror; it requires that the offeror intend to take advantage of some psychological weakness or vulnerability on the part of the offeree or that the offeror act in reckless disregard of the offeree’s probable condition. The intent element should function as it does with intentional torts.\(^3\)\(^0\)\(^3\) Two elements must be met: first, the offeror must act voluntarily\(^3\)\(^0\)\(^4\) and, second, the act must be performed with

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\(^3\)\(^0\)\(^2\) See supra part III.A.I and accompanying text.
\(^3\)\(^0\)\(^3\) The intent element is met whenever the subject deliberately acts to bring about a desired consequence. Intent is distinguished from negligence by this subjective requirement. When this subjective desire is absent, the consequence must be substantially certain to occur. Negligence requires only that the subject act unreasonably. KEETON, supra note 110, at 33-39. The actor need not seek to cause harm of any kind. Id. at 36.

\(^3\)\(^0\)\(^4\) Voluntariness simply requires that some behavioral occurrence follow a mental state which precipitates the behavior. Intent is voluntariness and substantial certainty of the requisite consequence. Id. at 34-35.
the desire to, or with substantial certainty that the act will in fact, bring about some specific consequence. The standard for intent is thus objective, not subjective. Including recklessness expands the basis for liability of the offeror.

But what is the specific consequence that the offeror must seek? Must the offeror intend to gain some advantage or to do harm to the offeree? Both of these questions must be answered in the negative. Although gaining advantage or harming another may provide evidence of the motive for the act, neither is necessary for exploitation.

In the case of exploitative offers, the offeror must act with the desire or substantial certainty that the offer will implicate or take advantage of some vulnerability of the offeree that is likely to induce a bad decision on her part. This is all that must be intended. The offer need not create the cognitive impairment; it is sufficient that it take advantage of a pre-existing condition. Thus, the offeror must subjectively know, or there must be substantial certainty, given what the offeror knows or should know about the offeree's situation, that the offer will undermine the rational capacities of the offeree. The offeror must, therefore, act in conscious disregard of the likelihood of exploitation.

For example, in the lecherous millionaire example discussed above, if the millionaire had made the proposal, "Be my mistress and I'll give you one million dollars," without knowing about the young woman's son, the offer would not have been exploitative. Indecent proposals are not per se exploitative. Similarly, the quack doctor in the third scenario meets the intentional element because of his awareness of the father's vulnerable condition. In the same manner, the dance studio in the first scenario does not exploit the widow simply by selling her fifty years of dancing lessons (a bad deal, on the widow's part, not only because it is highly unlikely that she will live long enough to enjoy them, but also because she has to sell everything she owns to pay for the lessons). Rather, the studio exploits her by playing on her loneliness. It is because the agents of the dance studio know that she

\[305\] Id. at 36.
\[306\] Again, however, a subjective desire to bring about the consequence may be enough, even where the actor could not be substantially certain, as an objective matter, that the consequence would follow.
\[307\] Recklessness requires that the consequence be highly likely, if not substantially certain, to follow.
\[308\] Id. at 35.
\[309\] Id. at 36.
\[310\] However, the offer might be exploitative on other grounds. For example, it might be per se exploitative if the offer of a million dollars set in motion some form of intra-psychic compulsion.
is not in a position to reason properly that they are taking advantage of her.

Why is intention necessary? Exploitation could function as a strict liability claim. Any offer that causes a substantial impairment of the offeree's capacity to reason would be deemed exploitative. The law, however, does not remedy every bad bargain. With the exception of some contractual status defenses, such as infancy or incapacity, the law will not relieve a party of the burden of an agreement even when it results from some substantial impairment of rational capacities. Acting impulsively, or from some internal conflict, or from some overwhelming desire will not relieve that party of the burden of the arrangement. Transactions only become exploitative when a party knows about and attempts to take advantage of the plight of another. Otherwise, neither a bad deal nor an immoral offer, nor the fact that an individual's reasoning was impaired, will be sufficient to render the arrangement exploitative.

In sum, while the offeror need not intend to wrong the offeree by making the offer, the second condition is met when the offeror has good reason to know about the condition of the offeree. This is what makes exploitative offers morally wrong—the fact that the offeror seeks to undermine or take advantage of the offeree's vulnerable condition.

3. A Recognized Psychological Vulnerability

The third condition of exploitation requires that the offeror intend to take advantage of some human weakness or vulnerability which is recognized as such by modern psychology. "Vulnerability" means a disposition of personality or circumstance of life that serves to hamper the rational-emotive process, such as severe depression, grief, guilt, fear or physiological addiction. A mere passing desire is not sufficient. In the second scenario, the man who purchases a Bruce Springsteen ticket at an exorbitant price from a ticket scalper is not vulnerable within the meaning of this condition. On the other hand, the widow in the first scenario and the father of the dying boy in the third case almost certainly satisfy the condition.

Notwithstanding the relatively clear cases of vulnerability, however, this condition may be the most controversial of all. Does vulnerability include the effects of socioeconomic status as well as emotionally traumatic conditions, intrapsychic coercion and compulsion? Is poverty, political oppression or social disenfranchisement suf-

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311 See Calamari & Perillo, supra note 113, at 304-33 (providing overview of these defenses).
ficient to constitute a vulnerability within the meaning of the third condition?

Poverty and sociopolitical alienation certainly do result in decisions that would not otherwise be made. How many persons of comfortable means offer to sell a kidney, even where the remuneration is substantial? Differences in life choices, even those resulting from limited alternatives, however, do not inevitably imply a vulnerability. A poor person's decisions may differ from a rich person's, and yet still be rational given the life circumstances of the poor person.

Vulnerability is defined here as an internal psychological condition that typically or routinely causes an impairment in the rational-emotive capacities of the actor. External conditions or circumstances, whether temporary, as in the case of duress, or relatively more permanent, as in the case of socioeconomic factors, may cause the internal psychological condition, but the internal condition must nonetheless be characterized by a recognized psychopathology. Psychologists must agree that the trait or condition is a psychological factor that tends to impair a person's ability to reason practically and effectively.\textsuperscript{312}

Poverty, political oppression or social alienation, then, constitute a vulnerability or weakness within this definition only if being poor or oppressed creates some internal psychological disability. Generally, poverty will not constitute such a vulnerability because it usually does not result in an internal psychological state recognized by modern psychology to interfere with the process of reasoning. This condition is met, however, when poverty results in a situation that physically threatens the actor, such as starvation.

As with all empirical concepts, questions of line-drawing arise. Not every psychological condition is severe enough to render the subject vulnerable. For example, imagine the following scenario: A young woman begins to see a psychic because she wants some questions answered. Over the course of the next year and a half, she becomes increasingly involved with the psychic, invests more money and psychological commitment in the process, ultimately spending thousands of dollars before realizing that the process is a sham. Although the relationship began as an amusement, or at worst the

\textsuperscript{312} Of course, psychologists may disagree about psychopathology, as evidenced by the debate concerning whether homosexuality is a form of psychopathology. Gerald C. Davison, Homosexuality: The Ethical Challenge, in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL PSYCHOLOGICAL ISSUES 162 (Joseph Rubinstein & Brent D. Sli\lfe eds., 1980) [hereinafter TAKING SIDES] (homosexuality is normal); Irving Bieber, A Discussion of Homosexuality: The Ethical Challenge, in TAKING SIDES 163 (homosexuality is a form of psychopathology). For a trenchant discussion of the normative, aspects of psychiatric classification, see THOMAS S. SZASZ, LAW, LIBERTY AND PSYCHIATRY 24-36 (1963) (suggesting that psychiatric classification has more to do with public policy than with descriptive medicine).
product of light-hearted credulity, it slowly develops into a more per-
nicious and parasitic practice.

At some point, when the motives and beliefs that underlie the
relationship become more serious and are characterized and
animated by fear, anxiety, dependence, or other rationally debilitating
conditions, the relationship becomes exploitative because the victim is
motivated by vulnerability. Drawing the line between what is and is
not a vulnerability, however, is no different from similar problems in
other areas. What is important is that vulnerability requires some-
thing more than mere credulity, gullibility, curiosity or naïveté.

4. Irrationality

The fourth condition requires that the vulnerability be of the va-
riety that typically impairs the rational-emotive process.

Part III addressed various theories concerning volitional and cog-
nitive impairment.313 I argued there that, although enticement, du-
ress and other constraining conditions are often described in terms of
some failure of the will, they are actually impediments to effective cog-
nitive functioning, even though these may result from perturbations
on the volitional side. As a psychological matter, the cognitive and
volitional aspects of personality are not so readily distinguishable as
traditional philosophy has regarded them.314 Emotional disturbances
may affect the capacity to reason practically in several ways, including
intrapsychic coercion and compulsion, and social conditioning. Their
influence skews the deliberative process.315 When the influence upon
the individual's judgment is substantial, such that the individual
would have decided otherwise in the absence of the debilitating psy-
chological state, this condition is satisfied.

The difficult issue is evaluating how a person might have acted
under other psychological circumstances and determining which solu-
tion "makes sense," as a rational matter, for the actor. Virtually any
decision may be "rational" from a subjective standpoint—that is, from
the standpoint of the actor's own beliefs, values and goals. For exam-
ple, the heroin addict who agrees to sell his soul for his next fix may
be acting rationally, on this account, if his desire for the drug is strong
enough.316 Rationality loses its prescriptive significance as it is relativ-
zized to the mindset of each particular actor.

313 See supra notes 177-287 and accompanying text.
314 See supra notes 247-87 and accompanying text.
315 See supra part III.A.
316 For example, self-destructive behavior may be rational if a person believes that life
is not worth living or that pain will outweigh pleasure in the remaining time. Even the
behavior of the insane can be rational if all beliefs are considered. If one really believes
that shooting oneself in the head will propel oneself into the tenth dimension, where life is
infinitely better than it is here on earth, shooting oneself must be recognized to be per-
An objective evaluation of the rationality of decisions considers whether a particular decision makes sense from the standpoint of an individual's subjective beliefs, goals, values, and desires, and also whether these beliefs, goals, values and desires are themselves rational. Given the obvious practical difficulties of engaging in such a global psychological analysis, this Article will follow tort law in proposing a convenient, if ultimately disappointing, criterion for determining whether a decision is rational: a particular decision will be deemed "rational" if it would be made by a reasonable person in the subject's circumstances. Failure to act in conformity with this standard permits the conclusion that the deliberative process has been adversely affected. Therefore, a person will be deemed to have made an irrational choice with respect to a given set of circumstances when a reasonable person in those circumstances would have chosen otherwise.\textsuperscript{517}

5. Causation

There are two aspects to the causation analysis. The fifth condition requires that the offer constrain or impair the rational-emotive processes of the actor in the particular case. Intention to exploit without any actual effect is not sufficient. Exploitation requires that the offer actually influence the victim. Finally, to meet the sixth condition, the cognitive impairment must function as the cause-in-fact of the decision to accept the offer. An offer cannot be considered exploitative unless the actor would have decided or acted differently in the absence of the cognitive impairment. Just as a threat is not coercive unless it compels actions that differ from what the victim would have otherwise done,\textsuperscript{318} an offer is not exploitative unless the victim would have decided differently, but for the existing cognitive impairment.

If the offeree acts rationally under the circumstances, there is no exploitation because condition (4) above is not satisfied. On the other hand, keep in mind that the offer need not cause the irrational decision; the cognitive impairment must bring it about. It is sufficient that the offeror should have known with a high degree of probability of the offeree's cognitive impairment in making the offer. Thus, proposals to mentally ill persons are exploitative because it is highly likely

\textsuperscript{517} Informed consent determinations require the court to determine whether a reasonable person in the plaintiff's shoes would have acted otherwise had full information been available. See, e.g., Scott v. Bradford, 606 P.2d 554 (Okla. 1979) (setting forth a similar standard in the informal consent for determining context).

\textsuperscript{318} Bayles, supra note 185, at 19.
that the resulting decisions will be irrational, even though the offer itself is not the cause of the cognitive impairment.

Similarly, the offers of the dance hall studio or the lecherous millionaire are exploitative even if the respective offerees would have done something equally irrational in the absence of the offer. For example, even though the young mother in the lecherous millionaire example would have sold herself into prostitution to save her daughter, the millionaire’s proposal is still exploitative even though it merely replaces one irrational decision with another. The millionaire’s offer is exploitative because it seeks to take advantage of the woman’s psychological vulnerability, even if that vulnerability would have resulted in other, equally irrational decisions without the offer. In the absence of the causal relationship between the impairment and the decision, however, neither the millionaire’s foul intent nor the young woman’s irrational decision suffice to render the transaction exploitative.

Note, however, that the theory of exploitation propounded here does not require that the offeree’s position be worsened, subjectively or objectively, as a result of the exploitative offer. Indeed, some exploitative offers may leave the party in a better position. For example, if the lonely widow in the first scenario would ultimately have committed suicide but for the dance hall studio’s exploitative proposal, the offer was actually beneficial. Similarly, if the desperate mother in the lecherous millionaire example had resolved to prostitute herself to save her daughter, she is arguably in a better position than before the offer. In both cases, the offer replaces one irrational decision (with possibly tragic consequences) with another irrational decision (that might have less onerous consequences).

The offers, however, are still exploitative notwithstanding the beneficial results. The offeror may not defend her actions on the ground that she bettered the offeree’s situation. The offer ceases to be exploitative only when it does not undermine the rational capacities of the offeree or take advantage of a pre-existing vulnerability.

V
APPLICATIONS

This theory of exploitation may now be applied to the three practices discussed in Part I.319 This exercise should be helpful both in demonstrating how the concept of exploitation is applied in actual cases and in substantively analyzing the claims of exploitation in each of these three contexts.

319 See supra notes 28-106 and accompanying text.
In all three contexts—surrogate parenting arrangements, organ sales from living donors and consensual, nontherapeutic medical experimentation on prisoners—we may assume that the first, second, fifth and sixth conditions are met: First, we may assume that an offer is made which the offeree is free to reject.\textsuperscript{320} Similarly, we will assume that the second condition, which requires that the offeror act knowingly, intentionally or recklessly to take advantage of a perceived psychological vulnerability on the offeree's part, is satisfied. Neither the fifth nor the sixth condition need be discussed since they cannot be assessed in the abstract. The fifth condition requires that the offeree experience a cognitive impairment of the kind expected to follow from psychological vulnerability. The sixth condition requires a causal relationship between the cognitive impairment and the resulting decision. These determinations can only be made on an individualized basis, and so the following analysis will assume that both conditions are satisfied. Thus, we will discuss here whether the three practices in question generally serve to take advantage of a vulnerability which characteristically results in irrational choices.

A. Surrogate Parenting Arrangements

What social, economic and psychological conditions predispose a woman to become a surrogate mother? More important for the purposes of this Article, do these motivations satisfy the conditions for exploitation?

While surrogate mothers come from diverse socioeconomic backgrounds, a general composite of surrogate mothers emerges from one survey.\textsuperscript{321} Most surrogates are non-Hispanic, white, Protestants, in their late twenties, who have earned a high school education.\textsuperscript{322} About one-third have college degrees and a small percentage has attended graduate school.\textsuperscript{323} Most come from lower-middle and middle-class households with annual incomes between $15,000 and $50,000 in 1987 dollars.\textsuperscript{324}

What role does financial exigency play in the decision to become a surrogate? One study found that roughly forty percent of all surrogate applicants were either unemployed or a recipient of financial assistance.\textsuperscript{325} Surrogates are generally paid between $10,000 and

\textsuperscript{320} If the situation is characterized by some form of coercion, then there is no offer at all.
\textsuperscript{321} See OTA, supra note 28, at 269-73.
\textsuperscript{322} Id. at 273.
\textsuperscript{323} Id. at 273.
\textsuperscript{324} The OTA reported that 53% came from households earning $15,000 to $30,000 (in 1987 dollars) and 30% from households earning $30,000 to $50,000. Id.
\textsuperscript{325} COREA, supra note 32, at 229.
Nonmonetary factors also motivate women to become surrogate mothers: many express an altruistic desire to give an infertile couple a baby, or a wish to experience pregnancy without having to raise the child. Others find themselves drawn to surrogacy after working in "nurturing" fields such as health care and early childhood education. There is little doubt, however, that financial incentives are a necessary condition to the surrogate's involvement in the arrangement.

Nevertheless, this data does not substantiate the charge that surrogates as a class are exploited. Economic incentive is not necessarily evidence of a psychologically recognized vulnerability that results in rational impairment. If it were, virtually all economic decisions would be similarly tainted as the product of exploitation. Of course, in extreme cases—situations of intrapsychic coercion in which financial exigency reaches the point of genuine desperation—the conditions for exploitation may exist. Generally, however, because payment is usually deferred until after the completion of pregnancy, surrogacy does not provide a viable economic alternative for women with immediate financial needs.

Nor is the payment for surrogacy so attractive that it approximates intrapsychic compulsion. While the value attached to a given sum of money is relative to a person's particular circumstances, $10,000 to $12,000 is not such an overwhelming amount that it becomes a compelling influence. The minimum wage employee working forty hours a week earns just under this amount annually. While surrogacy may offer some advantages over working a minimum

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326 This is the figure posited by those in the surrogate industry. Mellown, supra note 41, at 237. See also OTA, supra note 28, at 275 ("the most common fee for a surrogate mother is $10,000").


328 Id.

329 Even defenders of surrogacy admit that monetary considerations are important. See, e.g., Noel P. Keane & Dennis L. Breo, The Surrogate Mother 49-50 (1981) (few women would act as surrogates in absence of monetary renumeration). Aware that monetary considerations may motivate surrogates, many clinics require applicants to be economically independent. OTA, supra note 28, at 273. Clinics have also devised procedural protections, including cooling off periods to ensure against hasty decisions. This "cooling off" period is also accomplished, as a practical matter, by the fact that the period before artificial insemination results in pregnancy may be long. Even those in favor of enforcement of the surrogate contract defend the right of the woman to change her mind before conception occurs. See, e.g., Hill, In Defense of Surrogate Parenting Arrangements, supra note 30, at 367.

330 Alternatively, the surrogate may receive payment in installments. See Katie Marie Brophy, A Surrogate Mother Contract To Bear A Child, 20 J. Fam. L. 263 (1981-82) (discussing terms of the surrogate contract, including payment).

331 A working earning $4.50 per hour, forty hours per week, fifty weeks per year would earn $9,000 annually.
wage job—including the opportunity to stay at home throughout pregnancy—it also presents obvious physical disadvantages. Consequently, surrogacy offers few advantages over a full-time minimum wage job. Moreover, even if, hypothetically, the monetary benefits for participation in a surrogate arrangement were double that for the minimum wage job, such decisions would not necessarily be irrational. If acceptance of every offer that doubles the offeree’s annual income were *prima facie* grounds for holding the acceptance of the offer irrational, a large percentage of employment decisions (including those made by most graduating law students) would be similarly voidable. Thus, the financial rewards cannot be so compelling that they impede the rational capacities of the woman in making her decision.

Nor does the claim of social conditioning afford a basis for the charge of exploitation. First, the claim of ubiquitous social conditioning is simply overstated. If pervasive social conditioning is true, then presumably all decisions made by women—or at least all such decisions involving childbearing and rearing—are similarly tainted. If no woman is demonstrably free in such matters, when is any decision an expression of her true self?

Second, even if it could be established that all childbearing decisions are the product of social conditioning, in what sense are these distinct from other people’s ordinary decisions? If behaviorist psychologists are correct in contending that all behavior results from environmental conditioning,332 then no criterion distinguishes the woman’s decision to become a surrogate from any other decision. Thus, even if the decision to become a surrogate stems from social conditioning in some sense other than that from which all our decisions derive, it is not clear how this represents a form of psychological vulnerability that meets the requirements of condition three.

As noted earlier, however, there is a subtler dimension to the argument regarding conditioning: conditioning may either enhance or stunt a person’s potential course of self-development. Because entrenched social influences shape desires, intentions and values, women learn to perceive themselves primarily as procreators and nurturers whose value and identity is affirmed by their biological capacity to procreate and their resulting role as primary caretakers.333 Consequently, this argument contends that women recognize their limited options and seek out mothering roles.

Even if this argument accurately portrays the social influences that lead some women to become surrogates, it lacks the compelling

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332 *See* Skinner, *supra* note 221, at 138-74 (arguing that cultures can be designed to provide optimal reinforcement of socially beneficial behavior).

333 *See generally* Chodorow, *supra* note 40 (providing a feminist account of this process).
force it once had in an earlier day. Few people believe that women of
this generation have been so completely conditioned that they are
helpless to choose alternative roles. Indeed, the relatively few women
who become surrogates\textsuperscript{334} and the increasing number who delay or
forego childbearing\textsuperscript{335} are ample evidence of the polyphonic influ-
ences upon women's values in contemporary society.

Even to the extent that claims of social conditioning are accurate,
however, this general conditioning does not constitute a kind of psy-
chological vulnerability recognized by modern psychology. While ex-
treme forms of social conditioning of the "clockwork orange" variety
may indeed produce the requisite form of vulnerability, common so-
cial conditioning generally does not.

Moreover, even if social conditioning produces the requisite vul-
nérability, it is not the kind of vulnerability which typically results in
irrational decision-making. It is well within the range of rational alter-
atives for some women to become surrogates. The fact that other
women would never deign to consider this alternative, or that some
might even find the practice morally repugnant, does not necessarily
entail that the decision to become a surrogate is irrational. Thus, so-
cial conditioning does not necessarily result in irrational choices, as
required to fulfill condition four.

It might be argued, however, that the decision to become a surro-
gate is fundamentally irrational or, at least, ill-advised and unin-
formed. A surrogate must relinquish a child she has borne, a
potentially psychologically devastating act. How can she foresee her
emotional response when the time comes to turn over the child? Do
surrogate contracts exploit this lack of knowledge on the part of
surrogates?

First, various legislative proposals provide numerous procedural
and substantive limitations on surrogate contracts, including appli-
cant screening, counseling and a requirement that the woman have
previously borne a child, in order to be able to anticipate their feel-
ings regarding relinquishment.\textsuperscript{336} While these safeguards never en-
sure against subsequent regrets,\textsuperscript{337} they mitigate the dangers
associated with uninformed or unself-conscious decisions.

Second, the few instances in which the surrogate has attempted
to retain custody of the child do not demonstrate that the initial deci-
sion was irrational. An individual's expectations and goals change,

\textsuperscript{334} Between 1980 and 1987, fewer than 25,000 women contacted surrogate agencies to
inquire about surrogating. See \textit{Overvold}, supra note 327, at 125, 162.

\textsuperscript{335} OTA, supra note 28, at 61-85 (for a discussion of factors contributing to rising rates
of infertility, including postponing childbearing until later years).

\textsuperscript{336} Hill, \textit{supra} note 30, at 360-70.

\textsuperscript{337} For example, Mary Beth Whitehead, the surrogate in the \textit{Baby M} case, had borne
and there is always some risk that one may change one's mind about an agreement. This does not render each such agreement the product of exploitation. Nor does it render irrational the decision to enter into the agreement, from the standpoint of the knowledge, goals and intentions of the subject at the time of the initial bargain.

Finally, there is an element of uncertainty in all contracts. In this respect, nothing distinguishes surrogate contracts from any other type of agreement. Legislation can ameliorate the risks of uncertainty and of hasty or ill-advised decisions, but some uncertainty will remain. Occasionally—about one in one hundred cases—women change their minds and litigate the custody issue. But this is no more a reason for condemning all surrogate contracts on grounds of irrationality and exploitation than it is for prohibiting contracts in a variety of other situations.

In sum, there is little compelling evidence for the claim that surrogate arrangements are inherently exploitative. While there may be other reasons for objecting to surrogate arrangements and while these other reasons are sometimes confused with the notion of exploitation, the claim of exploitation is generally unfounded in the context of surrogacy. Surrogates are not subject to the requisite psychological vulnerability nor are their decisions intrinsically irrational. In rare cases women may be driven by economic exigency to become surrogates; this, however, does not distinguish surrogacy from other practices.

B. Voluntary Organ Sales

Voluntary organ sales present different social and economic considerations relative to surrogate arrangements. First, the motive of the seller is more clearly financial. While the surrogate usually knows the intended parents and may want to assist them in their quest to have a child, this familiarity and altruism is usually not the case with organ sellers. A market in organs from living donors may be completely anonymous. The potentially high price for organs makes it likely that the monetary motive is the overriding consideration, although in some instances the recipient may have a pre-existing relationship with the donor.

338 Kasindorf, supra note 29, at 14.
339 For example, commodification must be distinguished from exploitation. The former involves the alienation of some personal capacity which should not be sold. See supra notes 36-38 and accompanying text.
340 The surrogate often meets and interacts with the interested parents throughout pregnancy. See OvERvoLD, supra note 327 (discussing experiences of surrogates and parents in the process of interacting with each other.).
341 See supra notes 325-27 and accompanying text.
342 See supra notes 70-85 and accompanying text.
Second, the great majority of those reported as willing to sell an organ are citizens of developing countries. Surrogate mothers, by comparison, are usually middle-class Americans. Thus, the socioeconomic disparity between seller and buyer may be much greater in the case of organ sales.

Third, although pregnancy only rarely poses serious physical problems, organ donation is arguably more dangerous. Risks include surgery, and the long-term physical effects and risks of having a single kidney.

It seems important, therefore, to understand the origin and the intensity of the desire to sell an organ. The opportunity to earn perhaps a million dollars for selling a kidney may motivate a poor Brazilian with no viable economic prospects to do so. In extreme cases, this may approach intrapsychic compulsion.

There may, however, be an inverse relationship between the factors relevant to condition three and those relevant to condition four. As the amount of money offered increases, so does the likelihood that an overwhelmingly attractive desire will motivate the sale. As monetary consideration increases, however, there is also a proportionate increase in the rationality of the decision, all other things being equal. (Where risk increases in greater proportion than the offered amount, this will not be true.) Thus, in cases of enticement, the likelihood of fulfilling condition four increases as the prospect of satisfying condition three wanes.

This again raises the question regarding the criteria for measuring rationality. As noted earlier, a decision is rational if it is one which a reasonable person in the same circumstances would make. The invocation of context adds a subjective element: the rational decision is one that makes sense for a person in that person’s circumstances. Although it might be irrational for a middle-class American to exchange a kidney for a million dollars, it might be quite rational for an impoverished South American with a large family to feed and few alternative economic prospects to do the same. Indeed, from the standpoint of health alone, the economic advantage to a very poor person in obtaining adequate health care may more than compensate for the risks inherent in relinquishing one kidney.

Consequently, although there may be times when the organ seller is exploited in the moral sense—for instance, when the seller receives

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343 See supra note 324 and accompanying text.
344 At least one surrogate has died during pregnancy. Kasindorf, supra note 29, at 13.
345 At least 16 people have died donating a kidney to a relative. Note, supra note 71, at 1033.
346 For example, what happens if the remaining kidney fails.
347 See supra part IV.B.
a small sum of money for a kidney—organ sales cannot be collectively condemned as exploitative. While other public policy arguments may justify the ban on a market in organs, the claim of exploitation does not.

C. Consensual Medical Experimentation on Prisoners

Consensual, non-therapeutic medical experimentation on prisoners presents still different concerns. Prisoners' motives vary from the desire to participate in a good cause, as in the case of World War II drug testing, to the desire to obtain increased amenities, additional privileges, or higher pay.

Is there something particular to prison confinement that makes prisoners psychologically vulnerable? Of course, mentally ill or handicapped prisoners are potentially vulnerable, and present an obvious opportunity for exploitation. To the extent that such individuals are overrepresented in the prison population, this must be considered. It is possible, however, to prohibit their involvement based on incapacity.

Alternatively, it might be argued that the nature of confinement itself may be so psychologically debilitating that all decisions made by prisoners are suspect, i.e. that prisoners lack capacity generally. The National Commission for Biomedical and Behavioral Research focused on this issue in recommending against most forms of prisoner research. To be considered exploitative, however, this argument assumes that modern prison conditions are so severe that they create a state of physical deprivation or extreme psychological instability generally impairing the prisoner's ability to reason practically. This Article suggests that such brutal prison conditions are unlikely, and that

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348 See supra note 74 and accompanying text (listing these objections).
349 See Schroeder, supra note 86, at 971.
350 See Bailey v. Lally, 481 F. Supp. 203, 206-08 (D. Md. 1979) (describing inducements to experiment participation including higher pay, interaction with non-prison personnel, and improved living conditions. Favorable parole consideration was expressly forbidden).
351 National Commission, supra note 24, at 3076-79.
as a result, the decisions of prisoners, as a class, cannot be considered irrational.

Another possible argument is that characteristic prison conditions render prisoners more amenable than they might otherwise be to the requests of their confiners. Perhaps prison life dampens an inmate’s usual self-interest. Under this scenario, the inmate simply may not care. This would seem particularly likely for long-term or life prisoners. Thus, while the prisoner is still capable of functioning in a relatively normal manner, she does so with less regard for her own well-being and with less interest in the future. Under such psychological conditions, prison life may have a foreseeably detrimental or debilitating influence on the prisoner’s capacity to evaluate proposals involving some risk.

Additionally, inducements offered in exchange for participation may constitute intrapsychic compulsion. Favorable consideration at parole time might well be overwhelmingly attractive and skew the prisoner’s weighing of risks and benefits. It seems unlikely that other minor privileges or conveniences would have the same impact. Certainly, it is easy to see the way in which a combination of the repugnance of prison conditions and the desire to be free might represent such an appealing option that prisoners might be swayed in their consideration of the inherent risks involved in the project. Of course, prohibiting this type of incentive eliminates this objection.

Thus, prison conditions present the best case for the claim of a recognized psychological vulnerability from among the three practices discussed. Before the case for exploitation can be defended, however, additional research concerning the psychological effects of prison life is necessary. The most sound basis for the claim is that prison confinement over long periods of time may cause a decline in inmates’ self-interest which results in their de-emphasizing the projects’ risks.

Nevertheless, are prisoners’ decisions rational notwithstanding the psychologically enervating influence of confinement? A reasonable person faced with life imprisonment may appraise the prospects of life in prison as less valuable than that of a life on the outside. Under these circumstances, it might be rational to take certain risks to improve those prospects. Thus, while a strong case can be made that

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352 See generally Mark S. Fleisher, Warehousing Violence (1989) (for an anthropological investigation of prisons). Id. at 131-55 (discussing day-to-day conditions of prison life.).
353 See, e.g., id. at 125-29 (the story of Thom, a long-term prisoner at a federal prison in Lompoc, California).
354 See the current regulations on this matter for a practical approach. 45 C.F.R. § 46.305(a)(6) (1992) (forbids favorable parole decisions as inducement to participate).
condition three is satisfied, it is uncertain whether condition four, requiring an irrational choice, is met.

CONCLUSION

This Article has proposed a theory of exploitation as a psychological or a cognitive concept: exploitation occurs only when the victim acts irrationally under the circumstances at the time of the decision. Legally recognizable exploitation requires an offer of benefit intended to take advantage of a psychological vulnerability that impairs the offeree's rational-emotive capacity. Although social and economic considerations are relevant to the determination of rationality, exploitation is not fundamentally a social or economic construct.

Exploitation has long been a greatly overused and misused concept, serving to fill the vague conceptual gap between the pre-analytic intuition that there is something wrong with this bargain and the post-analytic determination as to what this something wrong is, exactly. As a result, exploitation has been confused with other concepts such as coercion, commodification, and the harm done when a person takes advantage of a dominant socio-economic position. The concept of exploitation has assumed the role of an omnibus moral catch-all category, a term with as many meanings as those who use it, and which is, precisely for this reason, a most mercurial charge to which to respond.

In concluding, it is important to note that the most fundamental questions remain unanswered. In particular, what criteria should be used to determine whether a particular decision is rational? The test may have subjective elements: a decision is rational if it coheres with the person's system of beliefs, values, and goals. It might also be defined objectively: a rational decision maximizes the probability of achieving a particular goal (for example, self-interest). If the test is entirely subjective, virtually any decision is rational. On the other hand, if the test is primarily objective, then must it also permit some consideration of the individual's idiosyncratic values, goals, beliefs or life circumstances? Most generally, is rationality fundamentally a substantive, result-oriented concept or a procedural, process-oriented concept? This analysis has considered both aspects, focusing primarily, however, on the substantive characterization of the offeree's decision in light of the impact of the offer on the reasoning process itself.

The common law avoids the issue, as this Article has, by contending that a decision is rational if it is one that a reasonable person would make in that person's circumstances. If this test is fundamentally unsatisfying—which it is, of course—it is, nevertheless, the closest we have come to providing a solution to the problem of rationality.