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EXPLOITATION, INTENTIONALITY AND INJUSTICE

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Abstract: This paper argues that, inasmuch as exploitation is a form of injustice, exploitative acts need not be performed intentionally.

Key Words: Rights, Endowments, Surplus value, Fairness, Justice

1. INTRODUCTION

Do exploiters have to *know* that they are exploiters in order to *be* exploiters? More specifically, do they have to *intend* to exploit in order to exploit? The common view of exploitation conceives it as 'taking unfair advantage'. As Alan Wertheimer says,

> We can give a broad – lowest common denominator – definition of exploitation with which virtually everyone will agree. . . . A exploits B when A takes unfair advantage of B. (Wertheimer 1996: 10)

But not all instances of taking advantage are ones of taking *unfair* advantage. Since fairness and unfairness refer to interpersonal relations, my taking advantage of sunny weather to mow my lawn is not an instance of taking unfair advantage. Nor is unfair advantage taken when I take advantage of our shared presence at a meeting to return your book which I'd previously borrowed from you. Nor, again, is unfair advantage taken when I take advantage of the goalkeeper's presence at the far side of the goal to score a point by kicking the ball into the near side of the goal. So it looks like what's doing the heavy lifting in that common conception of exploitation is the idea of *unfairness*.

The unfair advantage-taking that characterizes exploitation is standardly understood as a possible feature of those interpersonal

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activities that involve an *exchange* of goods or services: exploitations are a proper subset of exchanges. To say this is to say no more (or less) than that, *ceteris paribus*, neither gifts nor robberies count as exploitations. In an exploitative exchange, one party, Red, takes unfair advantage of the other party, Blue, insofar as the good or service he gives her is worth less than the good or service she gives him.[1] Although some writers have described exploitation as robbery, there is nothing to be gained, analytically speaking, from conflating them. That said, robbery does, as we shall see, play an important role in explaining the occurrence of exploitation.

The argument of this paper proceeds, through a sequence of four steps, to the conclusion that exploitations need not be intentional. Section 2 shows how exploitations result from rights violations. Section 3 locates the wrongness of exploitation in its injustice. Section 4 argues (via Kant) that injustice need not be intentional. And Section 5 argues (contra Rawls) that unfairness and injustice are synonymous, thereby yielding the conclusion that exploitation – conceived as taking unfair advantage – need not be intentional.

2. EXPLOITATION AND RIGHTS VIOLATIONS

A robbery or, more generally, a rights violation can create the necessary condition for an exploitation.[2,3] One relatively simple way in which this occurs can be illustrated by reference to auctions. Auctions are markets writ small and, *ceteris paribus*, the worth of auctioned items is determined by – is equal to – the highest amount that would be bid for them.[4] Suppose Blue is selling her X at an auction, and Red's $75 bid is the winner. Further suppose that White would have bid $100 for X, but didn't do so because, just prior to the auction, he was robbed of the funds he would have had to use to place his bid. There is, I take it, a clear sense in which Blue's

[1] That is, despite the fact that Blue prefers to receive more for her good/service than Red gives her. This qualification is necessary in order to exclude, from the category of exploitations, those unequal exchanges, such as the purchase of tickets for charity banquets, where neither the purchaser nor the seller prefers the value of the meal to equal, much less exceed, the price of the ticket. This type of unequal exchange is sometimes called a *benefit*; cf. Steiner (1984: 225–8).

[2] The present argument uses the phrase *rights violation* to refer to the unauthorized deprivation of any of a claim, liberty, power or immunity. Nothing here turns on what Hohfeld correctly described as this undiscriminating use of the term 'a right'.

[3] Other accounts deny that a rights violation provides a necessary condition of exploitation; see Ferguson and Steiner (Forthcoming) for a refutation of these theories.

[4] This conception of an item's worth thereby embraces the neoclassical conception of economic value as currently deployed in mainstream Economics, and thereby rejects classical conceptions which imply that a good or service can have positive economic value irrespective of whether anyone wishes to acquire it.

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X can thus be said to be worth $100: in a world where White's right had *not* been violated, the market price of that X would be at least $100. Its being worth at least $100 implies that, in purchasing X for only $75, Red has secured at least $25 of what Marx and others have called *surplus value*.[5]

Another way in which a rights violation can create the necessary condition for an exploitation occurs in the situation where Blue herself is robbed prior to the auction for her X, which Red's $75 bid again wins.[6] The effect of Blue's being robbed is to reduce her endowment and, thereby, to lower her reservation price from, say, $90 to $70. That is, had she not been robbed, Blue would have refused to sell her X for less than $90. Having been robbed, her optimal choice becomes one to sell X for whatever highest price it can secure that is at least $70. Thus, in this case, Red's winning bid of $75 secures him $15 of surplus value.

Rights violations can, of course, take many different forms apart from robbery. Thus, in the first situation, the rights-violating prevention of White's making a $100 bid might instead have consisted in gagging him, or withholding from him accurate auction information to which he was entitled, or barring him from the auction altogether, rather than literally robbing him. In whatever manner a right is violated, and regardless of whether the victim of that violation is the seller herself or a rival third-party bidder like White, the effect of the violation is to reduce its victim's endowment.[7] And it thereby either lowers the victimized seller's reservation price for her X, or raises the victimized third-party bidder's 'reservation price' for his money.[8] In either case, the successful bidder, Red, gets to secure X for less than it would have sold for in the absence of the rights violation.

Moreover, while rights violations may be the direct cause of some exploitations, they need not be so directly involved in all exploitations. For as I've argued, the exploitation-relevant effect of a rights violation is the reduction of its victim's endowment: it is this imposed endowment-reduction that constitutes the necessary condition for an exploitation. Thus, in the case where White, the would-be rival bidder for X, is the victim of that violation, the consequent lower selling price of X – namely,

[5] Of course, and unlike the present model of exploitation, classical Marxism does not identify an item's worth with the highest price it can command. The present model was first advanced in Steiner (1984), and was recently reviewed in *Ethics*' retrospective essay series (Bajaj 2015). It is further explicated in Steiner (1987) and Steiner (1994: ch. 5D).

[6] See Steiner (2010: 26–7), for this addition to the aforesaid model of exploitation.

[7] For an outline of some of the broad types of externally imposed constraints – rights-violations – that reduce exchangers' endowments, see the works cited in the preceding two footnotes.

[8] That is, the victimized rival third-party bidder will be rationally unwilling to pay as much for X as he would have done in the absence of his rights being violated.

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$75 – represents a loss to Blue of $25: Blue's post-auction endowment is itself $25 less than it would have been in the absence of that rights violation. Blue's being $25 poorer implies that the bids she herself can advance at auctions where she is a would-be buyer are going to be lower than they would have been in the absence of that rights violation. Thus, suppose counter-factually that Blue's X had gone to White for $100, i.e. that White had not been robbed. In that case, Blue would have been willing to bid as much as, say, $50 for Black's Y. But because White *was* robbed, and Blue actually received only $75 for her X, she cannot afford to bid as much as $50 for Y – she can afford to bid, say, only $35 for Y – which is thereby sold to rival bidder Green for only $40: Black has thus been exploited by Green to the tune of (at least) $10. The general point here is that, once a rights violation has supplied the necessary condition for an exploitation – namely, an *endowment-reduction* – that reduction can itself generate further exploitations which in turn imply further endowment-reductions: Black will not now be able to afford to bid as much for Pink's Z as he would have been able to do, had he not been exploited. And so on. Exploitations compound.

3. RIGHTS VIOLATIONS AND INJUSTICE

Thus far, we've seen that a rights violation creates the necessary condition for exploitations, and that an exploitation, in turn, creates that same necessary condition for other exploitations. What needs to be addressed now is the question of how those exploitations can count as instances of *injustice*. For there can be little doubt that exploitation is commonly regarded as unjust. And the reason for that common thought seems to find its grounding in the very sorts of cases we've just explored. That is, exploitations, being the proximate or serial results of rights violations, are seen to share those violations' presumed property of being unjust: one exchanger's ill-got gain and, correspondingly, the other's thereby unwarranted loss are tainted by – share – the presumed injustice of the rights violation that directly or indirectly caused them. Both rights violations and the resultant exploitations signify a maldistribution of endowments.

But being the results – immediate or compounded – of rights violations, though necessary for exploitations to count as unjust, is obviously insufficient. It's insufficient because, thus far, there's been no indication of whether those violations were themselves unjust. More precisely, there's been no indication that the rights violated by those violations were themselves *just* rights. The fact, if it is a fact, that they were, say, *legal* rights evidently does not imply that they were *just* rights. It's quite possible that White had no just right against being forcibly deprived of the $100, nor against being gagged at, or barred

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from, the auction, nor against being denied accurate auction information. Similarly, Blue may have had no just right against being deprived of the money forcibly taken from her prior to the auction. In other words, the argument thus far has shown only how the distinctive characteristic of exploitations – unequal worth of the items voluntarily exchanged – can occur as the proximate or ramified consequence of rights violations. It has not shown that the occurrence of that consequence amounts to an injustice. In this sense, all that we have so far is a *non-moral* account of exploitation.[9]

What would turn it into a moral account? What would make exploitations what they're commonly thought to be: namely, unjust? On the face of it, the answer is simply that the rights violated must themselves be *moral* rights. For moral rights are grounded in – are the elementary particles of – principles of justice. That is, whatever we believe the demands of justice to be, whatever theory of distributive justice seems to us most persuasive, we standardly identify the moral duties and disabilities thereby implied as ones correlatively entailed by moral rights, and the violations of those rights as injustices. Failures to fulfil other kinds of moral duty – instances of greed, cowardice, dishonesty – may, contingently, also amount to injustices, but they need not do so.

There are two other highly relevant features of principles of justice and, hence, of the just rights grounded in them. The first is the fact that they constitute the primary standard by which legal systems are morally assessed. Theories of justice are inherently theories about what the basic content of legal rules *should* be. The most common form of moral complaint against a legal rule and the duties it generates is that they fail to advance or protect persons' just rights – they fail to be *just* – whereas their failure to satisfy other moral requirements, e.g. benevolence, is not usually seen as being equally damning. While we do not expect legal systems to enforce generosity, we do expect them to uphold our just rights.

The second relevant feature, closely related to the first, is the fact that a legal system is understood to be that set of rules that *enforceably dominate* any other rules prevalent in a group of persons. That my moral code, or the rules of my club, require that I do A, standardly constitutes no defence against the charge that I violated the legal prohibition against doing A. Nor, therefore, does it normally exempt me from whatever legal penalty is forcibly imposed for that violation.

What significantly and fairly readily follows from these two features is what has elsewhere been called the *Moral Primacy Thesis* (Steiner

[9] Hence Classical Marxism is not mistaken in claiming that there can indeed be a non-moral account of exploitation, the initiating rights violation of which consisted, for Marx, in the (non-consensual) process of what he referred to as *primitive accumulation* and described as 'the prelude to the history of capital' (Marx 1867: Vol. 1, ch. 32).

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2013: 233 ff.). As the primary standard for the moral evaluation of that dominantly enforceable set of rules, the demands of principles of justice, or of the just rights grounded in them, enjoy moral primacy over the demands of other moral principles or values. Whether that primacy is understood in terms of lexical priority (Rawls 1972: 42 ff.), or side-constraints (Nozick 1974: 28–33), or trumps (Dworkin 1981), or reasons with peremptory force (Raz 1986: 192), in circumstances where duties correlative to just rights are not jointly performable with duties generated by other moral principles or values, it is compliance with the former that morality requires. What this relevantly implies for the argument of this paper is that, even if the intention driving a piece of such rights-violating conduct is itself a moral one – for example, an altruistic one – that fact is insufficient to render that behaviour morally permissible. Any act of injustice is wrong, regardless of its motivation.

4. INJUSTICE AND INTENTIONALITY

How does all this bear on the issue posed in the opening questions of this paper? Must exploiters *be aware* that they are exploiters in order to *be* exploiters? To answer this question, it will be useful, first, to consider whether violators of just rights must be aware that they are violators of just rights in order to be such violators. Further, must this awareness be accompanied by an *intention* to violate? Is *mens rea* a necessary condition of injustice?

The classic response to this latter question is supplied by Kant, who answers 'No'. In *The Metaphysics of Morals*, Kant's first order of business is sharply to distinguish the domain of justice or 'right' from that of ethics or virtue, by differentiating two types of moral duty: correlative and non-correlative. The former, in bearing on only the *form* of the relationship between persons' wills, differ from the latter which concern the *content* of person's wills – their 'maxims', purposes, ends, or intentions in acting – and which are thus matters of virtue. Correlative duties, by contrast, govern the interpersonal distribution of what Kant calls *external freedom.* And what they do is normatively to constrain their bearers' actions (whatever the intentions motivating those actions) to ones consistent with a particular distribution of that freedom. Actions that encroach on other persons' rightful shares of external freedom violate their just rights. For as H.L.A. Hart famously argued,

> The concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's ... Kant, in the *Rechtslehre*, discusses the obligations which arise in this branch of morality under the title of *officia juris*, 'which do not require that respect for duty shall be of itself the determining principle of the will', and contrasts them with *officia virtutis*, which have no moral worth unless

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> done for the sake of the moral principle. His point is, I think, that we must distinguish from the rest of morality those principles regulating the proper distribution of human freedom which alone make it morally legitimate for one human being to determine by his choice how another should act; and a certain specific moral value is secured (to be distinguished from moral virtue in which the good will is manifested) if human relationships are conducted in accordance with these principles even though coercion has to be used to secure this, for only if these principles are regarded will freedom be distributed among human beings as it should be. And it is I think a very important feature of a moral right that the possessor of it is conceived as having a moral justification for limiting the freedom of another and that he has this justification not because the action he is entitled to require of another has some moral quality but simply because in the circumstances a certain distribution of human freedom will be maintained if he by his choice is allowed to determine how that other shall act. (Hart 1955: 177–8)

For Kant, the rule determining each person's rightful share of external freedom is his *Universal Principle of Right* [*Justice*]*, UPJ*:

> Any action is *right [just]* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. (Kant 1991: 56)

Justice, for Kant, vests each person with a right to equal freedom. Unlike an action's conformity to the Categorical Imperative, which enjoins us to

> Act only according to that maxim by which you can at the same time will that it should become a universal law. (Kant 1959: 47)

its conformity to *UPJ* imposes no such intensional condition. The justness of an action – its compliance with *UPJ* – is predicated on its having the *extensional* characteristic of being capable of coexisting with everyone's external freedom in accordance with a universal law. But what about the alternative posed in *UPJ*'s second clause above, 'or if on its maxim . . .'? Doesn't Kant's use here, of the intensional term *maxim*, imply that the justice/injustice of an action can alternatively be determined (as its virtuousness/viciousness is) by reference to the actor's purpose in performing it?

The appropriate response to this question appears to be of the 'yes, but' variety: yes, but this apparent criterial alternative is entirely inconsistent with the aforementioned distinction that Kant so assiduously draws, between the domains of justice and ethics. And, indeed, having introduced *UPJ*, Kant immediately amplifies it, rejecting any such intensional requirement and observing that

> [I]t cannot be required that *I make it* [*UPJ*] *the maxim* of my action; for anyone can be free as long as I do not impair his freedom by my *external action*, even

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> though I am quite indifferent to his freedom or would like in my heart to infringe upon it. That I make it my maxim to act rightly [justly] is a demand that ethics [rather than justice] makes on me.... When one's aim is not to teach virtue but only to set forth what is *right* [just], one may not and should not represent that law of Right [Justice] as itself the incentive to action. (Kant 1991: 56–7)[10]

An intention to act justly or unjustly is neither necessary nor sufficient for determining whether that action is just or unjust. As Jeffrie Murphy remarks,

> Kant is not telling us merely to plan to leave others' freedom secure; he is telling us to leave it secure *in fact*. Whether or not an action of mine would be compatible with a like liberty for others is something capable of an objective determination and is not a function solely of my intentions. (Murphy 1970: 104)

Confirming this fundamental Kantian difference, over intentionality, between ethics-based assessment of actions and its justice-based counterpart, Arthur Ripstein also supplies its underlying explanation:

> Kant draws a series of sharp divisions between right [justice] and ethics. Ethical conduct depends upon the maxim on which an action is done: rightful conduct depends only on the outer form of interaction between persons. The inner nature of ethical conduct means that the only incentive consistent with the autonomy at the heart of morality must be morality itself; rightful conduct can be induced by incentives provided by others. Other persons are entitled to enforce duties of right, but not duties of virtue ... Each of these differences between right and ethics turns on Kant's representation of principles of right as governing persons represented as occupying space. The basic case for thinking about your right to your own person is your right to your own body; the basic case for thinking about property is property in land, that is, a right to exclude others from a particular location on the Earth's surface; the basic case for thinking about contract is the transfer of an object from one place to another ... [Kant's] normative arguments ... for the Universal Principle of Right ... work out the implication of free persons whose movements of their bodies can come into conflict. (Ripstein 2009: 11–12)

In short, it is an action's physical or behavioural parameters – not its maxim or motivating purpose – that determine whether it is encroaching on the rightful external freedom of others and, hence, whether it is unjust. Nor, therefore, is even mere awareness of such encroachment, on the part of the encroacher – that is, his or her knowledge of it unaccompanied by a desire to do so – a necessary condition of its being unjust.

[10] See also Ladd's version of the same passage (Kant 1965: 35).

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This Kantian view of justice, it should be noted, is entirely congruent with the two previously described standard views that imply the *Moral Primacy Thesis*. That justice is the moral standard by which legal rules are morally assessed, and that sets of legal rules are ones which enforceably dominate all other normative rules, are jointly sufficient to imply that an action can be deemed unjust and morally prohibited regardless of the content of the intention motivating it. If, then, exploitations are to be viewed as injustices, it would appear that exploiters *need not* intend to exploit in order to exploit.

5. INJUSTICE AND UNFAIRNESS

Should exploitations be viewed as injustices? An affirmative answer is supported by both the fact that they are commonly viewed as such, and the fact that their causes are violations of just rights: both exploitations and such rights-violations signify unwarranted denials of things to persons who are justly entitled to them. They are, as previously noted, both causes of maldistribution. Yet, given the canonical definition of exploitation as 'taking *unfair* advantage', the answer to that question must evidently be sought through an inspection of the relation between unfairness and injustice. Is that relation one of synonymity or subsumption?

This is precisely the question that John Rawls addressed when he opened his path-breaking 1958 paper, 'Justice as Fairness', by arguing for the latter – subsumption – view:

> It might seem at first sight that the concepts of justice and fairness are the same, and that there is no reason to distinguish them, or to say that one is more fundamental than the other. I think that this impression is mistaken. In this paper I wish to show that the fundamental idea in the concept of justice is fairness. (Rawls 1958: 164)

The relevance of this 'more fundamental' claim to our present concerns is reasonably apparent. For if it is correct, it opens up the possibility that there can be exploitations – unfair advantage-takings – which are *not* unjust and which, therefore, need not share those properties of injustice that we've just explored. To sustain his 'more fundamental' claim, Rawls evidently needs to supply an analysis of fairness that is independent of the concept of justice: that is, an account that does not invoke the kinds of Hohfeldian juridical relation standardly associated with justice and rights.

But it is this very desideratum that is lacking. Instead, we are offered the following formulation:

> [F]undamental to justice is the concept of fairness which relates to right dealing between persons who are cooperating with or competing against

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> one another, as when one speaks of fair games, fair competition, and fair bargains. The question of fairness arises when free persons, who have no authority over one another, are engaging in a joint activity and amongst themselves settling or acknowledging the rules which define it and which determine the respective shares in its benefits and burdens. A practice will strike the parties as fair if none feels that, by participating in it, they or any of the others are taken advantage of, or forced to give into claims which they do not regard as legitimate ... It is this notion of the possibility of mutual acknowledgment of principles by free persons who have no authority over one another which makes the concept of fairness fundamental to justice. (Rawls 1958: 178–9)

Setting aside the indeterminately affective conditions of '*feeling* that one is not being taken advantage of' and 'not forced to give into claims one *regards* as illegitimate', it seems clear that this passage's key phrase is 'free persons who have no authority over one another'. And what this phrase plainly denotes are persons (1) who, in the absence of contractual understandings with respect to their joint activity, are possessed of Hohfeldian liberty – are 'free' – to do as they wish, and (2) who lack Hohfeldian powers – 'authority' – to *unilaterally* alter one another's juridical positions. In short, Rawls' analysis of fairness provides us with no reason to suppose that its conceptual profile subsumes that of justice, rather than being synonymous with it. Indeed, he implicitly seems to concede their equivalence in a closely following sentence, where he observes

> If, in ordinary speech, fairness applies more particularly to practices in which there is a choice whether to engage or not (e.g. in games, business competition), and justice to practices in which there is no choice (e.g. in slavery), the element of necessity does not render the conception of mutual acknowledgement inapplicable, although it may make it much more urgent to change unjust than unfair institutions. (Rawls 1958: 164)

The fact, if it is one, that we colloquially apply fairness and justice to respectively different domains, in no way implies that they lack synonymity. And that being so, we have no reason to suppose that all cases of unfair advantage-taking – all exploitations – are not also cases of unjust advantage-taking. Nor, therefore, do we have reason to regard the intention to exploit as a necessary condition of doing so.

Of course, and as is the case with persons committing the legal offence of *possession of stolen goods*, the culpability of exploiters can vary from zero to 100 per cent (i.e. fully intentional), with intermediate gradations presumably being functions of how reasonable it would be to expect an exploiter to have known that he was exploiting. The point of the present paper has been simply to argue that his zero culpability is possible.

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