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# Organ Sales: Exploitative at any price?

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## Introduction

Typically, when we talk about a transaction being exploitative, we focus on particular details of the transaction. For example, if talking about a worker being exploited, we are likely to focus on the wages, the hours, and the conditions.

In a few special cases, however, the claim that the exchange is exploitative doesn't focus on these specific details, but rather the exchange is considered exploitative *regardless* of the specific details regarding the price paid or the conditions.

In the case of practices that are considered very harmful, I think this may be relatively easy to explain. In these cases, the claim would simply be that the particular practice, act or procedure that the person is being paid for<sup>1</sup> is so harmful that we can be confident that the transaction is not in that person's interest even without the need to examine the particular details of the transaction.

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<sup>1</sup> Assuming the transaction is one involving payment.

At this point, there may still be a number of controversies about whether we should *prohibit* such transactions – regarding paternalism, for example. My claim isn't that an appeal to the level of harm would be uncontroversial. My claim is only that we have a relatively clear idea of how this argument would work. Similarly, if the objection in particular cases is that consent would not be valid, then again it is easy to see why we might want a blanket rejection of such transactions.

However, there are some cases that don't seem to fit into these categories (harmful or non-consensual), but which we may nevertheless consider to be problematic. For example, someone who sells an organ may not be harmed, and may benefit all-things-considered, but yet some may still want to claim that organ sales are exploitative, and may consider this to be the case, regardless of the details about the price or the conditions. Similarly, many talk about strippers being exploited, without focusing on the details of the conditions or the pay.

As such, it seems that many people believe there are some cases of exploitation where the transactions are exploitative, regardless of details about the conditions or the price paid, and which do not depend on the claim that there wasn't valid consent, or on the claim that the harms involved are so great that we can assume the transactions will not be beneficial all things considered. My claim is that there are no such cases.

This paper focuses on organ sales. However, I also discuss stripping the following reasons: to highlight that the arguments are not limited to organ sales, but will apply in other cases too; because I believe the comparison with stripping will be useful in highlighting particular issues; and because

stripping is one of the examples *most* likely to be considered exploitative, regardless of price or conditions.

Before arguing *against* the view that organ sales (and other transactions) could be exploitative, regardless of the details regarding conditions and the price paid, I will first consider arguments that could be used to *defend* this position.

First, I will consider, and reject, a number of arguments from other authors, which could be used to argue for this position. I will look at the work of Bob Brecher, Karl Marx, Paul Hughes and T.L. Zutlevics. After considering the arguments of these authors, I will focus on an argument I have developed myself. This is an argument that I consider to be a charitable interpretation of what some people seem to have in mind when suggesting that certain transactions are exploitative, regardless of the price or conditions, and which, on the face of it, seems to be a plausible argument in favour of the view that I will, ultimately, be rejecting.

## **Marx and Hughes**

One option might be to appeal to a Marxist account of exploitation. A discussion of Marx's idea of exploitation, discussed in relation to organ sales, can be found in Paul Hughes's "Exploitation, autonomy and the case for organ sales".<sup>2</sup> Hughes concedes that Marx's notion of exploitation is ambiguous, and

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<sup>2</sup> Paul Hughes, "Exploitation, autonomy and the case for organ sales" *International Journal of Applied Ethics*, 1998, 12, 1.

that, at times “Marx seems to mean by exploitation something more value-neutral and technical, as when one builds a dam to harness the power of a river and this ‘uses’ the waterway for the purpose of generating electricity.”<sup>3</sup> Hughes, however, claims that the essence of Marx’s concerns about exploitation is based on a concern about people being “unjustly taken advantage of”.<sup>4</sup> Hughes writes:

[T]he root of Marx’s concerns about exploitation is that workers in capitalism are exploited in the sense that they sell their labour for a wage, thus creating what Marx refers to as “surplus value.” This surplus value is the capitalist’s “profit.” The usual interpretation of the injustice of capitalist exploitation is that capitalists get something for nothing.<sup>5</sup>

Thus, on this interpretation of Marx, the idea is that workers are entitled to the profit, in its entirety, which results from their work. The problem then is that the workers only get a part of that value, their wage, while the capitalist takes the rest as profit. Note that this account of exploitation doesn’t focus on details, such as the bargaining power of different parties, or the extent to which individuals are working in very poor conditions, or for very little pay. As such, it is plausible to think that an appeal to the Marxist account of exploitation might also help us explain how organ sales could be exploitative, regardless of details such as price and healthcare etc. However, this approach is not promising, for a number of reasons.

First, on this account, if I sell a kidney to you directly, without any middle man involved, there isn’t a capitalist paying me a sum of money less

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<sup>3</sup> Hughes, “Exploitation, autonomy and the case for organ sales” p. 92.

<sup>4</sup> Hughes, “Exploitation, autonomy and the case for organ sales” p. 91.

<sup>5</sup> Hughes, “Exploitation, autonomy and the case for organ sales”, p. 92.

than the total paid for the kidney, and then taking the rest of the money as profit. Similarly, if I sell a kidney to the NHS, and then the NHS gives my kidney to someone on the waiting list, *for free*, there is no capitalist making a profit on top of what is paid to me. In a very straightforward, technical sense, on the Marxist account, there is no exploitation in these transactions.

Second, there is a more general problem with Marx's account of exploitation, if we treat it as a *normative* account of exploitation (rather than as a technical value-neutral account). It has some radically counter-intuitive results. For example, on this account, we should be concerned about Manchester United's exploitation of Wayne Rooney. Rooney plays football for a wage. Income comes in from ticket sales, merchandise, sponsorship and TV deals, and so on. Some of that money then goes to Rooney, and the other players, and other staff. But not *all* of it. Assuming the club is profitable, there is a capitalist then taking the remainder as profit. As such, regardless of his significant earnings, and regardless of the significant bargaining power that he clearly has, according to the Marxist account Rooney is exploited. If this is only a technical sense of exploitation, explaining how surplus value is created, allowing capitalists to make a profit, this may not be problematic. If it is meant to be a *normative* account of exploitation, this account looks implausible.

Luckily for Hughes, however, his most significant arguments do not depend on the Marxist account of exploitation, and these will be considered later in this paper.

## The customer is always wrong

Another candidate explanation of the claim that organ sales would be exploitative, regardless of price and conditions is Bob Brecher's argument in "The kidney trade: or, the customer is always wrong."<sup>6</sup>

Before addressing Brecher's argument, I must confess that I find much of the paper unclear. First, it is unclear how conclusive Brecher considers his arguments to be. Early in the paper, he states, "I shall draw attention to certain similarities between selling and buying a human kidney for transplant and other practices, without of course wishing to suggest that these outweigh the differences between them."<sup>7</sup> Later, however, Brecher seems to consider his arguments to be much more conclusive:

Those who consider that such a practice [the selling of organs] ought not to be allowed are logically committed, whether they admit it or not, to similarly opposing the sale of blood, renting of bodies, and physical exploitation of labour.<sup>8</sup>

Second, it is not clear whether Brecher is objecting to wage labour in general, or only to particular forms of wage labour. The second interpretation could be supported by noting that Brecher states, "Marx's moneyless utopia seems an all too unfashionable vision",<sup>9</sup> and we might also suggest that the second interpretation is simply the more charitable interpretation. However, in developing his argument, Brecher does not specify that he is talking *only*

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<sup>6</sup> Bob Brecher, "The kidney trade: or, the customer is always wrong" *Journal of Medical Ethics*, 1990, 16.

<sup>7</sup> Brecher, "The kidney trade: or, the customer is always wrong", p. 120.

<sup>8</sup> Brecher, "The kidney trade: or, the customer is always wrong", p. 122.

<sup>9</sup> Brecher, "The kidney trade: or, the customer is always wrong", p. 120.

about sweat shops, risky jobs and other jobs where people work in poor conditions or for low pay. Rather, he writes, “Let us... consider, first, prostitution, and second, wage labour”,<sup>10</sup> and his examples include, “waste disposal workers, train drivers” and “ambulance workers”.<sup>11</sup> Therefore, I interpret Brecher as objecting to wage labour in general.

On this interpretation, Brecher’s position is similar to the Marxist position considered above, and this argument, like Marx’s, will be prone to the Wayne Rooney objection, discussed above.

For the sake of this paper though, I will avoid the difficulty of interpreting Brecher by focusing primarily on the sale of blood. On this issue, Brecher is very clear. Here, he claims that “It is the customer, the generator of demand, who is always wrong in the sorts of transaction I have been discussing.”<sup>12</sup>

In the case of *illegal* organ sales, where the payment is not great and healthcare is poor, the claim that the customer is wrong looks relatively uncontroversial. But Brecher does not limit his claim to these cases.

The point about buying a pint of blood, or a kidney; renting someone's body for an hour or two; or living off other people's ill-health is that all these are forms of exploitation based on making a commodity of human beings.<sup>13</sup>

Crucially, Brecher ignores the distinction between treating someone as a commodity, and treating someone as a *mere* commodity. In fact, although

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<sup>10</sup> Brecher, “The kidney trade: or, the customer is always wrong”, p. 121.

<sup>11</sup> Brecher, “The kidney trade: or, the customer is always wrong”, p. 122.

<sup>12</sup> Brecher, “The kidney trade: or, the customer is always wrong”, p. 122.

<sup>13</sup> Brecher, “The kidney trade: or, the customer is always wrong”, p. 122.



not discussing it in these terms, he explicitly rejects the significance of this distinction, arguing instead that the details don't matter. Merely making a commodity of someone – in any way – is what is wrong. And, as he stresses, in these cases, it is *always* the customer who is wrong. Brecher's view is radical, to say the least. As such, it requires a very strong argument to persuade us to accept it, but Brecher's paper lacks this argument, and seems very prone to objection by counter-example.

Imagine that my brother, a keen climber, has had an accident. Although he has been rescued, he lost a lot of blood and is likely to die without a blood transfusion. Imagine, also, that we are isolated from others. There is a doctor and a nurse, and some basic medical equipment, but there are few people, no blood supplies, and I am the only person with the same blood type as my brother. Only I can help. But I refuse. I see this as an opportunity not only to make some money, but also an opportunity to get my own back for the time my brother stole my Action Man and sold it to his friend.

My brother does not have much money, so instead of asking for cash, I say that I will give him all the blood he needs if he gives me his house. He swears at me, but I insist that if he wants to live he needs to sign his house over to me. He is weak, but he is just able to sign the contract that I have quickly drawn up. After faxing the document to myself, to ensure no one can steal it later and claim that the transaction never took place, I allow the medics to take the blood they need.

Should we really conclude that it is my brother, the customer, “the generator of demand”, who is wrong in this case, guilty of exploitation, “making a commodity of” me? Surely not.

More plausibly, we might think that we can find an explanation of the claim that organ sales would be exploitative, regardless of price and conditions, in the arguments of Paul Hughes or T.L. Zutlevics.<sup>14</sup> I do not believe that either author intends their argument to be an argument in favour of this claim, but others may try to appeal to their arguments to defend this claim. Could this strategy be successful?

### Hughes (without Marx)

Paul Hughes argues that some options can be constraining options. Giving us *these* options makes us less free, not more free. Hughes argues, for example, that giving a victim the option of not pressing charges against an assailant may not give them more autonomy. Rather, that choice itself may result in them suffering more abuse, and having less autonomy, in the future. Thus the claim is that allowing people to sell their organs would be problematic for similar reasons. The option to sell one's kidney, he thinks, is a constraining option that is likely to keep a person in poverty.<sup>15</sup>

James Stacey Taylor responds to this argument in more detail than I do here.<sup>16</sup> Here I intend to focus on one particular point, stressing that the argument cannot be used to support the claim considered in this paper. That point is simply that Hughes' argument *does* depend on the details. Hughes's

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<sup>14</sup> Paul Hughes, "Exploitation, autonomy and the case for organ sales" *International Journal of Applied Ethics*, 1998, 12, 1, and T.L. Zutlevics (2001) "Markets and the needy: organ sales or aid?" *Journal of Applied Philosophy*, 18, 3.

<sup>15</sup> Hughes, "Exploitation, autonomy and the case for organ sales".

<sup>16</sup> James Stacey Taylor, "Autonomy, Constraining Options, and Organ Sales" in *Journal of Applied Philosophy*, Vol. 9, No. 3, 2002, and *Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative*. (Ashgate, 2005), chapter 4.

claim is that organ sales might reinforce the person's poverty. This certainly fits the view of Goyal, Mehta, Schneiderman et al, discussing the situation in India.<sup>17</sup> Their claim, based on empirical research, is that the majority of people who sold a kidney in India found themselves worse off, and in more debt, than before – largely due to ill health effecting their ability to work. But this is harmful exploitation, and may not involve valid informed consent. Thus, this isn't one of the cases I am interested in. Also, the exploitation in this case clearly *is* dependant on the details. If the health care, including after care, was much better (matching that received by donors in the UK, where there isn't evidence of similar ill health<sup>18</sup>), and if the money paid was much more substantial, the situation would be very different, and the option to sell a kidney could plausibly be a liberating option. (As an extreme example, imagine that payment is sufficient, not merely to allow the seller to start their own small business, but to allow the seller to buy out Microsoft. In these circumstances, the option to sell a kidney could not plausibly be considered to be a constraining option.)

This emphasises the point that the empirical considerations are crucial.

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<sup>17</sup> Goyal, Mehta, Schneiderman et al in "Economic and Health Consequences of Selling a kidney in India", *The Journal of the American Medical Association*, vol. 288, no. 13, 2002.

<sup>18</sup> Goyal, Mehta, Schneiderman et al "Economic and Health Consequences of Selling a kidney in India", p. 1592.

## Zutlevics

Zutlevics presents an argument similar to Hughes', but she focuses on the effects on the poor in general, as a group, rather than the individual seller, and she focuses on the future. Essentially, Zutlevics claim is that if we, the wealthy, know that the existence of poor people means a steady supply of organs, then it won't be in our interests to eradicate poverty. As such, allowing individuals to sell their organs may result in a reluctance to help the poor and contribute, therefore, to the continued existence of poverty. Plausibly, someone could try to use this argument, or something like it, to defend the claim that organ sales would be exploitative, regardless of the details.

However, this *extension* of Zutlevics argument will not work. First, Zutlevics argument is not based on the claim that the transaction *itself* is exploitative. The claim is that it makes future exploitation – or just future poverty – more likely. Of course, that needn't be less of an objection. It may, in fact, be a stronger objection. But it is a different objection. Second, and more importantly from the perspective of this paper, Zutlevics argument *does* depend on the details. Imagine, as I will in much of this paper, that those buying the organs are committed to paying a generous price for a kidney. Indeed, they are committed to paying this price even if many people would be willing to sell a kidney at a lower price. The generous price isn't offered as an incentive to persuade the unwilling to consider selling. The generous price is offered because this is the price that is considered fair and the buyer is committed to paying a fair price. If this were the case, there would be no

incentive to keep the poor poor.<sup>19</sup> Thus, Zutlevics' argument would lack force if we are committed to paying a substantial fee for a kidney, and committed to doing so in the future, regardless of whether or not we are in a position to be able to offer less and still get all the organs we need.

Of course, Zutlevics would reject the empirical claim that rich countries would do what was necessary to prevent the rich from seeing poorer countries as mere resources. I do not need to challenge Zutlevics here. Indeed, I am quite sympathetic to these concerns.<sup>20</sup> My point is that the question of whether Zutlevics is right or not is, essentially, an *empirical* question. We cannot say that organ sales are exploitative (or promote exploitation), regardless of the details about price and conditions.

### **A new argument for the claim that some practices are exploitative regardless of the price paid**

Many of us wouldn't do our jobs (or indeed any job) if we didn't need to work in order to earn a wage, in order to live. Few think that it follows from *this* that workers are exploited. This is because we do not think that fairness requires it to be the case that a person should have the privilege of being able to avoid

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<sup>19</sup> Taylor also points out that this argument wouldn't count against the poor selling to the poor. "Autonomy, Constraining Options, and Organ Sales", p. 281.

<sup>20</sup> For those not sympathetic, see Leif Wenar's "Property Rights and the Resource Curse", *Philosophy & Public Affairs* 36, no. 1, 2008. See Taylor, James Stacey Taylor, "Autonomy, Constraining Options, and Organ Sales" in *Journal of Applied Philosophy*, Vol. 9, No. 3, 2002, p. 282 for Taylor's response, challenging Zutlevics.

working for a living, regardless of whether or not they have the money to finance this privilege. In contrast, it is not obviously absurd to think that a person should have the privilege of being able to hold on to both of their kidneys, regardless of whether or not they have the money to finance this privilege (though, presumably, those opposed to organ sales will not want to call it a privilege). Similarly, we might claim that fairness does require that I should be able to make a living without having to take my clothes off for people's entertainment. This is the first way in which we might think that cases like organ sales and stripping are special. I call this "the fairness claim."

In addition, there is another way in which a transaction can be contrasted with the more usual types of exploitation. Typically, A takes unfair advantage of B's lack of bargaining power in order to get a *better* deal – to pay less, for example. In the cases I am concerned with here, however, we might claim that A takes advantage of B's desperation in order to get a transaction *of any kind*, where there wouldn't have been a transaction *at all* if it wasn't for B's dire straits. As such, the details about the conditions and the price paid are not necessary in order to claim that someone is exploited in *this way*. I call this the "basic transaction claim".

To move from the claim that these acts are exploitative, to the claim that these acts should be prohibited, the points above would need to be reinforced by the claim that it is more important to protect the vulnerable than to allow others to do what they want – "the priority claim".

In short, those wanting to argue that organ sales are exploitative, regardless of the price or conditions, would appeal to these two claims.

1) The fairness claim

Selling an organ is quite different from selling one's labour: fairness *does* require that I should be able to retain all of my internal organs.

2) The *basic* transaction claim

A doesn't take advantage of his bargaining power in order to pay B less. Rather, A takes advantage of B's desperation simply in order to get a transaction *of any kind*.

And those who wanted to argue not only that organ sales would be exploitative, but also that they shouldn't be permitted, would also appeal to the third claim.

3) The priority claim

It is more important to protect the vulnerable than to allow others to do what they want.

For those who want to argue that organ sales are exploitative, and that this does justify prohibition, I think this may be the most fruitful approach. On this account, the exploitation isn't meant to be dependent on the details like the price. Thus, it is not clear that the usual arguments appealing to good regulation to ensure good conditions and a fair price will be a good response to this particular form of the objection to organ sales. If the claim is that I am exploited because you take advantage of my dire straits *just to get me to sell*, regulations requiring you to pay more miss the point.

As such, a new form of argument will be required to demonstrate that organ sales needn't be exploitative. We will need an argument that takes into

account the fact that the claim is not about the conditions or the pay. In the remainder of this paper, I provide two arguments. The second argument focuses on cases in which the basic transaction claim can be challenged, and the first argument focuses on cases in which it can't. Both arguments appeal to a contrast between the willing seller and the *reluctantly* willing seller – the reluctant seller for short.

## The willing seller and the reluctant seller

Imagine a future in which organ sales have been legalised in developed countries, a substantial fee is paid for a kidney (for example, the price of a kidney is *fixed* at a price equivalent to £50,000 today), and there is good healthcare.

Regarding the health risks, Goyal, Mehta, Schneiderman et al claim that, in contrast with those who had sold a kidney in India, “Persistent pain and decline in health status have *not* been reported in previous long-term follow-up of volunteer donors in developed countries.”<sup>21</sup> Similarly, the NHS website offering advice on organ donation states, “it is possible for a healthy person to lead a completely normal life with only one working kidney.”<sup>22</sup>

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<sup>21</sup> Goyal, Mehta, Schneiderman et al “Economic and Health Consequences of Selling a kidney in India”, p. 1592.

<sup>22</sup> <http://www.nhs.uk/Conditions/Organ-donation/Pages/Recommendations.aspx?url=Pages/what-is-it.aspx>. (Accessed 18.05.12.)



Assume therefore that, in the scenario we are imagining, health care is as good for sellers as it is for donors.

In a future like this, it seems likely that there would be a number of people who would consider this to be an attractive deal, and who would be willing to sell an organ, despite not being in dire need (on any plausible criteria).

They may simply see it as an attractive option, an option that is better than other available (and acceptable<sup>23</sup>) alternatives. If the amount paid is substantial, if the risks are minimal and the after care is good, and if it is true that one can live an ordinary life with just one kidney, then this would look like an attractive option to many.

I will call these people the willing sellers.

At the same time, however, there would (I stipulate) be others who, as long as they were not in dire need, would *not* be tempted by this and who would not *normally* sell an organ *at any price*.<sup>24</sup> They may, however, reconsider their willingness to sell if they fell into dire straits, such that they *needed* to sell an organ. I will call these people the reluctant sellers.

If this was the case, we would have to consider the possibility that it might be exploitative to buy an organ from the reluctant seller, but not exploitative to buy from the willing seller, even if both were offered the same deal. What should we say about this?

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<sup>23</sup> Acceptable in the sense that we don't think that people should have the privilege of being able to avoid these alternatives, regardless of whether or not they can afford to.

<sup>24</sup> Or would only sell for something closer to £10,000,000.

## The exploitation of strippers

Because this is not (currently) an issue in relation to organ sales, because organs cannot be sold legally for substantial amounts of money, this issue may be clearer in a context where the difference between the willing and the reluctant is, plausibly, a real issue: in the employment of strippers at strip clubs.

I will assume that some women working as strippers do so because they need<sup>25</sup> to, and that they wouldn't if they had other options available, but that others work as strippers not because they are desperate, or lack other options, but because they see it as an attractive option, and see it as an option that is better than other available (and acceptable) alternatives: perhaps they can work shorter hours and still earn more money (compared to other jobs available), or perhaps they find the work less tedious than other work.

If this is the case, it might be tempting to argue that it could be the case that one stripper is exploited and another isn't, even if they both work for the same wage and in the same conditions. Is this argument convincing?

Suppose for example that Peter has always wanted Susan to work for him, as a stripper. Whenever he approached her, however, she insisted that she wasn't interested, even though it paid more than her current job and the

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<sup>25</sup> In some vague, unspecified sense of "need". My arguments should not depend on the defence of one interpretation of "need" rather than another.

hours suited her better. One day, however, Peter hears that Susan has lost her job, and is struggling to find a new one. Straight away, he phones her and offers to give her a job, as a stripper. Even if we don't think that paying people to strip is *necessarily* exploitative, and even if we stipulate that he pays her a fair wage (and I will also stipulate that this is the same wage he was offering when he was trying to *entice* her into the job when she wasn't desperate), we might still think that he is exploiting her, in that he took unfair advantage of her misfortune in order to get her to work for him.

So the claim isn't that he used his bargaining power to get her to work for less than a fair wage. Rather, the claim is that he used his bargaining power to get her to work full-stop, doing something that she wouldn't otherwise do.

What should we say about this case? Is Peter exploiting Susan?

I think there are a couple of questions that could be illustrative here. First, were his actions exploitative, or merely unpleasant or insensitive? Contrast this case with another. Suppose Adam wants Lucy to work for his law firm, and offers her a very good wage and good working conditions, but she insists that – although it is her ideal job and she would love to take it – she is not interested as she is looking after her husband, who is very ill. One day, Adam hears that Lucy's husband has died. Adam phones her straight away to ask if she will now consider taking the job. Adam is opportunistic, unpleasant and insensitive, but it seems to me that he is not exploitative. If this is right, maybe we should say the same thing in the Peter case too. We can agree that he is opportunistic, unpleasant and insensitive, but we shouldn't be too quick to jump to the conclusion that he is also exploitative.

Consider Susan's case again but, this time, imagine there is a second strip club owner – Jim. He isn't opportunistic, unpleasant or insensitive. He doesn't approach Susan at all. She approaches him. Knowing her situation, Jim insists that Susan should think about it carefully, and ask herself if it really is what she wants. She insists that it is, and so he offers her the job.

Jim may be less insensitive than Peter, but it is not clear that he is less exploitative. In the absence of a good argument to the contrary, it seems most plausible to conclude either 1) that Peter exploits Susan *and* Jim *tries* to exploit Susan, or 2) that there is no exploitation (or attempted exploitation) in either case.

The second question that might shed light on this issue is: what could Peter do to avoid being exploitative? In a case where the exploitation involves offering less than a fair wage, the employer can simply offer a fair wage. Of course, *specifying* what a fair wage is may not be easy. In *broader terms*, however, the answer is simple: if he wants to avoid being exploitative, the employer simply has to pay more. In *this* case, however, it is not clear what fairness requires of Peter. It is not clear, for example, that fairness requires him to *refuse* to let Susan work for him. This is separate from the common argument that, if we intervene to prevent A from exploiting B, B will be made worse off by the removal of this option. In that case, there are two basic assumptions: first, that A should treat B fairly, offering to pay more, for example; second, that A will not do this. The argument, then, is that, even acknowledging that the transaction will be exploitative, any third party who could intervene should care more about the person's welfare than about ensuring that the person is not exploited. Here, on the other hand, the

question is, what can *Peter* do if he wants to treat Susan fairly and if he wants to avoid exploiting her? If there is nothing Peter can do that would be fairer than offering the job, it is not clear that why we should think he exploits her if he does offer her the job.

Again, this may be clearer if we isolate the exploitation, and ignore Peter's other unpleasant traits. Thus, it might be clearer if we consider this in relation to what Jim should do. In this case, it is far from clear that Jim is doing less than fairness requires by giving Susan the job, with a generous wage, instead of turning her away. As such, I want to deny the claim that it is possible for one person to be exploited, while another isn't, even though they are both offered the same deal in the same circumstances (where the only difference is that one person is willing and the other is reluctant).

## **Taking unfair advantage and taking advantage of an unfair situation**

Wertheimer makes a point of stressing that there is a difference between taking advantage of an unfair situation and taking *unfair* advantage of the unfair situation. Merely taking advantage of an unfair situation needn't be exploitative. Unless we put the emphasis on *taking unfair advantage* we will not be able to "distinguish exploitative profiteering from the normal and

unexploitative work of roofers, plumbers, automobile mechanics, appliance repairpersons, physicians and lawyers.”<sup>26</sup>

It may be unfair, for example, that Susan is in a position in which she feels that stripping is her only viable option. However, this claim is distinct from the claim that Jim exploits her if he offers her a job as a stripper.

## And back to organs

In the real world, now, (in contrast to the future imagined earlier) the distinction between willing sellers and reluctant sellers isn't a significant distinction in relation to organ sales, but this is only because of *contingent* facts: sales take place in an unregulated black market, little is paid for a person's organ, and the healthcare is so poor that selling an organ is not generally an attractive option, except to the very poor (and probably not even for them, if they were properly informed<sup>27</sup>).

If organ sales were legalised, however, and if a substantial fee was paid (£50,000 for example) and if the healthcare was good (and if we take seriously the claim that one can live a normal life with just one kidney), we could conclude that giving up a kidney needn't be a *very* significant cost. Consequently, I think we could, plausibly, be faced with a phenomenon very

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<sup>26</sup> Wertheimer, *Exploitation*. Princeton, NJ: Princeton University Press: 298.

<sup>27</sup> See Goyal, Mehta, Schneiderman et al in “Economic and Health Consequences of Selling a kidney in India”. *The Journal of the American Medical Association* 2002; 288 (13):1589-1593.

much like the one described above (in relation to stripping), with a mixture of willing sellers and reluctant sellers wanting to sell a kidney.

In the remainder of the paper, I will argue that, in this scenario, there is an even more conclusive argument against the claim that the reluctant seller is exploited. This is because this scenario differs in one significant way from the Peter and Susan case. Peter is particularly keen to have Susan work for him, and he takes advantage of her situation to get the deal he wants. In contrast, I will argue that, in the organ sales scenario, we can reject the basic transaction claim. In the circumstances described, it simply isn't true that A takes advantage of B's situation in order to get a transaction that wouldn't be possible otherwise.

## **You can't exploit someone without taking advantage of them**

Consider this in the context of the UK's National Health Service (NHS). Suppose, for argument's sake, that the NHS buys kidneys in order to give them out according to need. Suppose also that we could meet the need for kidneys solely by buying from the willing sellers. Without ever buying from a reluctant seller, we could meet the demand for kidneys and supply a new kidney to every patient on the waiting list.

If this was the case, we would *not need* the kidneys of the reluctant sellers. We have stipulated that the NHS would not be using the greater potential supply of organs in order to pay less for organs. The price is fixed. If

the NHS does not need to buy from the reluctant sellers, and if there would be no advantage in buying from the reluctant sellers, and if the NHS recognises this to be the case, we cannot reasonably accuse the NHS of exploiting the reluctant sellers. The NHS could buy only from the willing sellers, and not be disadvantaged in the slightest by not buying from the reluctant sellers.

If the NHS doesn't *need* to buy from the reluctant sellers, should it buy from them anyway? Would it be treating them unfairly if it *refused* to buy from them, or would it be exploiting them if it *did* buy from them?

This is crucial. If exploitation involves taking unfair advantage of someone, it follows that we cannot exploit someone (that is, we cannot take *unfair* advantage of them) if we don't take advantage of them *at all*. If A doesn't take advantage of B, the issue of whether they take *unfair* advantage doesn't even arise. It cannot be exploitation. That said, the conclusion could be that, while A doesn't take unfair advantage of B, A may still treat B unfairly. So the question of what A should do remains.

So why should we think it is appropriate for the NHS to buy from the reluctant sellers as well as the willing ones? One response might be to appeal to the *practical difficulties* of distinguishing between the two groups, but this response would be unsatisfactory because this would suggest that, *ideally*, the NHS should *not* buy from these people, but that we should just ignore this because distinguishing between the two types of people is too difficult.

I think we can provide a justification that is better than this and would justify buying from the reluctant sellers even if we could easily and infallibly



distinguish the willing from the reluctant. And that is simply that the reluctant sellers have *as much of a right* to sell as the willing sellers. Given that, in the circumstances, they *do want to sell* (albeit reluctantly), and given that we are also stipulating that they are being offered a fair price, that they are competent and have given (valid and informed) consent, it looks like it would be unfair to *prevent* them from selling.

### **Peter and Jim again**

This account might also allow us to make a distinction between Peter and Jim, in order to reconsider the possibility that Peter was trying to exploit Susan while Jim was not.

On the account above, Jim wasn't exploiting Susan. This is because he had no interest in employing the reluctant worker rather than the willing worker. From his point of view, he is happy to employ either. As such, if he offers Susan a job it is not because he is taking advantage of the fact that she is now available to work (when she wasn't before). Rather, it is because he thinks she has as much right to apply for the job as anyone else. If he is not taking advantage of her, he cannot be taking *unfair* advantage of her.

On the other hand, I have stipulated that (for whatever reason) Peter wants Susan in particular. As such, he *is* taking advantage of the fact that *this* reluctant worker is now in a situation that means that she may now be willing (albeit reluctantly) to work for him. He is taking advantage of her dire

straits to get something he couldn't get before. This then opens up the possibility that he could be exploiting her. He *is taking advantage* of her situation, so now there is the possibility that he is taking *unfair* advantage.

I am still inclined to argue that Peter is not exploiting Susan, for the reasons discussed earlier. However, unlike Jim, he cannot appeal to the argument above, so his case is less conclusive than Jim's. In the organ sales case I have described, the NHS is like Jim and not like Peter.

## A possible misunderstanding

Finally, I should address a possible misunderstanding. Take a paradigm example of exploitation. Consider for example the exploitation described in John Steinbeck's *The Grapes of Wrath*:

"This fella wants eight hundred men. So he prints up five thousand of them things an' maybe twenty thousand people sees 'em. An' maybe two-three thousand folks get movin' account a this here han'bill. Folks that's crazy with worry."

"But it doesn't make no sense!" Pa cried.

"Not till you see that fella that put out this here bill. You'll see him, or somebody that's workin' for him. You'll be campin' by a ditch, you an' fifty other families. An' he'll look in your tent, an' see if you got anything left to eat. An' if you got nothin', he says: "Wanna job?" An' you'll say: "I sure do, mister. I'll sure thank you for a chance to do some work."... Maybe he needs two hundred people, so he talks to five hundred, an' they tell other folks, an' when you get to the place, they's a thousand men. An' maybe half a men walk off. But they's still five hundred that's so goddamn hungry they'll work for nothin' but biscuits... The more fellas he can get, an' the hungrier, less he's gonna pay... Took two kids dead, took my wife dead to show me."<sup>28</sup>

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<sup>28</sup> John Steinbeck, *The Grapes of Wrath*, Mandarin, 1939, reprinted 1990, p. 221-2.

Perhaps the exploiters in this case could say, I am not taking advantage of *you*. I don't need *you*. I could use him, or her, or them. So I am not taking advantage of *you*. Therefore, I can't be taking *unfair* advantage of you. This argument, if it were offered, would be flawed. This situation is not like the case I have described, in which the NHS do not need the poor.

Superficially, there may be some similarity. In both cases, the buyer can say, I don't need to buy from *you*. There is also a clear difference though. In the exploitation of workers in *The Grapes of Wrath*, the exploiters take advantage of the *competition* for work – the reserve army of labour – in order to keep wages as low as possible. And, on any plausible account, the exploiters took advantage of the workers' desperation. *Whoever* he employs, he is taking unfair advantage of *that* person, taking unfair advantage of *that* person's lack of bargaining power in order to pay an unfair wage.

In contrast, if the NHS is committed to paying a generous sum for a kidney, and if they will pay this price regardless of the fact that they could – if they wanted – pay much less, then it clearly would not be taking advantage of the poor in the same way. If the price is fixed in this way, there is no advantage to be gained from having a reserve army of potential organ sellers. Thus, if buyers are committed to paying a substantial fee, even if they could use their superior bargaining power to pay less, Zutlevics argument will not be applicable.

## Conclusion

For those who intend to argue that certain trades or transactions are exploitative regardless of details regarding the conditions and the price paid, even in cases where the exploitation is mutually beneficial rather than harmful, I think the most fruitful approach would be to appeal to something like the three steps that I have referred to as:

- 1) The fairness claim
- 2) The *basic* transaction claim
- 3) The priority claim

Ultimately, however, I remain unconvinced by this argument, for a number of reasons.

In cases in which the buyer could get everything he wants, buying only from the willing seller such that he gains no advantage from buying from the reluctant seller, he doesn't take advantage of the reluctant seller *at all*. If the buyer isn't taking advantage of the seller, he can't be taking *unfair* advantage. And, I have argued, if the willing seller is not exploited, and if we should permit the willing seller to sell, then we should reach the same conclusions regarding the reluctant seller. The reluctant seller has the same right to sell as the willing seller.

In cases in which the buyer cannot get what he wants buying solely from the willing sellers (as in the Peter and Susan case), a different argument is required. In this case, the buyer *is* taking advantage of the seller's dire straits in order to get a transaction that he would not be able to get otherwise.

I have argued that, in these cases, the buyer would be taking advantage of an unfair situation, but not necessarily taking *unfair* advantage of the situation.

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