

## 12 The ethics of transactions in an unjust world

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### Introduction

The world is indisputably unjust and will remain so for the foreseeable future. No individual has the power to correct this injustice. For the vast majority of people, even if they do everything they can, the corrective change they will produce will be small. Individual agents must therefore interact with one another against a backdrop of injustice.

Individual transactions across national borders or between citizens of different states are increasingly common. These include straightforward trade in goods, but also trans-national hiring, medical tourism, international collaborative medical research, the sharing of biological samples and other uses of people's bodies. With these transactions, even in cases where all parties agree to arrangements that are expected to benefit all, there may be concerns about ethical violations. For example, in 2007, Indonesia stopped sharing H5N1 (avian flu) samples with the World Health Organization's Global Influenza Surveillance Network because it judged that its population was highly unlikely to get access to a vaccine in the event of a flu pandemic (Sedyaningsih *et al.* 2008). There have been multiple cases in which complaints have been raised about the uncompensated or under-compensated use of indigenous people's knowledge about their environment (Millum 2010). One of the central debates in international research ethics concerns the distribution of benefits and burdens when research is conducted in low- and middle-income countries (LMICs). It is widely believed that in order for such research to be ethical, benefits must accrue not just to research participants, but to the populations from which those participants are drawn (Emanuel 2008).

In this chapter I examine the ethics of benefit-sharing agreements between victims and beneficiaries of injustice in the context of trans-national bodily giving, selling and sharing.<sup>1</sup> Some obligations are the same no matter who the parties to a transaction are. Prohibitions on threats, fraud and harm apply universally and their application to transactions in unjust contexts is not disputed. I identify three sources of obligations that are affected by unjust background conditions. First, power disparities may illegitimately influence transactions in unintentional ways. Second, better-off individuals have duties

to ameliorate injustices. These are not specifically duties to those with whom they interact, though often it is easier and more effective to help those with whom one already interacts. Third, the power differentials created by injustice make exploitative transactions more likely. I summarize a transactional account of exploitation and argue that avoiding exploitation is usually easiest to achieve by ensuring that the more powerful party does not obtain an unfair share of the benefits from the transaction. The beneficiaries of a transaction do not have to be only those individuals directly involved in it. Indeed, in many cases it is thought that exploitation may be avoided by providing benefits to third parties. Working out when this is the case requires working out when a contribution or burden on another's behalf can count towards the avoidance of exploitation. I argue that it counts as such in two main cases: when the people in question are already involved in relationships of reciprocation, and when the individual making the contribution identifies with the interests of the other people.

The central examples I draw on in this chapter concern trans-national forms of exchange involving people's bodies. However, my conclusions apply equally to individuals transacting in any unjust institutional context, including within a single nation-state. I also mostly discuss the responsibilities of individual actors. However, this should not be taken to refer to just single, isolated people. Any entity that acts as one may count here, including corporations, ministries of health, families and so on.

### **Background injustice**

In claiming that the world is unjust I am making a claim about *distributive* justice. That is, I am making a claim about the way that institutions, broadly construed, distribute rights, duties and – most importantly for the cases I am interested in – resources.<sup>2</sup> These institutions include national governments, but also trans-national institutions, such as the United Nations and the World Trade Organization. The fact that there are institutions that greatly affect the distribution of resources internationally implies that the international order can be appraised to see if it is just. More or less all political philosophers – from cosmopolitans to statisticians – agree that there are principles of justice that apply globally.<sup>3</sup> The fact that more than three billion people live on less than US\$2.50 a day, while the 500 richest people are worth approximately US\$3.5 trillion is powerful evidence that the global order is in fact unjust (Shah 2013). I do not argue further for this claim here.

The transactions that generate particular ethical concern as a result of this injustice are those that take place between parties who are in different positions in the global order. We may be concerned, for example, when pharmaceutical companies transact with marginalized indigenous communities, or when rich high-income-country patients with kidney failure transact with very poor potential organ donors. Paradigmatically, then, we are concerned about interactions between two parties, in which some sort of exchange is proposed,

from which one or both parties stand to benefit, and in which the parties start from very unequal positions.<sup>4</sup> In general, we are also naturally more concerned with the wrongs that may be committed by the more powerful party, though, of course, all parties will have obligations.<sup>5</sup>

Wrongs can be committed within such transactions as a result of how the terms of the transaction – what is to be done and how the costs and benefits of doing so are to be distributed – are reached. For example, one person might get her way by presenting a credible threat to the other party and thereby coercing him. She might engage in deception about what benefits will accrue to him and thereby fraudulently set the terms. Or she might act negligently while doing what they agreed to and unjustifiably harm him. Both parties may have difficulty communicating and agreeing on mutually acceptable terms simply because of cultural, linguistic, or other impediments to a straightforward interaction. But all of these are problems that frequently arise independent of whether the actors involved are beneficiaries or victims of injustice. Although they require careful ethical analysis, they do not require it because of injustice.

Three ethical concerns may arise as a result of background injustice. First, when powerful actors interact with those who have little power, even if they do not use unethical means to influence the terms of a transaction, they may be perceived as doing so. For example, a doctor may not be threatening her patients when she asks them to participate in a clinical trial in which she is involved. However, a patient may have no other access to care, and may not feel empowered to insist on his rights; he may perceive a threat of abandonment, even if one does not exist. Such possibilities entail *pro tanto* duties on the parties to a transaction to make reasonable efforts to ensure that the transaction not only does not wrong people, but is not perceived as doing so. I do not think this is controversial. The real challenges in this regard do not require ethical analysis but are practical problems concerning how to fulfil this obligation in different cultural and socio-economic contexts. Second, those who are the beneficiaries of injustice, those who are more powerful and those who have more resources, may have greater duties to ameliorate injustice. It might be thought that these duties are owed to those with whom they transact. I consider this possibility in the next section. Finally, transactions can be fully consensual and mutually beneficial, and yet be exploitative. The power differentials created by injustice make exploitative transactions more likely. I examine at length how exploitation can be avoided in the latter part of the chapter.

### **The obligation to redress injustice**

The area of transitional theory that addresses the obligations of individuals to work towards justice is underdeveloped. However, it is plausible that moral agents who live under unjust social institutions have some obligations to make those institutions more just, especially if they are the beneficiaries of injustice.

It is also possible that outsiders to unjust social institutions have some, perhaps weaker, obligations to improve them. These obligations may be both negative – requiring non-interference with others who are working towards justice – and positive – requiring that the agent perform actions in order to improve her social institutions. They are likely to be *pro tanto* obligations, that is, obligations that can be outweighed by countervailing obligations and limited in how much they can demand of individual agents.

In order to work out whether such obligations affect the ethics of transactions, it is necessary to consider what grounds them. There are two plausible candidates. First, they might be grounded in a general duty of beneficence, such as the duty of rescue.<sup>6</sup> If this is correct, then there will be no additional duties that arise in virtue of interacting with the victims of injustice: duties of beneficence arise because of the extent of the needs of the beneficiary and the ability of the benefactor to provide a benefit, not because of any interaction between them. However, it may be that it is easier to provide benefits to people with whom one interacts. For example, a duty like the duty to rescue is more likely to be triggered when interacting with people who are likely to need rescuing. The fact that benefactor and (potential) victim are already interacting can dramatically lower the cost to the benefactor of providing the rescue. If a researcher collecting blood samples from a population is already screening them for HIV, the cost of contacting HIV-positive donors and referring them to a clinic is likely to be low. Such referral could therefore be an ethically required rescue. By contrast, there is not a rescue-based obligation to engage with such a population in the first place, just to ensure that those who are HIV-positive are identified and referred.<sup>7</sup>

Second, one may acquire duties in virtue of being part of an unjust system. In order to avoid complicity with injustice it might be necessary to do something to repair the injustice, even if you did not create it yourself (Malmqvist 2013). Someone who is the beneficiary of injustice, such as someone who receives more than her fair share of the gains of social cooperation, might have an obligation on the basis of restitution to help repair the system. Again, a prior interaction might make such repair or restitution easier. For example, a high-income-country scientist is better placed to upgrade the infrastructure and train technicians at a research site in a low-income country when she is actually collaborating with that site. Again, however, the duty would not be related to any interactions between the beneficiaries and victims of injustice. Such duties would stand even if they were otherwise isolated from one another.

It might be that it is possible to discharge one's duties to make the global order more just through benefiting those with whom one transacts. It might also be easier to benefit those with whom one transacts, which could trigger a duty to do so. However, the transaction is unconnected to the grounds for the obligation to repair injustice. Such obligations do not, therefore, seem likely to affect the ethics of transactions against a background of injustice.<sup>8</sup>

### **Exploitation and how to avoid it**

While our duties to repair injustice, arguably, do not depend on the individual transactions in which we are engaged, our duties to avoid exploitation do. According to Alan Wertheimer, one party to a transaction exploits another when she takes *unfair advantage* of him (Wertheimer 1996, 207). Suppose the local water supply is temporarily contaminated and only one, privately owned, well remains. Provided that there are no other sources of clean water, people will pay as much as they can afford for the water, since they need it to survive. If the owner of the well massively increases the price of water, then she will be taking advantage of the local population's need for her water. If we think that it is unfair to charge more for water just because the other supplies are contaminated then she will be taking unfair advantage of the local population, that is, she will be *exploiting* them.

Charges of exploitation are often raised against trans-national transactions. This was the complaint that Indonesia made to justify stopping sharing H5N1 samples – the government thought that they were contributing to a resource whose benefits were going to go to rich countries' citizens, but not to poor Indonesians. When the knowledge of the San people of southern Africa about the appetite-suppressing qualities of *hoodia* was used to develop products for the Western weight loss industry, one of the complaints of the San was that they should have the opportunity to benefit from the commercialization (Wynberg 2004). Their lack of access to the technology needed to commercialize *hoodia* and their open communication about its properties made them vulnerable to exploitation by better resourced and connected outsiders. When it is argued that clinical research in low- and middle-income countries ought to be "responsive" to the health needs of the local populations, the most plausible explanation of why people think this is that they think responsiveness can prevent research from being exploitative (CIOMS 2002, Guideline 10; Millum 2012b).

Social injustice frequently makes exploitation easier. Much of the time, the beneficiaries of injustice have greater bargaining power than the victims of injustice, as a consequence of the resulting disparities between them. Consider, for example, how economic disparities make exploitation more likely. Someone poor is likely to need a given amount of money much more than someone wealthy. She is therefore more likely to agree to terms that are unfair than he is. The wages and working conditions of sweatshops can result from these sorts of disparities. Given sufficient poverty in a population and surplus labour supply, people will agree to work in conditions that are clearly unfair, so long as they are still better off than they would be without the work.<sup>9</sup>

If exploitation occurs when one party takes unfair advantage of another, this suggests two ways in which exploitation can be prevented. The first is to equalize the power disparities between the parties that make it possible for one to take advantage of the other. If two people are roughly economically equal, have access to the same information and so on, then neither will be

able to make the other agree to an unfair distribution of benefits. This is one justification, for example, for allowing workers to form unions. The union has greater bargaining power than do individual workers and, normally, in heavily unionized industries it is not easy for an employer to take advantage of a surplus of workers to drive down the wages paid to each.

The other way to prevent exploitation is to ensure that the distribution of the benefits and burdens of the transaction is fair. If the benefits and burdens are distributed fairly, then it is not possible for the more powerful party to take *unfair* advantage of the vulnerable situation of the other.<sup>10</sup> Laws that set minimum wages or that make stipulations about the quality of working conditions can be understood as attempts to prevent unfair agreements about how the benefits and burdens of work should be distributed.<sup>11</sup> They therefore use this strategy to prevent the exploitation of workers.

Both ways to prevent exploitation face challenges in specifying what is meant by their normative terms. What does it mean for a distribution of benefits and burdens to be fair? There is no agreement on principles of fairness for transactions; rather, much of the time people rely on intuitive judgments (Wertheimer 1996, 207–246). What does it mean for two individuals to have equal power? Neither analytic philosophy nor the bioethics literature provide analyses of power that are easy to apply to the sorts of transactions with which this chapter is concerned.

However, the strategy of preventing exploitation by ensuring that the benefits and burdens of a transaction are fairly distributed has one clear advantage. When there is a difference in power between two parties, trying to equalize their power may be highly problematic. First, it may be very hard to achieve. For example, the privileges of being a Western scientist are not easily given up. Second, quite prudently given the unjust state of the world, people may not want to unilaterally relinquish their power. Third, the mutually beneficial transaction may rely on the advantages of the more powerful party. The Western scientist who renounces her position, ignores funding opportunities and refuses to use her contacts is likely to be of little use to a fellow scientist in an under-resourced institution in sub-Saharan Africa.

By contrast, it is often possible to make the terms of one's transactions fair without running into these problems. The Western scientist can keep her privileges, retain her connections and funding, and yet still work out a memorandum of understanding that ensures that her collaborators are fairly rewarded for their contributions to joint research projects.

### **Third party beneficiaries**

In science and medicine, the majority of the benefits of a project often return to people other than the particular individuals who contribute to it. For example, a disease surveillance programme that takes blood and saliva samples from patients is normally intended to benefit at least the local population, and could be crucial to preventing national or international outbreaks of

disease. Likewise, the primary function of medical research is to benefit future patients, not research participants themselves. Indeed, in both of these cases, there are sometimes projects that are not expected to benefit the majority contributors at all, but generate great benefits for other people. The surveillance programme may only have benefits for people who have not already been infected. The research may only result in new clinical interventions years after the participants have died from their disease. How can such projects avoid exploitation?

Notice, first, that the identity of the beneficiaries seems to matter greatly. In the cases I mentioned in the introduction, the complaints of exploitation were levelled at institutions and other actors from rich countries who were perceived as benefiting too much. Part of the grounds for the complaints was that a particular set of people would not benefit – poor Indonesians, patients in LMICs, indigenous populations. But this latter set of people is much larger than the set of people who directly contribute to the project. It was not all Indonesians who were contributing samples to the Global Influenza Surveillance Network. And it is not all members of a host community or nation who participate in a research study. This suggests that exploitation can sometimes be avoided by providing benefits to people who are not themselves parties to the transaction.

Which beneficiaries count? That is, when does a benefit to a third party count towards an assessment of whether the distribution of the burdens and benefits of a transaction is fair? Since the third parties are not themselves involved in the transaction, we must presumably count their interests as in some sense co-extensive with those of a party to the transaction. That party will be contributing to the project *on behalf of* these third parties (and they will, as it were, be benefiting on her behalf). We may distinguish two types of relationships in which this makes sense: *reciprocal relationships* and *relationships of identification*.

Reciprocal relationships occur when people repeatedly interact with each other in ways that provide benefits to both parties. In such cases, while the distribution of benefits and burdens within one transaction may be unequal and not reflect the parties' respective contributions, their transactions taken as a whole may not lead to an unfair distribution of benefits and burdens. For example, within a community, people may work with each other, lend money to each other, share resources, watch each other's children, manage common land, be governed by the same institutions, and so on. One person from the community taking on a burden to help others may reasonably expect reciprocal burdens to be taken on by the others at different times.

Reciprocal relationships need not even require the actual benefits and burdens between parties to balance out. Hypothetical contributions can count here, too, i.e. when one party *would* contribute to a social good or help another, were the occasion to arise. Such hypothetical acts are partly constitutive of some relationships, such as community membership and friendship. Friends not only do, but arguably should, perform favours for one another without

accounting. That one person does much more for her friend than he does for her does not imply any unfair treatment, provided that he would do the same for her under the right circumstances. The richer friend regularly pays for dinner, though the poorer one would do so if their circumstances were reversed. Everyone watches the game at the house of the person with the television, though each would host if she were the television owner instead.<sup>12</sup> Only when the opportunity for reciprocation arises and the purported friend fails to do his part is there cause for her to complain that he is not a true friend, or, pertinent to this discussion, that he was exploiting her friendship.

This idea about whose interests count makes sense of why benefits to a person's community or fellow citizens might prevent her from being exploited by an outsider. For example, as noted above, it is commonly thought that research in LMICs that is "responsive", that is, research that addresses an important health problem of the population from which research participants are drawn, is not exploitative. One explanation for this is that the members of the population that benefit are often part of a wider system of reciprocation. Research participants may contribute to the health of others in their community or society. But where others within that population also contribute in different ways, or even where they would contribute if the opportunity arose, the benefits of the research to this population may prevent it from being exploitative.<sup>13</sup>

Relationships of identification occur when someone regards the interests of another as though they were her own. For example, a parent might choose a benefit to her child over a benefit to herself without regarding it as a sacrifice. Spouses and close friends may find that their lives intertwine to the extent that the successes and losses they care about are as much the other person's as their own. In such cases, if the person involved in a transaction reasonably regards the interests in question as equivalent to her own interests, it seems reasonable for others to do so as well. Again, benefits to the other person could then be counted for the avoidance of exploitation.<sup>14</sup>

Reciprocal relationships and relationships of identification frequently coincide. We often interact for mutual benefit with those whom we care about and we naturally come to care about those with whom we beneficially interact. Thus we should expect overlap between these two cases in which benefits to a third party can count towards an assessment of the fairness of the terms of a transaction.

The foregoing analysis of when benefits to a third party can count towards an assessment of the fairness of the terms of a transaction fits well with many people's intuitive judgments about cases. For example, it explains why benefits to the communities from which research participants are drawn can prevent research from being exploitative, even if those communities are not themselves heavily involved in the research. And it correctly places beneficiaries like company shareholders, researchers whose careers are advanced by the research and wealthy patient groups on the other side of the scale. Research may be conducted on behalf of these beneficiaries. But they are not normally



the beneficiaries on behalf of whom research participants in LMICs take on burdens and contribute to generalizable knowledge. The benefits to these latter beneficiaries are the ones that must be balanced by benefits to the research participants (or those with whom the research participants have relationships of reciprocity or identification).<sup>15</sup>

### **Cautionary notes**

These conclusions about whose benefits count should be interpreted and implemented with caution. First, we should beware of exacerbating injustice. The fact that people are part of a social system, even one that they endorse, does not entail that their positions with respect to each other are (roughly) fair and thus that it is acceptable to ask one to take on burdens for the sake of another. There is always the risk that the less privileged members of a community will end up bearing burdens from which the more privileged members benefit, or the elite of a country will themselves exploit other members of the population. In general, we should be alert for unjust social structures that make certain people bear burdens for others, and wary of relying on the self-serving testimony of powerful people who claim to speak for others.

Second, whether or not we count a third party's interests depends on whether the person directly involved in the transaction agrees. In these situations, one party to the transaction is asking another to contribute or take on burdens *on behalf of* third parties. It may be that the second party declines to do so. The claim argued for in the previous section is not that the interests of others actually *are* the interests of the person directly involved in the transaction, just that it is acceptable to ask her to count them as such, for the purposes of analysing the transaction's fairness. For example, you cannot unilaterally decide to pay my brother for work I do and thereby claim to have given me a fair deal, even if I identify with his interests. I would have to agree to it.

The other side of this cautionary note is that the contributor's agreement to let certain benefits count is necessary but it is not sufficient for them actually to count for the purposes of assessing a transaction's fairness. With both reciprocal relationships and relationships of identification it is a matter of fact whether the relationship obtains. Whether or not the members of a community are in reciprocal relationships with one another depends on how they do and would help each other. Whether someone identifies with the interests of a distant relative depends on various facts about her relationship to him, her conception of herself and the significance that family has for her. Neither relationship can be created by a simple speech act, such as giving consent.

### **Conclusions**

People are rightly concerned about how to ethically transact with those who are victims of global injustice. I have identified three areas of possible concern: the existence of disparities may encourage the perception of wrongdoing,

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there may be duties to ameliorate injustice, and disparities between transacting parties make exploitation easier and therefore more likely. Analysis of this last category suggests that it is normally easier to ensure that the benefits and burdens of transactions are shared fairly than to eliminate the power disparities that make it possible for some to take advantage of others. Fair distributions of benefits and burdens can be achieved through the provision of benefits more widely than just to the parties directly involved in a transaction. In particular, it can be helpful to conceptualize the burdens or contributions someone assumes or makes as being on behalf of others. This explains why benefits to community members, fellow disease sufferers or co-nationals can have ethical significance.

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### **Notes**

- 1 Strictly speaking, both parties could be victims of injustice, since I am concerned with any case in which there are significant unjust disparities between the transacting parties. For ease of expression, I continue to describe one as the beneficiary and one as the victim.
- 2 Compare Rawls (1971, 7).
- 3 For a brief overview see Millum (2012a, 20–24).
- 4 The extension to more than two parties should not throw up any additional ethical concerns, though it may generate additional coordination problems.
- 5 Throughout I describe the party who is more advantaged as the more powerful party. However, this is a simplification. Not only is the concept of power multi-faceted, but the relative power of two individuals is highly sensitive to context. The relative power of a rich tourist in Brazil and a poor slum dweller will change depending on whether the tourist is at his hotel bar or lost in a favela. Likewise, considered as a dyad, a healthy poor person with a kidney to sell may have more power than her rich potential buyer, who urgently needs a transplant. But if there are many people willing to sell their kidneys this power dynamic may reverse. Thanks to Alan Wertheimer for this point.
- 6 An alternative to the duty to rescue might be something like the second original position posited by Rawls, which he argues leads to a duty on peoples to assist burdened societies (Rawls 1999, 105–113).
- 7 For an example worked through at greater length see Merritt *et al.* (2010).
- 8 Similar conclusions have been reached regarding the source of obligations to research participants and host communities. See, e.g., Hughes (2014), and for a contrary view London (2005).

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- 9 I do not mean to imply that all sweatshop labour is freely chosen, only that it can be freely chosen and yet still be exploitative.
- 10 Article 1 of the Convention on Biological Diversity states: “The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” (UN 1992). The requirement for “fair and equitable” benefit-sharing thus writes into the Convention how benefits should be allocated – albeit at a rather abstract level – rather than relying on free, individual negotiations to decide allocations at a case-by-case level.
- 11 It does not follow that they are successful in doing so – an improvement in the terms of a contract may still not bring the contracting parties to the level of being fairly treated.
- 12 The rules of friendship are, at least partly, a product of culture. These examples are simply meant to illustrate the existence of conceptions of reciprocal relationships that are familiar from other areas of people’s lives.
- 13 Cf. Millum (2012b) which draws an analogy with how research is (ideally) incorporated into health systems for the benefit of all. Compare the analysis given by Hughes (2012), who argues that it is not justifiable for researchers to ask research participants in LMICs to take on substantial net risks in order to benefit patients in high-income countries. However, he argues that it is permissible to ask such participants to take on substantial net risks to benefit people in their own socio-economic class (or those worse off than they are). Note that Hughes is interested in when it is appropriate to ask people to act altruistically, rather than with how to analyse the fairness of a distribution of benefits.
- 14 One interesting question concerns how these benefits are to be counted. Someone might, for example, identify much more with the interests of her spouse or child than with her co-nationals. A precise reckoning might analyse this by discounting for more distant relationships. Such precision is outside the bounds of this chapter.
- 15 There are some interesting grey cases that are illuminated by this analysis. Patients with the same disease may feel solidarity with one another. Such solidarity might constitute an appropriate justification for asking some of them to take on burdens, such as through research participation, for the benefit of others, even if they have no other connection. Similarly, poor populations in different countries might reasonably take on burdens and make contributions on each other’s behalves when it would be inappropriate to ask them to do so for more advantaged groups.

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