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Conceptualism by Any Other Name ...

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I. INTRODUCTION

Attitudes towards critical legal thought seem to be changing. When the Conference on Critical Legal Studies first came on the legal scene in the 1970s, it was the "bad boy" of legal scholarship. Critical legal theory's sharpest critics characterized it as pure critique, as containing no substance of its own but instead merely delighting in the deconstruction of prevailing modes of legal analysis. In short, they saw it as not a theory at all; it was pure nihilism.[1] Failing to see the political assumptions that informed their own work, these writers viewed critical theory as the exact opposite of scholarship: as biased and self-interested instead of neutral, advocacy instead of analysis, political diatribe instead of legal reasoning. In short, many law professors saw it as a discourse *outside* the academy, not of it. Nevertheless, I would argue that at the beginning CLS actually *reinforced* the legitimacy of mainstream legal thought,[2] providing the foil against which such thought could define itself, the "other" in a self-other binary.[3] If critical theory was nihilist, biased,

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1. *See, e.g.*, Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-7 (1984).

2. It is always hazardous to generalize about the views of a large and diverse group of people, such as "mainstream" law professors. Moreover, most law professors are rather atheoretical (if not antitheoretical) in their orientation. (Many were trained by legal realists and have taken from that experience a commitment to empiricism and a profound skepticism about grand theory; others identify with the practicing bar and are dismissive (if not suspicious) of "ivory tower" thinking that seems to have little relevance to the world of practice.) Nevertheless, I would argue that there are definite similarities among most law professors' ideas of how to "do" law. Those ideas tend to be composed of an amalgam of jurisprudential influences, including: a realist-styled emphasis on social science and policy analysis, a process theory focus on institutional roles, an enduring formalist commitment to the basic (even if not complete) objectivity and determinacy of language, and a liberal belief in the essential neutrality of law (evinced through distinctions such as process/substance, facts/beliefs, and law/politics, as well as in the use of supposedly apolitical balancing tests). It is this set of characteristics that I envision when I use the term, "mainstream legal thought."

3. Of course, this is not unusual. Many recent writers have discussed how the dominant term in any hierarchical relationship needs the other term to define itself. For a particularly trenchant articulation of such an analysis, see EDWARD W. SAID, CULTURE AND IMPERIALISM (1994). At one point Said quotes Sartre: "[T]he European has only been able to become a man through creating slaves and monsters." *Id.* at 197 (quoting Jean Paul Sartre, *Preface* to FRANTZ FANON, THE WRETCHED OF THE EARTH 7, 26 (1968)); *see also*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 68 (1991).

destructive and totalitarian, then mainstream legal theory must be positive, neutral, constructive and liberating.[4] As long as critical theory was seen as pure critique, mainstream theorists could continue to maintain that they, in contrast, were doing neutral "legal reasoning" (whether they saw the neutrality as coming from doctrinal or from policy analysis). By viewing CLS as not a legitimate legal theory at all, they could avoid acknowledging the substantive assumptions implicit within their own analyses.

Of course, instead of seeing critical legal thought as pure critique, mainstream legal thinkers could have viewed it as presenting an alternative set of substantive political preferences upon which to found a legal system—as articulating, for instance, a preference for the community over the individual, for substantive over formalist definitions of justice, for participatory over authoritarian legal structures, for human values over property values, for contextual over abstract legal rules, and the like. However, to see CLS in this way would have required mainstream legal thinkers not only to recognize the substantivity of their own approach, but also to concede that the debate between themselves and critical scholars was a debate between equally rational, alternative paradigms that were founded upon differing *political* preferences about the ordering of society. Such an admission would, of course, have fundamentally challenged the assumption that mainstream legal analysis was based on logic, not substantive political judgments. It was easier, therefore—and indeed useful—to simply dismiss CLS as irresponsible rowdyism.

But times have changed. At least in terms of institutional presence, CLS is much more accepted now. Most law schools feel the need to have at least one self-proclaimed "Crit" on their faculty; many panels at conferences include one or more among the presenters; the newer textbooks frequently cite to critical authors in the notes and textual material they present;[5] jurisprudential surveys invariably include critical theories in their lists. While such representation is often mere tokenism, it is still undeniable that many have come to see critical legal thought as a legitimate approach to legal theorizing.

As a result, one would expect a crisis in confidence to be occurring within mainstream legal scholarship. That is, it would seem that recognition of the value of critical theory would necessarily bring with it a concomitant crisis of legitimacy for mainstream thinking. One would expect, in other words, to see the entire landscape of legal scholarship changing, to see the foundations of mainstream legal theory shaking, to see new paradigms overtaking the field—or, perhaps, a disintegrative splintering of scholarship into a plethora of approaches, as has happened in other academic fields. And, indeed, on the

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4. *See, e.g.*, Carrington, *supra* note 1, at 227. I realize that, in drawing a contrast between CLS and mainstream legal theory here, I am ignoring a plethora of other jurisprudential schools of thought, from process theory to law and society to feminist theory, queer theory, and critical race theory. But if one had to reduce all of the various developments in legal theory during the second half of the 20th century down to two major trends, I would argue that CLS and mainstream legal theory best capture the contemporary jurisprudential landscape. Most identity-politics-related theories (critical race theory, feminism, etc.) have close affinities with CLS (despite their forceful disagreements on particular points) and law and economics is arguably just a pseudoscientific take on the liberal legal constructs that undergird mainstream theorizing.

5. *See, e.g.*, JAMES A. HENDERSON ET AL., THE TORTS PROCESS (4th ed. 1994).

margins this splintering is exactly what *is* happening. *Within* progressive legal scholarship there has been a luxurious growth of offshoots: queer theory, intersectionality, feminism, critical race theory, etc. But all of this has taken place only on the edges of the academic world, while mainstream legal thought remains essentially unchanged, sailing on placidly like a huge ship oblivious to the sharks sniping at its bows.

Now, it is not unimportant that critical theory has become an accepted mode of legal analysis. No longer the "bad boy" of the academy, today it is seen as a legitimate choice in the smorgasbord of jurisprudential offerings. For those who recognize the value of working within the system, this new inside (if still not insider) status brings a certain satisfaction. From the inside one can affect hiring, rules structure and policies, institutional publications, and the like. But there is also something very troubling about being inside, about the notion that one can choose between CLS and law and economics, or feminism and utilitarianism, in the same way that one chooses between Crest and Pepsodent, chocolate and vanilla. Like its predecessor, critical realism, critical legal theory risks being merely absorbed into liberal legal thinking, its insights reduced to window-dressing—a set of flat and simplified assertions to which one pays brief obeisance before continuing on with one's analysis, but which do not change that analysis in any fundamental way. In the past, mainstream legal theory (and the larger liberal ideology of which it is a part) reduced the threat posed by critical knowledges such as CLS by rejecting their contributions as illegitimate obstructionism. Today, it continues to reduce the threat of CLS, but in a subtler way—by absorbing it through reformist adjustments to the existing system.[6] Moving from outside to inside might thus be merely a phyrric victory—a move from exclusion to domestication.[7]

It is from the perspective of these observations that I find it interesting and elucidating to examine the two articles by Alan Wertheimer in this issue—both of which were presented at the symposium on Choice and Coercion for which this article was written.[8] Although Professor Wertheimer is a political philosopher, not a legal theorist, I believe that his papers may provide us with a valuable window into the interaction between theoretical perspectives within our own discipline, and may indirectly illustrate the domesticating dynamic with which I am concerned here.

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6. Political discourse in the United States is arguably still in the first stage of outright rejection. Thus, this country, in contrast to Europe, lacks an established socialist political presence, still viewing left political critique as destructive and un-American, rather than as an alternative—and equally legitimate (even to those who disagree with it)—political perspective. Presumably, inclusion of the left within the world of legitimate activity would have mixed results in the political arena, just as (I will argue) it has had in law.

7. On the domestication of legal realism, see generally Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

8. Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997) [hereinafter Wertheimer, *Commercial Surrogacy*]; Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889 (1997) [hereinafter Wertheimer, *Remarks*]. Professor Wertheimer has written extensively on subjects relevant to the symposium topic. *See, e.g.*, ALAN WERTHEIMER, COERCION (1972); ALAN WERTHEIMER, EXPLOITATION (1996). However, given the space limitations of this commentary on his symposium presentations, I will confine myself here to those presentations and will not discuss his other work.

When I first began reading Wertheimer's work in preparation for my role as commentator at this symposium, I attempted, as one always does, to categorize his analysis. What type of theorist was he? How was he approaching the material? Indeed the papers presented at the symposium, especially the one on exploitation, seemed to invite such categorization, by explicitly addressing the issue of methodology. As I understood Wertheimer's description of his own approach, he meant to eschew conceptualism in favor of something different, which he termed "moral" or "normative" analysis.[9] But as the argument proceeded, I became confused, for Wertheimer's "moral" analysis seemed in fact to be very abstract, categorical, and deductive—in short, it seemed decidedly conceptual. Thus, I will argue here that Wertheimer's analysis is an example of a domesticating use of anti-conceptualist theory. While he seems to have heeded the critique of abstract analytics, he ultimately succumbs to it, presenting an analysis that, because of its anticonceptualist window-dressing, appears at first reading to be something that it is not.

What this suggests is that it is important in our own field of legal academics to be wary of similar tendencies. In his purported rejection of conceptualism, Wertheimer of course stakes out a position that is consistent with critical legal theory (and legal realism before it). Yet, like generations of liberal legal scholars who have claimed to heed antiformalist arguments only to produce the same old conceptual analyses in new garb,[10] Wertheimer reveals himself to be (assumedly not intentionally) a wolf in sheep's clothing. As such, his analysis attests to the resilience of conceptualism (and/or, perhaps, of liberal ideology), and suggests that recently expressed scholarly receptivity to critical arguments does not necessarily presage conceptualism's downfall. Thus, while it may be encouraging to Crits and other progressive legal academics to see our colleagues apparently listening to what we have to say, it is important that we not to be so grateful for the open ear that we fail to criticize incomplete or domesticating uses of our work.

Professor Wertheimer's articles provide a useful context in which to explore this problem of domestication, for, although he is a political philosopher, he is writing here about a subject near and dear to mainstream legal categories of thought: coercion.[11] Moreover, he discusses the concepts of exploitation and coercion in the context of a number of hypothetical situations that are exactly like the questions law professors love to pose in classroom discussion, situations involving such things as offers to buy organs from poor people, exorbitant charges for sea rescues, sales of lifesaving drugs at high prices, etc.

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9. As I will discuss further in Part III.A, Wertheimer does not completely reject conceptualism, but rather conceives of it as having a limited, preliminary, definitional role in his analysis. As I will also discuss further, he clearly does not see the conceptual aspects as controlling the conclusions he reaches. *See infra*, Part III.A.

10. While legal thinkers often claim to have escaped conceptualism, they continually fall prey to its appeal. Thus, process theory has been shown to be fundamentally formalist, *see* Gary Peller, *Neutral Principles in the 1950s*, 21 MICH. J. LEGAL REFORM 561, 617-19 (1988), as has law and economics. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

11. His focus is actually on distinguishing coercion from a different phenomenon, which he calls exploitation.

In addition, as I will discuss in more detail later, the assumptions informing Professor Wertheimer's analysis of these types of situations are the same assumptions that underlie most mainstream legal approaches to such questions. Thus, his articles for this symposium provide fertile ground for an exploration of the ways in which mainstream legal analysis might domesticate critical legal theory.

The following discussion focuses on Professor Wertheimer's discussion of the issue of contract parenthood, or surrogacy.[12] Just as Wertheimer's purpose in discussing surrogacy is to highlight his analysis of the concepts of coercion and exploitation, so my purpose here will be to use the contract parenthood issue as a vehicle for exploring the nature of the underlying analytical approach that Wertheimer takes to his subject matter. Thus, while I will be saying many things about surrogacy contracts, articulating a fully-developed position on the legality or desirability of such arrangements will not be my goal. My central point is that, while Wertheimer presents his analysis as a "normative" approach that relies only minimally upon conceptual reasoning, he ultimately reproduces the very mode of analysis that characterizes the perspective he is attempting to escape.

II. OVERVIEW OF WERTHEIMER'S ANALYSIS OF SURROGACY

Professor Wertheimer's analysis of surrogacy takes off from his broader conceptualization of coercion and exploitation. For Wertheimer, coercion relates to problems in the *formation* of a contract between two parties. In contrast, exploitation refers to problems in the *substance* of the agreement reached, such as unfairness in the pricing arrangement (the price paid by the buyer for a good or service is too high or the compensation received by the seller is too low[13]) or inappropriateness of the subject matter (the subject of the contract is something that "should not be exchanged for money"[14]). I will refer to the first type of exploitation as reflecting the "just price" concern and the second type as reflecting the "commodification" concern. Whereas Wertheimer apparently believes that *coercive* contracts should not be enforced, he contends that *exploitative* agreements are acceptable unless they harm the offeree.[15] Thus, what he calls "mutually advantageous exploitation"—contracts that benefit the offeree but nevertheless violate either just

12. I prefer the term "contract parenthood," since "surrogacy" implies the illegitimacy of the biological (or gestational) mother's connection to the child. Nevertheless, since "surrogacy" is so widely used, I will employ that term as well.

13. Wertheimer, *Remarks*, *supra* note 8, at 897. According to Wertheimer, however, this does *not* mean that any transaction in which the parties did not gain roughly equally would be exploitative. He does not explain how some contract prices could be determined to be too low or high if not by comparing the benefits obtained by both sides. Instead, he renders the exploitation question irrelevant, by *assuming* that surrogacy contracts are exploitative and by arguing that, even if they are, they are still enforceable as long as they benefit both parties. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1220-21.

14. Wertheimer, *Remarks*, *supra* note 8, at 898.

15. "We do not need to be moral rocket scientists to argue that harmful exploitation may be legitimately prohibited by the state or that coerced agreements are neither morally nor legally binding." *Id.* at 897.

price or commodification concerns—should be legal.[16]

Applying this conceptual framework to surrogacy, Wertheimer begins with the assumption that such contracts *are* exploitative, and thus turns immediately to the question of whether they're mutually advantageous. Here he first considers "nonmoral" harm, asking whether the tangible benefits the surrogate receives from a surrogacy arrangement outweigh the disadvantages of the contract for her. He concludes that, although it is difficult to say definitively whether the benefits outweigh the costs,[17] even if they don't that problem can be simply solved by paying the surrogate more money.[18] Discussions of surrogacy often fail to consider that option, Wertheimer continues, because of fear of the "moral" harm of surrogacy. It is under the category of moral harm that he addresses the commodification concern.

Rather than considering the impact that the commodification of reproduction might have on the condition of women as a group, Wertheimer confines his discussion at this point to the impact surrogacy has on the actual women who agree to be surrogates.[19] Defining the harm of commodification quite narrowly, he essentially treats it as a loss of respect—either of one's self or of others.[20] He then dismisses this concern, expressing doubt as to whether either the surrogate herself or others in society in fact lose respect for her and concluding that, even if they do, "it is not clear that [such loss of respect] represents a basis for condemning the practice [of surrogacy] rather than a basis for condemning society's reaction" to it.[21] Thus, for Wertheimer, surrogacy is probably advantageous to the surrogate, because it causes her neither

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16. Wertheimer, *Commercial Surrogacy, supra* note 8, at 1224. Where surrogacy creates moral harm,

> there are reasons . . . to prefer a political regime that does not regard such wrongness as a sufficient justification for invoking the coercive powers of the state.
>
> . . . .
>
> If surrogacy is a case of mutually advantageous and consensual exploitation, then it certainly does not follow that . . . we should prohibit A from exploiting B.

Id.

17. *Id.* at 1217. "In view of our limited factual knowledge and unresolved theoretical controversies over what counts as objective harm, I am inclined to think that we should now remain agnostic." *Id.* at 1217-18.

18. *Id.* at 1218. "If we are operating in the territory of the surrogate's nonmoral interests, I think it is entirely possible, nay inevitable, that a sufficiently large increase in compensation would convert a net harm into a net benefit for many women." *Id.*

19. Wertheimer recognizes that his limited inquiry into whether commodification makes the contracts exploitative does not end the discussion: "Commodification may better be understood as a basis for thinking that surrogacy is wrong for reasons unrelated to the interests of the surrogate and, therefore, unrelated to worries about exploitation of the surrogate." *Id.* at 1220. But when he returns to those reasons, they do not prevent him from concluding that surrogacy should be legal. *See infra*, text accompanying notes 68-72.

20. For a much richer conceptualization of the harm that commodification of reproductive functions can produce, see Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1880-81 (1987).

> To speak of personal attributes as fungible objects—alienable 'goods'—is intuitively wrong. . . We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object. Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.

Id. at 1880-81.

21. Wertheimer, *Commercial Surrogacy, supra* note 8, at 1219.

nonmoral nor moral harm.[22]

According to Wertheimer, such a "mutually advantageous" contract should be allowed, even if it is unfair to the surrogate. Even "if surrogacy is wrong and exploitative because it commodifies that which should not be commodified, it does not follow that surrogacy should be prohibited or that surrogacy contracts should not be enforceable."[23] For Wertheimer, exploita-

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22. I must admit that the structure of Wertheimer's argument is a bit confusing to me here. It is unclear which of two alternative arguments he means to be presenting. First, he could be differentiating between the question of whether a contract is exploitative and the question of whether it is harmful. Under that approach, his analysis would look like this:

Exploitation		Harmfulness	
unjust price? or commodification?	) if yes, contract is exploitative; if no, it's not	nonmoral harm? or moral harm?	) if yes, it's harmful exploitation; if no, it's mutually adv exploitation

The problem with this way of setting up the analysis is that the concept of mutually advantageous exploitation becomes difficult to comprehend. How can an agreement involve either an unjust price or commodification and yet not be harmful to either party? In some contexts, the answer seems easy. If you sell me a glass of water in the desert for a million dollars, I'm still better off than I would be without it, because without it I'd be dead. The contract, while exploitative ($1,000,000 is an unjust price for a glass of water (or is it, if it's in the desert?)), is still mutually advantageous (being alive is better than being dead). But in other contexts, and specifically in surrogacy, the distinction between exploitation and harmfulness loses its coherence. How do we know that an unjust price has been paid for surrogacy services? How do we know whether a surrogate is better off being a surrogate than she would have been had that option not been available? The only way to judge both exploitativeness and harmfulness is to measure the benefits to her against the costs; the two inquiries collapse into one.

Alternatively, it could be that Wertheimer in fact intended to collapse the two inquiries together, in which case his analysis would look like this:

Exploitation	
nonmoral harm (unjust price)? or moral harm (commodification)?	) if yes, then harmful exploitation;) if no, then mutually advantageous) exploitation

Under this approach, however, the concept of exploitation loses all of its substantive content. An arrangement is seen as mutually advantageous exploitation whenever it involves neither moral nor nonmoral harm. But there is no indication of why, in such circumstances, it should still be considered to constitute exploitation at all. The exploitation label loses all significance, and Wertheimer's argument reduces to the contention that beneficial contracts should not be prohibited, a rather uncontroversial point. Because I assume that Wertheimer is meaning to say more than that, I am assuming that the first interpretation is the correct one.

However, an additional comment that Wertheimer makes in his paper suggests that the second interpretation might actually be what he intends. At one point Wertheimer acknowledges, and in fact makes light of, the absence of a definition of exploitation in his paper, noting that, if someone contests his view that a contract can be both exploitative and mutually advantageous, such agreements can instead be called "cases of mexploitation or shmexploitation or whatever. I am interested in the moral character of certain sorts of transactions and relationships, whatever we want to call them." Wertheimer, *Remarks, supra* note 8, at 898-99. Thus, he seems to be saying that he *intends* for the concept of exploitation to be in some sense extraneous to his analysis. Under his formulation, then, the fighting issue is apparently whether the agreement is harmful. Yet Wertheimer treats that question very conceptually, citing little empirical evidence and aiming most of his discussion at a very abstract, general level. Nor does Wertheimer ultimately explain why it is necessary to address the notion of exploitation at all if it is in fact irrelevant to his analysis.

23. Wertheimer, *Commercial Surrogacy, supra* note 8, at 1220.

tion does not justify banning surrogacy so long as the practice is beneficial to the surrogate. "[T]he surrogate may be exploited even if surrogacy provides a net benefit to her. On the other hand, if the compensation is (or could be made) adequate, then we will have to conclude that the surrogate is not (or would not be) *exploited*, whatever else we may want to say about surrogacy."[24] Apparently, then, just price trumps commodification; if the amount paid is large enough, the arrangement cannot be exploitative, regardless of its commodification effects. Whatever disrespect the surrogate might feel can be salved with money.

Regardless of whether surrogacy is considered exploitative, Wertheimer nevertheless believes that "[i]t will be easier to justify the prohibition or nonenforcement of surrogacy agreements if they are nonconsensual."[25] He believes absence of consent is not likely to be a problem, however, for "[o]n any standard account of coercion, surrogacy is simply not coercive."[26] The offer made to a surrogate is a "positive good"[27] because it confers a benefit on her and does not propose to make her worse off if she refuses it. Moreover, any sense of compulsion that she might experience due to the circumstances in which she finds herself—such as a need for money or a lack of employment options—does not render the contract coercive because those conditions are not produced by the offeror. Relying here on an individualist notion of citizens' responsibilities of the sort that critical scholars often critique, Wertheimer asserts that the intended parents have no obligation to correct the unequal background conditions that might cause a surrogate to accept a "nonrefusable offer"—an offer that anyone in her situation would rationally choose to accept. In such situations, the surrogate should be allowed to choose between the two evils with which she is presented.[28]

Having concluded that most surrogacy contracts are mutually advantageous and therefore should probably not be prohibited even if exploitative, Wertheimer considers whether, as an alternative to banning these arrangements, the government should instead regulate the amount paid to the surrogate. However, he concludes that is not necessary either, arguing that a potential surrogate is likely to be in a strong negotiating position vis-a-vis the intended parents and that any restrictions that discouraged surrogacy would unacceptably infringe upon the autonomy of women who desire to be surrogates. Moreover, even if the surrogacy contract itself could be seen as violative of a woman's freedom, "it remains an open question whether the right to choose not to be positively or truly free is itself a crucial dimension of one's autonomy."[29]

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24. *Id.* at 1221.
25. *Id.*
26. *Id.* at 1222.
27. *Id.* at 1223.
28. *Id.* In contrast to situations where background conditions influence the surrogate's decision, if her decision is instead the product of "cognitive error"—a miscalculation as to the effect that surrogacy will have on her life—Wertheimer *is* willing to consider her consent involuntary. *Id.* For Wertheimer, then, it appears that irrational or unperceptive women might be deserving of protection, although powerless women are not. He ultimately leaves the question open, however.
29. *Id.* at 1225 (cites omitted).

Finally, Wertheimer returns to the question of the impact of contract parenthood arrangements on society as a whole—a "justice" concern which he dismisses rather quickly. First, Wertheimer reiterates his point that societal, as opposed to individual, effects of surrogacy have nothing to do with exploitation as he defines it. Second, he asserts that, since prohibition of surrogacy would burden "the least well-off" women to benefit others, it is hard to justify.[30] Finally, citing an absence of empirical evidence to indicate that surrogacy would reinforce existing inequalities, Wertheimer concludes that the practice should not be prohibited.

III. A CRITIQUE OF WERTHEIMER'S ANALYSIS

In his attempt to avoid a conceptualist analysis, Professor Wertheimer commits the same error as do those who domesticate critical legal thought. His alternative approach reveals a very narrow conception of what is wrong with the type of thinking that critical realists and Crits have consistently attacked. Apparently viewing abstract, categorical reasoning as the primary flaw in conceptualist analyses, he ignores the critical argument that such analyses are necessarily grounded upon challengeable, but nevertheless invisible, *substantive* assumptions. Rather than appreciating the more radical implications of the critical realist attack on formalism, he domesticates that attack, reducing it to little more than a call to empiricism.

I will limit my comments on Professor Wertheimer's analysis to three points. First, as stated above, although Wertheimer dismisses conceptualist analysis, in founding his argument upon an elaborate web of abstractions and an essentialist view of the individual legal subject, he ultimately reproduces the metaphysical approach he purports to reject. Second, like his conceptualism, Wertheimer's summary conclusion that negative liberty is the only type of liberty to consider here reflects a conceptual framework typical of mainstream legal thought and sharply criticized by the Crits. In endorsing an abstract, decontextualized notion of human liberty, Wertheimer uses as formalistic an argument as that found in *Lochner v. New York*,[31] the anticonceptualists' favorite whipping boy. Yet his anticonceptualist gloss makes his analysis seem less dated than it really is. Third, Wertheimer's assertion that background conditions are irrelevant to the enforceability of surrogacy agreements ignores the constitutive role of law in creating those background conditions and thus contributing to the individual choices that respond to them. This argument, too, adds little to traditional mainstream legal takes on such issues. Throughout, Wertheimer's argument reproduces, rather than escapes, an individualist, conceptual, and formalist approach to questions of coercion, exploitation, and surrogacy.

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30. *Id.* at 1228.
31. 198 U.S. 45 (1905).

A. *Normative in Name Only*

Professor Wertheimer describes his approach to exploitation as a "normative" or "moralized" approach, emphasizing that "[t]he questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis."[32] He continues:

> I do not deny that it is possible to produce a morally neutral or empirical account of coercion . . . . I do maintain that if we were to operate with a morally neutral account of coercion, we would have to go on to ask whether that sort of coercion renders B's agreement invalid and that we will be unable to answer that question without introducing substantive moral arguments.[33]

Thus, regardless of whether the moral inquiry is imported at the definitional level—the determination of "what counts"[34] as coercion or exploitation—or at the justification level—the determination of when coercion or exploitation is justified—it cannot be avoided.[35]

In his articles for this Symposium, Wertheimer seems to mean to limit himself to discussion of the definitional side of the equation, explaining that such conceptual analysis is not completely useless, but must be supplemented at some point by moral inquiry. "The concepts of coercion and exploitation," he argues, "provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that."[36] Thus, at the same time that Wertheimer rejects conceptual analysis as inadequate, he endorses it as useful. And, at the same time that he labels his own approach as normative, he grounds it upon a definitional, conceptual bottom. Wertheimer apparently believes that conceptual and normative approaches can coexist, and sees no contradiction in trying to combine them as he does.[37] But I will argue here that the definitional side of

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32. Wertheimer, *Remarks*, *supra* note 8, at 890.

33. *Id.* at 892.

34. *Id.* at 890.

35. The two questions that Wertheimer applies to coercion seem to apply to exploitation as well, and his discussion of surrogacy reflects a similar bifurcation between definitional and justificatory questions, so I am treating his *methodological* approaches to coercion and exploitation as the same.

36. *Id.* at 890.

37. It is unclear to me exactly what Wertheimer means by "normative" analysis or "substantive moral arguments," but it seems likely that he does not mean the same thing that critical legal scholars mean when they talk about the moral or value-based element in law. The latter mean to be referring to the *irreducibly political* nature of legal decisionmaking, to the fact that the manipulability of legal doctrine means that judicial decisions are based not on the rules but on substantive visions of how society should be structured and substantive assumptions about the nature of existing social relations. Wertheimer probably does not intend to go that far. In any event, what is important for present purposes is that he clearly intends to be contrasting normative with conceptual; he clearly believes that purely conceptual analysis is inadequate to the task of resolving problems involving human choices. And, like mainstream theorists who make allusions to critical insights in their own work, he seems to believe that conceptualism and anticonceptualism can peace-

his argument, the importance of which he minimizes, is actually central to his approach. Like many legal theorists who have tried to respond to critical critiques of conceptualism, Wertheimer ultimately fails at the task he sets for himself. Despite his protestations to the contrary, the analytics ultimately drive the analysis.

1. What Counts as Mutually Advantageous Exploitation is What Counts, Period

As I described above, how surrogacy is categorized determines Wertheimer's assessment of how it ought to be treated. Wertheimer thinks exploitation that produces *nonmoral* harm to the surrogate should perhaps be restricted, that *morally* harmful exploitation is a harder case, and that *mutually advantageous* and consensual exploitation should probably not be prohibited at all.[38] Thus, for Wertheimer, the categorization of a type of exploitation determines its treatment. Once he has decided that surrogacy constitutes mutually advantageous exploitation, his position on regulation is a foregone conclusion. Although Wertheimer distinguishes between definitional and justificatory inquiries, and emphasizes that either one or the other must include moral analysis, his conceptual approach to defining types of exploitation becomes the tail that wags the dog, leaving no room for a moralized account.

In setting out his overall approach to analyzing coercion and exploitation, Wertheimer clearly sees the definitional inquiry as separate from and unrelated to the justificatory questions.[39] He thinks it is possible to decide how to define concepts such as coercion and exploitation without considering the results of those definitions. He treats the definitional and justificatory questions separately and notes that the former "are much less important than they first seem,"[40] because they do not tell us whether to prohibit or allow certain agreements. Moreover, Wertheimer believes as well that it is possible to proceed from the definitional questions to a moral analysis of how a practice ought to be treated, without having the previously-engaged-in definitional analysis determine one's moral results.

Yet, by separating the definitional from the justificatory questions

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fully coexist.

38. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

39. As noted earlier, he states:

> The concepts of coercion and exploitation provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that. The questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than by conceptual analysis.

Wertheimer, *Remarks*, *supra* note 8, at 890.

40. *Id.*

in this way, Wertheimer has painted himself into a box. If the question of whether a particular agreement ought to be seen as coercive or exploitative really has no practical ramifications—if it cannot tell us whether the agreement ought to be regulated or banned—then it is hard to see why one should care *what* the agreement is called. We could call it "coercive," "exploitative," "mutually advantageous," "meditative," or "car wax," and it would make no difference whatsoever to any conclusions we might draw about its legitimacy. If the definitional inquiry is not tied to justificatory questions it is pure metaphysics (fine for a philosopher, perhaps, but rather unsatisfying for a lawyer).[41]

On the other hand, if we attempt to tie the definitional question to the justificatory one—as Wertheimer does in basing the treatment of a contract on its categorization—then we face a different problem. That is, it is impossible to decide what counts as coercion or exploitation (or mutual advantage) without knowing how coercive or exploitative (or mutually advantageous) agreements will be treated. The definition of a concept necessarily turns on the *purpose* for which we are defining it. To draw on the well-known realist example of this point:[42] The definition of what constitutes a *vehicle* under an ordinance prohibiting vehicles in the park will depend upon whether the ordinance is designed to prevent noise pollution (a war monument with a truck on it will be OK), assure pedestrian safety (golf carts might be OK), or reduce air pollution (electric cars will be OK). In other words, Wertheimer has set up a false dichotomy between definitions and impacts. That is, it is arguably impossible to define coercion without reference to what one is attempting to accomplish with the concept. Similarly, it is arguably impossible to decide when a coercive practice should be prohibited without knowing *what* exactly we mean by coercive. Thus, once Wertheimer tells us that, under his scheme, mutually advantageous exploitation will probably not be prohibited, the response to the question of whether surrogacy constitutes mutually advantageous exploitation resolves as well the question of whether surrogacy should be prohibited. They are two ways of asking the same thing. The conceptual analysis that (in Wertheimer's terms) does no more than organize the issues in fact resolves them, leaving no room for moral argument. The question of what counts as mutually advantageous exploitation is what

41. This may, of course, be a problem of paradigm differences. *See generally* Catherine Kemp, *The Uses of Abstraction: Remarks on Interdisciplinary Efforts in Law and Philosophy*, 74 DENV. U. L. REV. 877 (1997). Professor Wertheimer is a political philosopher; I am an attorney. Political philosophy invites the exploration of knotty metaphysical problems for the edification that such exploration provides; law requires concrete answers. I would suggest instead, however, that there is a flaw in Wertheimer's argument. If exploitation is irrelevant to his analysis, then it should have been excluded.

42. *See* Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 633 (1958).

counts, period.

2. Conceptualism and Consent

In addressing the voluntariness of surrogacy agreements, Professor Wertheimer again raises both a definition question and a justification question, and again fails in his effort to keep the two separate. He emphasizes that the label "coercive" means nothing, but he simultaneously sets up his analysis so that it means everything.

Wertheimer states that our labeling of a surrogate's contract as consented or coerced will not resolve the substantive moral question of whether it ought to be prohibited. "Whatever label we use to describe her choice, we must still decide whether she should be allowed to make such a choice. And referring to such choices as 'coerced' will not resolve that substantive moral question."[43] Here Wertheimer sounds very much as if he believes that terms like *rights*, *duress*, and *coercion* should not be understood metaphysically and that conceptual reasoning relying upon such terms cannot be the basis for judicial conclusions—points that critical scholars frequently make as well. But he nevertheless ultimately resorts to an approach to coercion that is just as formalistic as his approach to exploitation, ignoring his earlier indictment of the question-begging nature of such analyses.

Consent is important in two places in Wertheimer's surrogacy article. First, he notes that, while consensual exploitation is possible, it is nevertheless easier to justify prohibiting surrogacy contracts if they are nonconsensual—that is, involuntary.[44] Second, he states that, even if a surrogacy contract could be said to have violated the woman's rights (for example, her right not to have her reproductive labor commodified), her consent eliminates any concern we should have for such a violation. To Wertheimer, the answer to the question, "Was the surrogate's consent coerced?," directly affects how the contract should be treated.

Despite having expressed skepticism about the validity of the enterprise, Wertheimer does not hesitate to label surrogacy voluntary: "On any standard account of coercion, surrogacy is simply not coercive."[45] This is because coercing someone means threatening to make her worse off if she does not accept one's offer. Since the intended parents do not propose to make the surrogate worse off were she to refuse their offer to pay her for bearing them a child, their offer is not coercive. Moreover, any situational factors that might make the offer

43. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

44. *Id.* at 1221. Wertheimer also asserts, more definitively, that coerced agreements should not be legally binding.

45. *Id.* at 1222.

"nonrefusable"—difficult to pass up—are irrelevant, because they are not caused by the intended parents. In such situations, "it is arguable that it is the background conditions that are the problem and not the offer that allows [the surrogate] to improve on those background conditions. The offer is still a positive good."[46] Even if the surrogate has been forced by circumstances to agree to sell her reproductive capacity, she has not been "coerced" because the parties with whom she has contracted are not responsible for those circumstances. Thus, Wertheimer concludes, "the intended parents' proposal is an offer, and offers do not coerce."[47]

Just as Wertheimer's attempt to combine a conceptual definition of exploitation with a normative argument as to when it is justified collapses under its own weight, so here the inquiry into voluntariness ultimately determines the question of enforceability. A surrogacy contract is enforceable, Wertheimer says, only if it is freely entered into. Yet his inquiry into consent is extremely conceptualist, with definition piled upon definition. Treating the presence or absence of coercion as a question susceptible of logical determination, he ignores the moral/political choices involved in the selection of a definition. And since, under Wertheimer's schema, how coercion is defined determines how the surrogacy contract is to be treated, this flawed conceptual analysis becomes the central determinant of the outcome; the normative element is rendered irrelevant.[48]

In separating out his conceptual analysis from a subsequent normative inquiry, Wertheimer not only fails to see that the conceptual analysis will affect what follows, but also erroneously assumes that by saving the normative dimension for later he can assure the viability of the conceptual part. But Wertheimer's focus here on whether one of the parties to the contract has affirmatively acted to harm the other party, and his treatment of the background conditions as irrelevant, is itself a value choice—a substantive preference for an individualist, rights-based inquiry over, for example, a more community-focused perspective that emphasizes, say, fiduciary duties and security instead of self-protection and autonomy.[49] While it may be that this is what Wertheimer means

46. *Id.* at 1223.

47. *Id.* at 1222.

48. Compare, for example, Albert Alschuler's take on coercion: "Most lawyers have known for a long time that the term coercion cannot be defined, that judges place this label on results for many diverse reasons, and that the word coercion metamorphoses remarkably with the factual circumstances in which legal actors press it into service." Albert Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 957 (1997). While some of Wertheimer's language suggests that he adopts a similar view, the details of his analysis suggest otherwise. For him, the conceptual inquiry into definition determines the supposedly normative conclusion about application.

49. *See, e.g.*, Leslie Bender, *A Lawyer's Primer of Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

by the normative element in his analysis, that seems unlikely, for he neither articulates the basis of that value choice nor defends it in any way. Rather, it seems more likely that he simply fails to see the substantive political content residing within what he perceives to be the initial, purely conceptual, side of his analysis.

Like the legal scholars who treat conceptual and anticonceptual approaches as equally viable alternatives, Wertheimer here retains a faith in conceptualism that reveals a failure to comprehend the corrosiveness of the critique that has been directed against it. Thus, rather than fully abandon conceptualism, he tries to redeem it by combining it with a separate "normative" analysis. But this pluralist approach domesticates the anticonceptualist critique and, as a result, fails to escape reliance upon a set of formalist abstractions.

B. *Decommodification and Positive Freedom*

In addition to mislabeling his analysis as anticonceptualist, Wertheimer also relies upon many of the substantive assumptions for which conceptual thinkers, at least in law, have been repeatedly criticized. In particular, his narrow conceptualization of the autonomy interests at stake and his implicit reliance upon the public/private dichotomy are both analytical moves that have characterized formalist legal thought since the mid-19th century. Yet Wertheimer's rejection of conceptualism apparently does not extend to these elements. Like many legal theorists who thought the realists' main contribution was to reveal that legal thinking was divorced from modern social realities, Wertheimer seems to be centrally concerned with the need to tie analyses of issues like surrogacy to concrete, empirical information. But, just as many legal theorists who focused on empiricism failed to appreciate the indeterminacy arguments of the critical realists, so here Wertheimer has taken only a small piece of the modern critique of formalism into his analysis, leaving much just as it was before. By thus domesticating the progressive critique, he opens himself up to repeating many of the flaws of conceptual analysis.

Wertheimer sees surrogacy as presenting a choice-of-two-evils type of situation. If the woman would be worse off without being a surrogate, then we should not presume to prevent her from choosing that option, even if surrogacy causes her some harm. "If a woman can reasonably regard surrogacy as improving her overall welfare given that society has unjustly limited her options, it is arguable that it would be adding insult to injury to deny her that opportunity."[50] By assuming

50. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

that governmental interference with such private choice is illegitimate, Wertheimer ignores the fact that a number of practices are considered sufficiently harmful to justify prohibition precisely *to prevent* individual actors from choosing them. Thus, the pressing question about surrogacy is, in a sense, whether a surrogate *can* reasonably regard the contract as beneficial to her—or whether we want, instead, to say as a matter of law that it is not. While it is certainly possible to argue that surrogacy is sufficiently harmful to justify prohibition,[51] Wertheimer's argument precludes that discussion by focusing on the question of government intervention and narrowly defining the harm of surrogacy.

Wertheimer fails to consider, for example, the wide variety of choice-of-evil situations in which we prohibit a choice that would arguably benefit someone because we decide that the harm that it would do, both to that individual and to society at large, is of a type that we simply do not wish to incur. That harm might come, in fact, precisely from one's being required to make the decision to engage in dehumanizing behavior that no rational person in one's position would resist. As Wertheimer himself acknowledges, in limiting his conception of harm to the surrogate to *negative* liberty, he precludes the conclusion that her *positive* liberty will actually be served by banning or regulating such contracts.

Yet the law has clearly recognized that decommodification—restraints on people's economic choices (on what can be exchanged in the market)—is sometimes necessary to truly protect people's freedom. And an entire set of legal rules is premised upon the assumption that "[t]here are . . . some things that money cannot buy."[52] We do not allow people to enter into contracts of slavery, to sell their organs, to agree to work in substandard industrial workplaces or for less than the minimum wage, to live in housing that fails to meet the housing code, etc. At least in some circumstances, we have answered the question Wertheimer poses, as to whether autonomy necessarily includes "the right to choose not to be positively or truly free,"[53] with a resounding "No." Sometimes, as John Stuart Mill so aptly put it, such exercises of negative liberty "defeat[] . . . the very purpose which is the justification of allowing" the exercise of freedom to begin with.[54] And Roscoe Pound, commenting on Mill's quote, adds, "[This principle] applies to any situation where a person by contract imposes substantial restraints upon his liberty. Freedom to impose

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51. For an excellent articulation of that argument, see Radin, *supra* note 20, at 1921, 1928-33.

52. *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988).

53. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1225 (cites omitted).

54. John Stuart Mill, *Liberty*, ch. V (discussing selling oneself into slavery) (cited in Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484 (1909)).

these restraints, in the hands of the weak and necessitous, defeats the very end of liberty."[55]

Now, obviously, there are many choices of evils that we allow people to make. In fact, we usually do not worry at all about the coercive effect of market exchanges. Thus, we allow people to decide to work in toxic workplaces, to labor a grueling number of hours each week (with overtime pay or not, depending upon one's profession), to work for companies that provide neither day care nor health insurance, etc. The crucial question to address, therefore, is whether one can articulate a principled basis for decommodifying certain types of transactions but not others. Why should I be prevented from selling myself into slavery but not from deciding to be a surrogate? What is it about the *harm* of slavery that makes it categorically different from surrogacy? If we do not consider the harm of commodifying human beings through slavery to be remediable by payment of a sufficiently large amount of money, should we consider the harm of commodifying human reproductive capacities through surrogacy to be? Questions like these have been thoughtfully addressed by a number of legal scholars, most notably Margaret Radin.[56] Wertheimer's analysis, in failing to raise them at all, is unsatisfying and incomplete.[57]

In addition, in limiting his notion of autonomy to negative liberty, Wertheimer implicitly assumes that illegitimate governmental action is limited to affirmative interference in the surrogate's decisions, rather than including as well the failure to assure that the circumstances in which she makes such decisions are adequate. In short, his position on negative liberty relates to his argument that unjust background conditions are irrelevant to the status of a surrogacy arrangement. My critique of that argument is the focus of the next section.

C. *Bringing the Background to the Foreground*

1. Background Conditions and the Social Good: Wertheimer on Individual and Society

a. *Background Conditions and Nonrefusable Offers*

At several points in his article, Wertheimer asserts that the social or economic conditions under which a woman decides to be a surrogate

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55. Pound, *supra* note 54, at 484.

56. *See* Radin, *supra* note 20, at 1928-33.

57. My point here is not that Wertheimer needed to engage in a lengthy discussion of such questions in this symposium, for I realize that he was using surrogacy primarily as a vehicle for exploring his concept of exploitation. The problem is rather that his approach—including his cramped definition of harm—allows one to analyze the question of surrogacy without ever having to acknowledge the *importance* of these questions.

are irrelevant to his analysis. First, in considering nonrefusable offers, he argues that the fact that background conditions may have caused the woman to accept an offer she otherwise would have refused does not render her decision involuntary.[58] Wertheimer acknowledges the critical challenge to conceptualist notions of choice, commenting that, "[i]t may be argued that when background conditions provide an inadequate range of opportunities, the moral quality or significance of one's choice is diminished."[59] But he adds that this can be so "even if the background conditions do not compromise the 'voluntariness' of the choice, strictly speaking."[60] Moreover, he proceeds to dismiss the voluntariness concern in the surrogacy context, asserting that, regardless of any unjust background conditions, the contractual father's offer is still a "positive good" because it allows the surrogate to improve her welfare over the situation in which society has placed her.[61] Thus, he contends, a woman who finds herself in difficult background conditions should not be prohibited from making the rational decision to sign a surrogacy contract. "[I]t would be adding insult to injury," he asserts, "to deny her that opportunity."[62]

b. *Societal Attitudes and Commodification*

Similarly, Wertheimer is not willing to use societal reactions to surrogacy as a reason for prohibiting it. In discussing whether the commodification of surrogates' reproductive capacities harms them,[63] he suggests that, because surrogacy might be regarded by some as "immoral" (on the grounds that "it is wrong to commodify procreational labor"[64]), a woman who engages in this practice might be "degraded" in her own eyes or those of others.[65] Because such loss of respect comes from "the way surrogacy is regarded by the society,"[66] however, "it is not clear that it represents a basis for condemning the practice

58. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1222.

59. *Id.* at 1223.

60. *Id.*

61. Wertheimer also emphasizes that whether we *label* the surrogate's consent coerced is irrelevant anyway, since the coercion question cannot be resolved without substantive moral analysis. As discussed above, however, he never offers that analysis, and the question of coercion turns out to be crucial to his ultimate conclusions, for he clearly asserts that nonconsensual surrogacy contracts should probably not be enforced. *Id.* at 1221.

62. *Id.* at 1223.

63. Wertheimer does subsequently discuss whether surrogacy harms women as a group, concluding that it does not. *See infra*, text accompanying note 71.

64. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219.

65. *Id.* For a critique of Wertheimer's rather limited definition of commodification, see *supra* note 20 and accompanying text.

66. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219. For a discussion of other, arguably more plausible, societal attitudes that could affect surrogates, see *infra*, text accompanying notes 73-81.

rather than a basis for condemning society's reaction."[67] Attitudinal, as well as economic, background conditions are simply irrelevant to the legitimacy of surrogacy contracts.

c. *Social Good and the Individual*

For Wertheimer, societal attitudes are not only an insufficient reason for concluding that surrogacy unacceptably commodifies women, but are also an inadequate basis upon which to conclude that surrogacy is unjust. He contends that, because its unjust effects on women as a group or on society at large are counterbalanced by the positive effects for the individual surrogate, contract parenthood ought not to be prohibited.

Wertheimer describes three possible bases for concluding that contract parenthood arrangements are unjust: because they "instantiate unjust distributions," because they "instantiate[] highly asymmetrical and unjust personal relations," and because they have "harmful effects on women as a class."[68] As to the first, he concludes that concern about the distributive effects of such contracts does not justify state intervention in the individual's decision to enter into one. The question, he says, is "whether society can justifiably prevent [the surrogate] from participating in such a transaction on the grounds that it is unjust. And it is not clear that it can."[69]

In addressing the second type of justice concern, asymmetrical and unjust personal relations, Wertheimer again focuses on whether the government can override the choices of the individual: "[I]t is hard to see why such transactions should be prohibited on the grounds that the relation is unjust—at least if the welfare of the potential surrogate is the focus of our concern."[70] As to the third concern, the effect on women as a group—arguably the most relevant to issues of the relationship between the individual and the society—Wertheimer objects, as noted above,[71] that prohibiting surrogacy would burden a small group of women (those who would like to be surrogates) at the expense of a larger group of women (presumably women in general). Appar-

67. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219.

68. *Id.* at 1227.

69. *Id.*

70. *Id.* It might be objected here that, because Wertheimer is using the surrogacy issue as a vehicle for exploring and developing his concept of exploitation, his focus on the individual is appropriate—and does not necessarily indicate an unwillingness to consider other non-individualist bases for prohibiting surrogacy. However, to the extent that he addresses the ultimate prohibition question, and includes in his analysis questions such as the impact of surrogacy on women as a group, he clearly means to go beyond the development of his exploitation thesis. And, to the extent that he treats the exploitation question as determinative, which he seems to do at points, see *supra*, text accompanying notes 38-42, he leaves himself open to the criticism leveled here.

71. *See supra* note 30 and accompanying text.

ently, Wertheimer grounds this argument on the assumption that the impact of any such group-wide harm on surrogates themselves is outweighed by the benefits to them (otherwise they wouldn't be burdened by the prohibition at all.) He never explicitly states the basis of this conclusion, however. Perhaps he believes that his discussion of "disrespect" of the surrogate adequately resolves the question, but, since that discussion fails to consider the broad range of possible dehumanizing effects that commodification could have on women (beyond loss of respect), it is unconvincing.[72]

It is interesting to note the rhetorical impact of Wertheimer's concern for surrogates' interests. By suggesting that those interests ought not to be sacrificed for the benefit of a larger group, he invokes an image of the need to protect minorities—a concern for the little guy. But the irony, of course, is that the commodification concern that many writers have articulated relates directly to the status of women who are likely to choose to be surrogates. That is, it is precisely the women who have limited economic resources and hence might choose earning money through surrogacy whose reproductive capacities are most susceptible to being seen as a means to individual or societal ends. Moreover, by conceptualizing the problem in this way, Wertheimer portrays the issue as representing a sort of battle of the interest groups—pitting the self-interest of potential surrogates against the self-interest of women unlikely to be surrogates. In so doing, he ignores the general *societal* interest in assuring that people are not treated in dehumanizing ways and that harmful gender roles are not reinforced. Rather than thinking about the common good in more organic terms, he reduces it to the preferences of discrete groups.

Wertheimer's analyses of nonrefusable offers, commodification, and what he calls "justice concerns" reveal a classic liberal individualist approach to the surrogacy issue—an approach which frames the question as concerning the relationship between the state and the individual and assumes that legal rules regulating the contracts do not and should not implicate broader societal concerns. For Wertheimer, it is illegitimate for legal rules to burden individuals in order to improve the community at large. He assumes a radical disjunction between the individual, the state, and the society: individual choices and societal attitudes neither are nor should be affected by law; the role of the state is to facilitate private freedom, not to change the conditions under which that freedom is exercised, and the common good is determined by political struggle among interest groups. As the next subsection will argue, in rejecting conceptualism, Wertheimer has not moved the ball

72. *See* Radin, *supra* note 20.

very far beyond 19th century formalist analysis. He ignores the more corrosive aspects of the critical challenge to conceptualism.

2. Choices, Background Conditions, and the Essentialized Legal Subject: Wertheimer Criticized

Ignoring the extent to which surrogates' decisions are socially constructed, as well as the role of law in that process, Wertheimer precludes the recognition of society's, and the legal system's, responsibility for any harm that such arrangements might cause surrogates, as well as any meaningful discussion of the broader societal impact of the practice. In conceptualizing economic conditions, societal attitudes, and individual women's choices as part of a private world in which law does not and should not interfere, he employs essentially the same conception of the relationship between society and the individual as is employed by many mainstream legal thinkers, the public/private dichotomy. Like them, he rejects conceptualism while retaining the central organizing structures that characterize much of formalist thinking in law.

Wertheimer asserts that the intended parents who sign a surrogacy contract have no obligation to repair the unjust background conditions that induce the surrogate to agree to its terms. But this argument fails to recognize that the invalidation of such contracts would not constitute an illegitimate governmental intervention in the relationship between two private actors. The legal system is implicated in the existence of those background conditions; they are often, themselves, the product of law. Thus, invalidation of the contracts is merely a change in the *already existing* regulatory system, not a *turn to* regulation where there has previously been none.

Consider, for example, the surrogate's choice to bear a child for an infertile couple, which many such women make because they want to "give the gift of life" to others.[73] (Wertheimer appears to allude to such altruistic impulses when he mentions the "psychological gratification"[74] that surrogates get from the practice.) Why do such women find giving this type of gift gratifying? If it makes them feel like good people, why does it? To the extent that these women are also motivated to use surrogacy as a way to earn money, why does the "job" of bearing children appeal to them? It doesn't take an expert on gender relations to notice that both altruism and motherhood (not to mention *selfless* motherhood) are central components of the idealized image of womanhood that has been imposed upon women in this society for

73. *See In re* Baby M, 537 A.2d, at 1236.
74. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1217.

generations.[75]

But my point here is not merely that societal attitudes contribute to surrogates' choices.[76] What is important for my argument is rather the role that law has played in constructing those societal attitudes. Legal culture, by treating the ideal woman as a creature of the domestic sphere of children and home and not the public sphere of politics and work, has helped to create and reinforce the societal attitudes that likely contribute to women's decisions to become surrogates. Legal rules such as those that prohibited or discouraged women from being trustees of estates[77] or serving as jurors[78] or continuing to work when pregnant[79] prevented both privileged and outsider women[80] from entering or staying in the public sphere and, by establishing a domestic ideal of womanhood, stigmatized those women who continued, whether by choice or by necessity, to work outside the home. Thus, law is implicated in the societal attitudes that may make the altruistic aspects of surrogacy appealing to some women. Similarly, judicial rulings that justify the legal regulation of women's reproductive functions on the grounds that it furthers the societal interest in producing babies[81] legitimate instrumental uses of women's bodies and may thereby make it easier for women themselves to see their reproductive capacities as vehicles for the realization of others' objectives.

Moreover, even if the main appeal of surrogacy is economic, rather

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75. While not all women have been stereotyped in accordance with this image—privileged women have been seen as vulnerable, altruistic, etc, while low income women and women of color have not—all of them have been *subjected* to it, in the sense that it has been held up as an ideal against which all are measured.

76. Nor do I mean to suggest that surrogates' decisions are *determined* by social forces. Clearly, individuals themselves make their own choices within the decisional universe constructed by the surrounding society. And clearly, the relationship between agency and environment is an extraordinarily complex one. *See generally* Kathryn Abrams, *Sex Wars Redux: Agency & Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995). (A statement by Karl Marx best captures, to my mind, the complexity (and truth, if you will) of the relation: A wage worker, he says, is a "man who is compelled to sell himself of his own free will." KARL MARX, CAPITAL VOL.1 766 (1967) (*quoted in* Jeffrey Reiman, *The Marxian Critique of Criminal Justice*, in RADICAL PHILOSOPHY OF LAW 119 (David S. Caudill & Steven Jay Gold, eds., 1995)). My only point here is that Wertheimer fails to recognize this fact, and as a result, produces a cramped and ultimately unelucidating discussion of the surrogacy issue.

77. *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (overturning statute that gave preference to men over women to serve as trustees of estates).

78. *See* Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (upholding statute that excluded women from jury duty).

79. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1984-85).

80. I use the term "privileged women" to refer to upper- and middle-income white women, and "outsider women" to refer to low income white women and women of color of all socioeconomic classes. *See* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 495 (1993) (developing these terms more fully).

81. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 873-77 (1992) (holding that the right to reproductive autonomy is not violated by state policies explicitly aimed at encouraging women to have children).

than attitudinal, law still affects women's choices to enter such contracts. As has been frequently pointed out, wealth distribution is greatly affected by governmental policies, both directly (through tax laws, for example) and indirectly (through property law, family law, criminal law, comparable worth law, workplace regulation, and the like).[82] The unjust background conditions that Wertheimer sees as irrelevant to the legitimacy of the surrogacy arrangement are themselves the product of legal regulation of society. Even the infertile couple's infertility, as well as their felt need to surmount it through surrogacy, are not disconnected from legal rules and policies.[83]

Thus, to ban surrogacy would not necessarily be to make the intended contractual parents repair the surrogate's unjust background conditions, as Wertheimer suggests. Such a ban would not necessarily constitute governmental imposition on the infertile couple of an obligation to protect surrogates from harmful choices. To see it that way is to assume that both contracting parties exist in a self-created, extra-legal condition, and that the surrogacy ban inserts governmental action to change that otherwise purely private condition. Yet, in recent years, critical legal scholars have thoroughly dismantled this vision of the relationship between private freedom and public power[84] (not to mention the earlier challenges by the realists[85]). As Frances Olsen has pointed out, "[T]he terms 'intervention' and 'nonintervention' are largely meaningless . . . and as general principles, 'intervention' and 'nonintervention' are indeterminate . . . . As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so."[86] For this reason, a law that prohibited surrogacy need not necessarily be seen as the imposition of a governmental burden on those

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82. In the surrogacy context, for example:

> From a legally enforced regime of private property that makes most people's survival depend on wage labor, to a publicly structured wage system that fails to give equal pay to women for work of comparable worth to that performed by men, to a definition of wage labor ... that excludes domestic work in one's home, the law establishes a background that severely constrains women's economic power and choices.

Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Contexts*, 41 DEPAUL L. REV. 1369, 1386 n.62 (1992) (reviewing CARMEL A. SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989)).

83. Causes of infertility that can be affected by legal policies include sexually transmitted diseases, workplace hazards such as chemicals and radiation, and unconsented sterilization. Moreover, law's role in elevating biological kinship reinforces the notion that infertility is a tragedy. *See* SHALEV, *supra* note 82, at 76-77; Ehrenreich, *supra* note 82, at 1386-87.

84. *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

85. *See, e.g.*, Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

86. Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835-36 (1985).

citizens who desire to participate in the practice. Rather, it could just as easily be seen as the *removal* of a previously-created governmental *subsidy* in favor of those individuals—as elimination of the effects of all the policies that gave the contracting parents the bargaining power to obtain the surrogate's consent to begin with.[87]

Thus, by retaining the liberal individualist notion of the essentialized subject—a self-creating person separate from social context, who *responds to* culture rather than being *constituted by* it—Wertheimer reproduces the same structural categories that usually inform conceptualist analyses. In so doing, he fails to acknowledge the alternative, constructivist, understanding of the relation between individual and society and hence fails to recognize his own take as challengeable. Like many conceptualists, he fails to see that his analysis is grounded on an unarticulated, *political* choice.[88]

Surrogacy is a very difficult issue. It is not clear to me that all surrogacy contracts for pay should necessarily be prohibited, or that all instrumental uses of women's bodies or reproductive capacities necessarily harm the women who engage in those practices. Like Professor Wertheimer, I find it somewhat patronizing when academicians presume to know better than the individuals involved which side of a choice of evils is the least harmful one to pick. But I also believe that approaching the contract parenthood question from a perspective like Wertheimer's is ultimately more harmful than helpful.

IV. CONCLUSION

In surrogacy, as in many legal issues, the devil is in the details. A process like that which led to Mary Beth Whitehead's pregnancy is clearly untenable; one where the surrogate picks the couple she is to work with, where both sides receive an independent mental health exam and the results of all such exams, where the surrogate has her own independent attorney, where she is allowed to pick her physician, where the fee is commensurate with the valuable and demanding service being provided, and where the costs of medical complications of the pregnancy (including lost income) are born by the contracting parents, might not be. Surrogacy might reinforce the damaging reduction of women to their bodies or it might destabilize traditional notions of motherhood as selfless and domestic, rather than lucrative and commer-

87. *See id.* at 852, 860.

88. I should emphasize here that I am not saying the constructivist account is more true or correct. And in fact, it might be most helpful to conceive of the individual and society as in a dialectical relationship with each other, so that neither essentialism nor constructivism provides the full answer. My point here is simply that Wertheimer's analysis, like the conceptualism he attempts to escape, necessarily entails political choices.

cial. Its effects will depend on its implementation and, in any event, they are inevitably difficult to predict.

But, regardless of the ultimate conclusion one reaches about contract parenthood, it is clear that to pose the issue as a question of whether certain abstract definitions of harm or consent are met, or whether government can justly override the private choice of a woman to become a surrogate, or whether it can require the contractual parents to act altruistically towards her, is to obscure the very real moral/political decisions that must be made. It is to substitute abstract, individualist analytics for an admittedly more ambitious (and muddy) inquiry into what kind of kinship system, gender relations, relationship to our physical bodies, and reproductive roles we want to have in this society.[89]

Moreover, an argument that retains these structural elements of liberal thinking, even while explicitly rejecting purely abstract and deductive analysis, fundamentally misperceives the danger of formalist approaches to sociolegal issues. It reduces the critical argument to nothing more than a set of alternative methodological preferences (the specific over the general, the concrete over the abstract, the empirical over the metaphysical, etc.) and ignores the more fundamental substantive assumptions that motivate modern critiques. Dangerously domesticating critical thought, it pretends that pluralist combination of contradictory views is possible and that politics can be tamed by law.

89. For a treatment of the surrogacy issue that relies upon the same public/private dichotomy as does Wertheimer, but nevertheless manages to engage issues of gender role and kinship definition in a creative and thought-provoking way, see SHALEV, *supra* note 82. *See also*, Ehrenreich, *supra* note 80 (reviewing Shalev's book).