

# Delicate Deals

Moral Choice on the Margins



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# Abstract

People who experience severe economic hardships sometimes consent to deals that many would not even consider. Examples include deals involving payment for sexual services, pregnancies, and kidney donations. Moreover, they may feel forced to accept deals on terms that few would accept. The term I will use for such morally challenging transactions is *delicate deals*. A feature of delicate deals is that even when they are entered into without fraud and coercion, many of us nevertheless find them objectionable.

Much of the literature on delicate deals has been concerned with characterizing their bad-making features. The vulnerable party is forced by economic necessities to engage in harmful deals, exploited, and involved in a practice of wrongful commodification. Although this line of research is important, it is unfortunately insufficient: it fails to inform us about what we should do, all things considered. Hence, they leave open questions, such as whether we should prohibit delicate deals or regulate them, and if so, in what ways.

The dissertation consists of two parts, an introduction and five papers. In paper 1, “The Bulldozing Fallacy,” coauthored with Ole Martin Moen, we argue that we need, when justifying prohibition of delicate deals, to avoid the bulldozing fallacy. This is the fallacy of believing that when people have a very narrow range of available options, we help them by taking away their preferred option in that range. To defend prohibition on grounds of the interest of the people engaging in the deal, one must be explicit about how removing the option will make them better. We propose six strategies for how to justify a ban that avoids the bulldozing fallacy.

In paper 2, “The Ethics of Emergencies,” also coauthored with Moen, we address our obligations to people in difficult circumstances. We explore whether we have special duties of assistance in emergencies and whether they generalize to other cases of need outside of emergencies. We defend a novel account of our duties in emergencies and show that it can be reconciled with many plausible moral theories. In the introduction to this dissertation, I show how the paper speaks to the issue of exploitation, price gouging and trades in emergencies, and the nature of our obligations in emergencies more generally, such as the ongoing coronavirus disease 2019 (COVID-19) pandemic.

In paper 3, “Sex Selection in India,” I address the issue of sex selection in India, a harmful and controversial practice that is caused by, and reinforces, gender discrimination. The Indian government has therefore banned the practice. Through a comparison between legal sex selection and its alternatives, I argue that the ban is unjustified because it makes the situation even worse for mothers and their daughters.

In papers 4 and 5, I defend a model of kidney provision where governments are the sole buyer of kidneys and kidneys are distributed according to need. In paper 4, “Why States Should Buy Kidneys,” I explore Cécile Fabre’s principled objection to organ markets: that they allow duty bearers to profit from doing their duty. This criticism, I suggest, fails to distinguish between different duty bearers. I argue that, when the collective is the duty bearer, it is not wrong to be paid to perform a service that it would be your duty to perform were it not for the collectivization of duties.

In paper 5, “Reframing Kidney Rewards,” I propose a new model for how to reward kidney donors. Many objections to kidney markets are rooted in the view that body parts are not ordinary market goods, and that the giving of a body part is an extraordinary act that is not properly valued through a market transaction. I show how framing a monetary reward differently makes a difference to its moral status, and that a prize is better able to reflect the extraordinary act of giving a body part compared to alternatives such as incentives, compensation or a competitive market price. In the introduction to this dissertation, I illustrate how this model can be used in other delicate deals. I suggest that a particularly good candidate for a prize would be to reward people who take part in early, risky, trials of a vaccine candidate against COVID-19.

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In late 2016, I lived a comfortable life as a columnist and editorial writer in the Norwegian daily *Dagbladet*. In many respects, it was my dream job. Nevertheless, when there was an opening as a Ph.D. fellow in philosophy at the University of Oslo, I could not let that possibility slide. Choosing to work full-time with academic philosophy was, in one sense, a leap of faith. I nevertheless have no regrets of leaving the haven. My deepest gratitude for assisting me on this journey goes to my friend and supervisor, Ole Martin Moen. The result would undoubtedly have been much worse without you, and I would be a different person. Thank you, with a hope for many more collaborations.

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# Introduction

## 1. Les Misérables

In Victor Hugo's (2019 [1862]) novel *Les Misérables*, Fantine faces a horrible situation.<sup>1</sup> She is fired from her job at the factory and asked to leave the city for the sole reason that she has a young daughter born out of wedlock. She is in debt and has nowhere to go. Fantine tries for a while to work as a servant, but no one wants her services. She is "without work, without a trade, with nothing but her bed, and still about fifty francs in debt." She barely scrapes by, making shirts for soldiers, but her creditors continue to make her life difficult.

No one treats her worse than the Thénardiens, who are watching over her daughter, Cosette. They continually extort Fantine by coming up with lies about Cosette's situation. The narrator tells us: "One day, they wrote to her that her little Cosette was entirely naked in that cold weather, that she needed a woolen skirt, and that her mother must send at least ten francs for this." Fantine has no other choice but to sell her beautiful hair to meet their demands. Still, the Thénardiens ask for more. They tell Fantine that her daughter is sick and that she will go without treatment if Fantine does not send 40 francs. Desperate for ways to save her daughter, she comes across a man who says to her:

'You have beautiful teeth, you girl there, who are laughing; if you want to sell me your palettes, I will give you a gold napoleon apiece for them.'

'What are my palettes?' asked Fantine.

'The palettes,' replied the dental professor, 'are the front teeth, the two upper ones.'

Two gold napoleons are precisely the price of the treatment her daughter needs. Still, she hesitates. However, when the pious Marguerite finds her later that day, Fantine has "a black hole in her mouth." She has sold her front teeth.

The Thénardiens continue to threaten her, and soon they demand 100 francs. Tired and frustrated, she says to herself, "Let us sell what is left." "The unfortunate girl," the narrator tells us, "became a woman of the town." The narrator continues:

It is society purchasing a slave . . . From misery. From hunger, cold, isolation, destitution. A dolorous bargain. A soul for a morsel of bread. Misery offers; society accepts. The sacred law of Jesus Christ governs our civilization, but it does not, as yet, permeate it; it is said that slavery has disappeared from European civilization. This is a mistake. It still exists; but it weighs only upon the woman, and it is called prostitution.

It is hard to resist the conclusion that Fantine deserves better than the misery she goes through. Do the people who stand idly by not have an obligation to stop injustice when they see it? And what about the people with whom she transacts? Rather than helping someone in need, they take advantage of Fantine's desperation by offering her a deal no person would agree to if she were not desperate. To what end? So that they can make a small profit by selling her teeth and hair to people who are better off. At every juncture of this road towards Fantine becoming "a woman of the town," we are faced with a dilemma. On the one hand, we may be tempted to say that people who are offering her these repugnant transactions are wrong to do so. Yet, on the other hand, we may think that the unsavory deals she is offered would make her situation better, however slightly.

Although we have made substantial improvements since Hugo published *Les Misérables* in 1862, people still find themselves in desperate situations, much like Fantine. We also deal with the same moral questions that confront us in the novel. While some behaviors, such as the extortion and deception the Thénardiens perform, are widely condemned, we still struggle to come up with right answers to many of the moral complexities involved in Fantine's situation, and the situation of those in similar position to Fantine. We grapple with how we should respond to the misery of our fellow human beings when they fall on hard times, and particularly people who engage in deals we find objectionable. People who experience injustice and have few options open to them will often engage in deals many of us would not even consider, such as sex work, surrogacy, and organ selling. Moreover, they may feel forced to engage in deals on terms that few would accept and are therefore vulnerable to exploitation.

The term I will use for such morally challenging transactions is *delicate deals*. I do not intend this term to clearly demarcate a set of deals. I do not seek to establish an exhaustive list of sufficient and necessary conditions that have to be satisfied for a deal to be considered delicate. The term is meant to cover a broad range of deals we find necessary either to warn against, or strictly regulate or prohibit. It broadly overlaps with other terms in the literature, such as contested commodities (Radin, 1996), obnoxious markets (Kanbur, 2001, Jul.), repugnant transactions (Roth,

2007), and noxious markets (Satz, 2010). I choose the more general term, delicate deal, over the alternatives, as I do not, from the outset, wish to point to commodification as the bad-making feature of the deals we find objectionable. As will be clear when I discuss sex selection and organ markets, it is not necessarily commodification (i.e., money or market transactions) that makes deals delicate.

Many of us think we should intervene in cases like Fantine's to prevent the misery or minimize the suffering of our fellow human beings. Whether we should intervene and in what ways are the overarching questions I seek to answer in this dissertation. My focus will mostly be on the policies we should put in place. However, I will also discuss what norms we should endorse. More specifically I seek to answer four questions. First, when are we justified in preventing someone from engaging in a delicate deal? Second, when do we have obligations to help people in desperate circumstances? Third, given the existence of such obligations, is it immoral to trade with people in such circumstances on competitive market terms or, more generally, to charge money for doing our duty? Fourth, are there certain activities, such as sex and the giving of body parts, where money and markets tend to make things worse?

In section 2, "How Is Fantine Wronged?" I explore prominent explanations in the literature for what is wrong with delicate deals through the lens of Fantine's situation. In section 3, "Methodology," I argue in favor of what I call bottom-up ethics. My dissertation comprises five papers. The paper "Sex Selection in India" is published in *Developing World Bioethics* (2019). The others are under review. I discuss the papers in sections 4 and 5 of the introduction. I end, in section 6, with some concluding thoughts about the main takeaways from the dissertation.

## 2. How Is Fantine Wronged?

A striking aspect of Fantine's situation is how little help she receives. She has to fend for herself and offer her body to get what she needs. Others seem to sit on their hands while Fantine's life falls apart. It is not only the lack of assistance from her fellow human beings that bothers us, however. In this section, I will look at many of the most promising explanations for what makes delicate deals objectionable through the lens of Fantine's story. My aim is not to critically assess the explanations, but to get them on the table. In the next section I will point to what I take to be a fundamental weakness in many of these explanations: that they do not address the normative question of what we should do for people like Fantine. In several parts of the introduction and in individual papers, the explanations will be critically assessed in more detail.

## 2.1 Forced to Partake in Harmful Deals

One worry about delicate deals is people's inability to resist offers and therefore to consent, in a meaningful way, to potentially harmful deals. Although Fantine consents to have her teeth removed and sell sex, "market exchanges are not necessarily as voluntary as market enthusiasts suggest," Michael Sandel (2000, p. 94) argues. "A peasant may agree to sell his kidney or cornea in order to feed his starving family, but his agreement is not truly voluntary. He is coerced, in effect, by the necessities of his situation." Although poverty is the cause of the problem, the offer contributes to the damage by imposing a new burden on the person in need.

This is particularly relevant, Simon Rippon (2014, 2017) argues, for "invasive trades," such as sex work, surrogacy, and organ trade. According to Rippon (2017, p. 131), we have a right to "full autonomous veto control over physical incursions on the intimate parts of our bodies by other people," and when we are poor, we may be unable to reject an offer to sell sexual services or a kidney. The combination of harmful deals and vulnerable parties who may be unable to meaningfully consent is also at the heart of Debra Satz' (2010, pp. 94-99) theory of "noxious markets."

The harm in delicate deals can come from the direct risk of having a particular risky occupation. Selling sexual services in nineteenth-century France out of economic desperation was likely extremely harmful and, in Fantine's case, it seems to lead her to her death. However, this is not the only harm delicate deals can bring. Having one's front teeth removed may not be particularly harmful physically. Nevertheless, when the dentist offers 40 francs for Fantine's two teeth, that is not merely an invitation to a mutually beneficial deal. The offer itself could express a lack of respect and engaging in such a deal out of economic desperation can be demeaning (Rippon, 2017). The lack of front teeth is a testament to Fantine's poverty and misery, which makes it difficult for Fantine to walk in public with her head held high. "How ugly you are!—Will you get out of my sight?—You have no teeth!" are among the remarks Fantine has to face when going about her day (Hugo, 2019 [1862], book 5, chap. 7).

## 2.2 Exploitation

Fantine's poverty, concern for her daughter's health, and lack of options also make her vulnerable to exploitation. Even if she consents to sell her teeth and the deal improves her situation relative to not partaking in the deal, the dentist may be taking advantage of her vulnerability in making her an unfair offer (Zwolinski & Wertheimer, 2017).

There are several competing explanations for what a fair share entails and why exploitation is bad (Ferguson & Steiner, 2018). In John Locke's (2014 [1661]) little-known work "Venditio," he argues that the just, or, in modern parlance, nonexploitative, price is "the market price at the place where he sells."<sup>2</sup> The market price is not just any price the market participants may come to agree to, however. Locke asks us to imagine the following case:

A ship at sea that has an anchor to spare meets another which has lost all her anchors. What here shall be the just price that she shall sell her anchor to the distressed ship? To this I answer the same price that she would sell the same anchor to a ship that was not in that distress. For that still is the market rate for which one would part with anything to anybody who was not in distress and absolute want of it (Locke, 2014 [1661]).

In other words, we ought to imagine ourselves in a situation where our bargaining party is not in a vulnerable position. Alan Wertheimer (1996) follows in Locke's footsteps when he takes exploitation to occur when a party uses a strong bargaining position to get more of the gains from a trade than perfect competition would have allowed.<sup>3</sup> We may well imagine that 40 francs for two front teeth is not the price that Fantine would have received in a competitive market where more buyers would compete to buy them. If so, the dentist is exploiting her. However, it may also be the case that 40 francs is the competitive price in the city where she lives. The living standards in France at the time of Victor Hugo's writings were miserable. In *Capital in the Twenty-First Century*, Thomas Piketty (2014) describes how

a new urban misery emerged, more visible, more shocking, and in some respects even more extreme than the rural misery of the Old Regime. *Germinal*, *Oliver Twist*, and *Les Misérables* did not spring from the imaginations of their authors, any more than did laws limiting child labor in factories to children older than eight (in France in 1841) or ten in the mines (in Britain in 1842). (p. 7)

When numerous people are desperate to sell their body parts or sexual services to survive, the prices for body parts and services will fall to subsistence levels. Therefore, when Fantine receives 40 francs for her teeth, that may well be the market price. If it is the competitive market that is the arbiter of what the just, nonexploitative price is, many transactions we think of as exploitative are fair. Examples are sweatshop labor in developing countries and perhaps even companies that lower wages in an epidemic because of a sudden increase in the supply of workers. The discrepancy between theory and our considered judgements has spurred people to look for other accounts of

exploitation. Several of them have roots in Immanuel Kant's writings (Arnold & Bowie, 2003; Sample, 2003; Snyder, 2008; Wood, 1995).

Ruth Sample (2003) and Jeremy Snyder (2008) argue that we exploit people when we fail to respond appropriately to their needs. When we are face to face with someone in desperate need, our otherwise imperfect duties of beneficence take a perfect form. If we trade with Fantine on market terms when we have an obligation to help her, we are "interacting with another being for the sake of advantage in a way that degrades or fails to respect the inherent value in that being" (Sample, 2003, p. 57). Similarly, when people in developing countries do not have their basic needs met and feel forced to sell their labor for wages that do not even cover these needs, we may be in the wrong if we trade with them purely on market terms.

### 2.3 Obligations of the Well-Off

If Snyder and Sample are correct, the well-off have obligations to people in need not to engage with them purely on market terms. However, are our obligations to the needy restricted to avoid exploiting them, or do the relatively well-off have more demanding obligations? According to Kant, we have further duties of general beneficence to people in poverty (MPV 390).<sup>4</sup> These duties are, however, less strict than the perfect duties not to harm someone. They are imperfect in the sense that we are permitted to fulfill them through multiple means at our own discretion. Peter Singer (1972) and Peter Unger (1996) go further and argue that we have strict obligations to people in need, no matter where they are or the cause of their suffering. What is required of relatively well-off people, Unger (1996, p. 20) argues, is that whenever they "learn of people in great need, they promptly move to meet the need, almost no matter what the financial cost." In Fantine's case, as well as in many of the contemporary cases that will occupy us, the well-off are doing little to help. This failure is, according to them, a breach of our moral obligations.

What many well-off people do instead, is demand body parts, sex, surrogacy, and cheap products produced under terrible conditions in developing countries. This raises several concerns besides their lack of assistance. Buyers could be involved in exploitation or at least be beneficiaries of it (Malmqvist & Szigeti, 2019). Additionally, for some of these deals, we may think that buyers are seeking to satisfy an illegitimate preference. If someone were to buy a kidney as a collection piece, many of us would think that this is the wrong way to treat a kidney and its owner (Sandel, 2012a). Others would think that sex is an illegitimate preference to seek fulfilled through the market

place, especially if the sellers are desperate and have few other opportunities (A. Dworkin, 1993; MacKinnon, 1993).

It may, moreover, be unfair for the rich to use poor people as spare body parts. Even vocal proponents of kidney markets, such as John Harris (2003), set the limits at the boundaries of the nation state, presumably to avoid having people in poor countries line up to sell kidneys to people in rich countries. However, if we adopt a kidney market within one nation state, we should expect the same pattern to emerge there. Poor people will be overrepresented among those who sell one of their kidneys (Rivera-López, 2006; Satz, 2010).

## 2.4 Degradation

Michael Sandel (2000, 2012b) provides reasons, beyond inequality, as to why it may be wrong to commodify certain goods. “Market valuation and exchange” can, he argues, have a “degrading effect . . . on certain goods and practices.” “If the sale of human body parts is intrinsically degrading, a violation of the sanctity of the human body, then kidney sales would be wrong for rich and poor alike” (Sandel, 2000, p. 94). The same could be said for sexual services. According to Elizabeth Anderson (1995, p. 154), sex work is “the classic example of how commodification debases a gift value and its giver.” Goods such as sex and body parts are goods that are better valued by consideration, respect, and love, she argues, than by the *quid pro quo* norms of the market (E. Anderson, 1995, pp. 8-12). Sandel (2000) thinks of this concern as a special sense of corruption or degradation of the good. Notice that if the issue is that the good is treated in the wrong way by being bought and sold, Fantine is as involved in the wrong act as her trading partners. She participates in practices that value goods in ways they should not be valued. However, although she is complicit, we may say that she is not to be blamed due to distress and lack of other options.

## 2.5 Societal Harm

A final concern with delicate deals is that they impose harm on other members of society who are not directly involved in the deal. When Fantine is degraded, this is not merely a harm that inflicts her, according to some authors. The way they treat her may, Satz (2010, p. 96) argues, have wider negative consequences by “[undermining] the social framework needed for people to interact as equals, as individuals with equal standing.” Sex work may also cause harm to the wider society by amplifying “gender inequalities by entrenching and deepening negative stereotypes about women.” (Satz, 2010, pp. 103-104). Some disrespectful offers can also be disrespectful to a wider set of people than the person who is receiving the offer. If a shopkeeper charges black people a higher

price than white people, this is clearly a harm to the individual buyers who are affected by the discrimination. However, even people who would never consider buying something in that shop are arguably harmed by the shopkeeper's pricing practice. This is arguably because discrimination on the basis of race has expressivist effects which impact the targeted group as a whole (Rippon, 2017).<sup>5</sup>

Some delicate deals are also said to undermine the moral fabric of society. In his comparative case study of the different systems for procuring blood in the United States and United Kingdom, Richard Titmuss (1972) argued that allowing the buying and selling of blood crowded out donors who were motivated by solidarity with their fellow citizens. This, he argued, had wider societal consequences. "It is likely that a decline in the spirit of altruism in one sphere of human activities will be accompanied by similar changes in attitudes, motives, and relationships in other spheres." (Titmuss, 1972, p. 111) His worry was that replacing nonmonetary exchange of services with markets eroded norms of solidarity on which a good society is dependent.

### 3. Methodology

#### 3.1 The Normative Question

As the previous section made apparent, there are many reasons to lament Fantine's situation. She is arguably forced to engage in harmful deals by economic necessity, exploited, and involved in a practice of inappropriate, if not wrongful, commodification. Moreover, the deals in which she takes part may have negative effects on society. These are all answers to an evaluative question: what is that makes Fantine's situation, and delicate deals more generally, bad? This is certainly an important exercise. However, it is insufficient to answer another important question, the normative question: What should we do for people, such as Fantine, who engage in delicate deals? Possible answers to this question include: we should prohibit delicate deals, regulate them, or that we should let people engage in delicate deals. I take the answer to the normative question to be the fundamental pursuit of practical ethics, and it will be the guiding question for this dissertation.

When asking what we should do, it is first of all crucial to specify what is meant by "we." We can direct our attention to different agents. If someone is exploiting another, we could ask or demand that she stop. Or we could direct our attention to the victim and recommend that she resist or comply. We could also ask our fellow bystanders to intervene or join us in intervening. We have at our disposal political means and moral judgments. We can, e.g., legally prohibit actions, and we



can sanction and create social norms in an attempt to guide people's behavior. In this dissertation, I will be primarily concerned with what we, as bystanders and citizens, should do. In other words, I will rarely ask what the people directly involved in delicate deals should do. The question I am interested in is how we should respond so as to make things better, given the nonideal world we inhabit, where people act immorally and sometimes illegally.<sup>6</sup>

### 3.2 The Problem of Disagreement

To answer the normative question, we first need a deeper understanding of the problem. As I understand it, the problem is one of disagreement. We struggle to agree on what we should do in situations where people, out of economic hardship, engage in deals we find delicate. The disagreement can have several sources.

We can disagree about what is valuable. This is the Problem of Value Disagreement. When Sandel (2000) and Anderson (1995) argue that we wrongly value certain goods, such as sex and gestation, by commodifying them, we could disagree about the truth of that claim. Perhaps commodifying sex is for the better. As Vida Panitch (2020) puts the objection:

What if the norms of altruism and beneficence that supposedly preserve the social value of sex and gestation – goods that have long defined women's lives as mothers and wives – turn out to be the vestiges, if not the very foundations of patriarchy? Perhaps all the better that these meanings be corrupted by women choosing to conduct their sexual and gestational lives in accordance with the supposedly market-driven norms of individuality and personal freedom. (pp. 67)

Another source of disagreement is that even if we reach agreement on which values are worth pursuing, we might disagree on their relative ranking. This is the Problem of Weighing. People could agree that allowing prostitution increases the sellers' option set and thus increases their freedom. Since freedom is good, it is *in that sense* better if we allow prostitution. However, they could also agree that prostitution is *in another sense* worse because it amplifies "gender inequalities by entrenching and deepening negative stereotypes about women." (Satz, 2010, pp. 103-104) However, even if people agreed on the importance of promoting freedom and gender equality, they could disagree on the relative importance of these values. Someone might think that freedom is more important than gender equality, while someone else might think that the opposite is true.<sup>7</sup>

When values conflict, we might ourselves be ambivalent. Anderson (1995, p. 156) argues that paying for sex is the wrong way to value sex and that this calls for prohibition, but nevertheless warns against prohibition because it could “function so as to drive [sellers of sexual services] to starvation.” Similarly, Margaret Jane Radin (1987, p. 1916) argues that commodification of sex “will harm [women’s] personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression.” However, she also recognizes that a ban on sex work could “force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers.” She characterizes this unfortunate situation as a “double bind.” (Radin, 1987, pp. 1916-1917). We need a way of weighing these different values against each other to be able to escape decision paralysis.

A related, but nonetheless distinct, problem has to do with the expected consequences of choosing different actions. Even if we agree on which values are important and their relative ranking, it is a further question whether our proposed actions will promote these values. This is the Problem of Means. Satz for example argues that certain deals are so noxious that they should be strictly regulated or prohibited. However, she also concedes that “we cannot immediately conclude from the fact that a market is noxious that we ought legally to ban it. Even if a market interfered with or failed to promote certain values, banning it might be worse overall *from the point of view of those same values.*” (Satz, 2010, p. 110, my italics) To move from the evaluative question to the normative question, we need, in short, to figure out whether the proposed action will actually deliver the goods.

To summarize what I have said so far, the problem we are trying to solve is one of disagreement, which is caused by the problem of not knowing what we should value, the relative ranking of values, or how we bring about what is valuable. To be able to solve this problem, we need a way of structuring our inquiry. As I see it, there are, roughly speaking, two ways to approach this issue. One is top-down, and one is bottom-up.<sup>8</sup> Below I will discuss the top-down approach (section 3.3) and the bottom-up approach (section 3.4) in more detail.

### 3.3 Top-Down Ethics

When we do top-down ethics, we solve the problem of disagreement by reducing the complexities that characterize our moral lives as we experience them. We search for *fundamental* justifications for our behavior in the right moral theory or the right theory of justice. These theories give order to what could otherwise look like an unresolvable concoction of competing reasons. When we find the

right theory, we apply it in a deductive fashion to the case at hand to show what morality demands of us in particular cases.

This way of doing practical ethics is particularly popular among utilitarians, such as Singer (1979), Richard M. Hare (1982), Richard B. Brandt (1998), and Torbjörn Tännsjö (2008). According to utilitarianism, all the things we value are valuable because of and insofar they promote happiness. What is required of us is to act to promote the maximum amount of happiness. If we wonder whether to prohibit delicate deals or not, we ask whether it would maximize happiness. If it does, then we should go ahead. If it does not, then we go back to the drawing board. Singer has, with significant degree of success, deduced practical conclusions from utilitarian principles on a wide range of issues. Examples are immigration policy, euthanasia, abortion, our obligations to the poor, and how to treat animals (see e.g., Singer, 1979).

Top-down ethics seems to provide a simple and reassuring solution to our problems. If we can justify our behavior in light of *the* correct moral theory, we can be certain that we are pursuing values that fundamentally matter. It thus offers us a solid moral grounding for our actions. To the degree that the theories either specify *the* fundamental value or the right relation between a plurality of values, top-down ethics can also solve the problem of weighing, by providing us with a perfect ranking of different actions according to their value. In that case, the only uncertainty we are left with is empirical uncertainty about the likely consequences of our actions.

There are unfortunately several problems with the top-down approach, which have their roots in our limitations as moral knowers. First, there is little agreement on which theory is correct, even among experts in ethics and political philosophy (Bourget & Chalmers, 2014). To show that a given policy is favored by utilitarianism, say, will therefore be unsatisfactory as a guide to action to all those who are unpersuaded by utilitarianism (Wolff, 2018).

Second, there is also the danger that if we “set off for the stratosphere” in search for the right theory, we may, like most philosophers before us, fail to “return to earth to enlighten the people [we] left behind.” (Radcliffe-Richards, 2012, p. 11) If practical ethics is to help us decide what to do, we need a way to resolve our issues here and now. We cannot wait for the fundamental disagreements in ethical theory to be resolved.

A third issue is that even if we were successful in our search for the right moral theory, it is far from straightforward to use them as guides to action. Henry Sidgwick (1981 [1907], p. 379)

lamented the fact that the moral axioms “are of too abstract a nature, and too universal in their scope, to enable us to ascertain by immediate application of them what we ought to do in any particular case; particular duties have still to be determined by some other method.” This is also true of our moral theories and theories of justice. They are often too general to offer clear guidance about what to do in most cases we struggle with, or on how to prioritize between different instances of injustice (Sen, 2009, pp. 96-105). Singer’s success in deducing practical conclusions from utilitarianism therefore depends on several contested empirical assumptions about what policies and actions will bring about the most happiness.

Top-down ethics therefore leaves us with the problems with which we started. Because we disagree on which moral theory is correct, we are left with disagreement both on what is valuable and on the relative ranking of values. And even if we managed to find agreement on which moral theory is correct, we would disagree on the implications the theory would have in many of the cases we care most about.

### 3.4 Bottom-up Ethics

Fortunately, top-down ethics is not the only way to come to reasoned conclusions about what to do. I want to suggest a more modest way to do practical ethics. I call it bottom-up ethics since it starts from the reasons we provide for our stance on any given policy or action and it accepts the plurality of values that characterize our moral lives.

The method proceeds in four stages. First, explore a wide set of reasons in favor and against a particular action, which could be a particular policy. Second, perform a test of the values on which our reasons rest to ensure that they are robust to individual predilections, biases and lack of moral knowledge. I show how this test is similar to, but nonetheless crucially different from, the method of reflective equilibrium. Third, build a *pro tanto* case and consider defeaters to the *pro tanto* case to establish whether to be in favor or against the action in question. To be able to compare many reasons of different strengths, I follow Julian Savulescu in proposing that we use the concept of vectors in physics as a pedagogical tool to make explicit the weight we put on different reasons. Finally, use a comparative method to come to a reasoned conclusion about whether our actions will bring about the goods.

This method has several benefits compared to top-down ethics. By accepting a plurality of values, it does not get stuck in disagreement about the fundamentals. This overlapping consensus

helps us reach agreement on mid-level moral concepts that we can then use to draw practical conclusions.<sup>9</sup> Taking seriously a wide set of values certainly has its own set of problems, related to how to compare different values and uncertainty about how our actions are connected to our ends. However, I hope to show that the structured inquiry which the method professes enables us to make headway on these problems as well.

Before we proceed, I want to make it clear that I do not intend this to be a step-by-step instruction for how every exercise in practical ethics should be undertaken. When we do practical ethics, we take a stab at different parts of the complex questions that face us. Several of the contributions in this dissertation will explore certain parts of the larger issue of delicate deals and our obligations to our fellow human beings, and will thus only focus on one or more stages of this process. Other contributions will come closer to the method I sketch here. I nevertheless think it is useful to make as explicit as possible how I think we can solve the problem of disagreement and arrive at plausible answers to the fundamental question of practical ethics: what we should do.

#### Stage 1: Explore Reasons

We wonder what we such do for Fantine and other people who engage in delicate deals. To be able to grapple with such questions, let us focus on the question of whether we should prohibit delicate deals for the betterment of the people who feel forced by economic hardship to engage in these deals. This will be the topic of “The Bulldozing Fallacy,” which I discuss in section 5.1.

First, we go looking for the many reasons people provide in favor and against banning delicate deals. When we go looking for reasons, we should not restrict ourselves to those that have been discussed in the academic literature, but talk to lay people, policy makers and interest groups. People who are differently situated and come from different backgrounds will have different perspectives and possess different pieces of knowledge. To avoid taking for granted, as far as we can, the tacit ideological and parochial commitments of the groups of which we are part, it is crucial, as suggested by Caroline Pateman and Charles W. Mills (2007), and Amartya Sen (2009, pp. 124-152), that we seek the perspective of people who are different from us.

To provide reasons comes naturally to most of us. A noteworthy characteristic of humans is that we let our actions be guided by reasons and that we take these reasons to be justifications for so acting. We are not slaves of our passions, mere “wantons” who are unable to critically reflect on our ends (Frankfurt, 1971). We can take a step back and ask whether we should fulfill our ends with

these particular means. In so doing, we provide reasons. Reasons are justifications for actions that relate the actions to valuable ends. We are, in that sense, reasoning creatures (Korsgaard, 1996).

However, we have a powerful contender to the image of us as reasoning creatures. Several moral psychologists argue that the enlightenment picture of humans as rational creatures who act according to reasons is widely inaccurate. Jonathan Haidt (2001, 2012) gives us the picture of a rider on top of an elephant. The rider is the self who experiences the world and reasons about what to do. The elephant is “the other 99% of mental processes—the ones that occur outside of awareness.” (Haidt, 2012, p. xxi) Although the rider thinks he is in control of the elephant, in reality the elephant is in control most of the time. Crucially for our purposes, the elephant’s domain is not restricted to the many automated and habitual actions we perform every day. The elephant seems to be in control also in situations where we think most stringently about what we should do.

Take the question of whether we should ban a delicate deal. When we think about this issue, it certainly feels like the rider is in control. We come up with reasons, explore the values on which they are grounded, weigh them against each other, and think about whether a ban will bring about the preferred outcome. What Haidt argues, however, is that the reasons we provide often are mere confabulations to support our gut reaction. Before the rider started his elaborate thought process, the elephant had already made up its mind. The rider is left with the role of cooking up a plausible story. It functions not as the president making the decisions, but as the press secretary coming up with arguments and evidence for a decision that is made by someone else (Haidt, 2012, pp. 78-79). We are not so much reasoning creatures, Haidt argues, as rationalizing creatures who justify our actions by providing reasons *post hoc*.

We need to be careful not to misunderstand the force of this objection. That our reasons are provided to support our gut reactions is not itself a sufficient reason for discarding them. To believe that we can judge a belief’s merits solely on its (unreliable) cause would be to commit the genetic fallacy (J.W., 2005). This is a fallacy because the cause of a belief does not determine whether it is true or not. What we should do is to be more open to the possibility that our reasons could be unfounded or that they fail to be connected in the right way to the things that we value.

This presents us with a challenge. We need to distinguish between reasons that only give the impression of tracking what is of value and the reasons that in fact do so. We could, with Derek Parfit (2011, p. 35), call the former set of reasons *merely apparent reasons*, and the latter set of

reasons *real reasons*. Before we have scrutinized the reasons, we should suspend judgement and call them *apparent reasons*.

Remember, reasons are justifications for actions that relate the actions to valuable ends. There are several ways in which apparent reasons can fail to be real. One is that the ends fail to be important. Another is that the ends they propose conflict with other, more important, ends. A third is that the actions do not bring about the ends. It is no coincidence that these are the three problems of disagreement I discussed in section 3.2: not knowing what is valuable, the relative ranking of values, and what actions enable us to realize the values.

The bad-making features of delicate deals, such as deals being harmful, exploitative, demeaning, and dignity violating, which we explored in section 2, “What Should We Do For Fantine?” are all apparent reasons for a ban. In other words, they seem to track something adverse and a ban on delicate deals is a plausible way to prevent these adverse states from occurring.

When we critically scrutinize the reasons people provide, we need to avoid several pitfalls. One is that the reasons people provide may not be formulated in a convincing way. It is important that we do not discard people’s reasons just because they do not hold up under critical scrutiny *in their present form*. Bottom-up ethics is not merely a critical enterprise, where we show that the reasons provided fails to provide justification, but a constructive one, where we provide *better* justifications than people who are busy with other things can do themselves. In short, we should “steel man” our opponents’ position, not make them into straw men we easily can pick apart.

The flipside of this, however, as suggested by James Rachel (1991, p. 70), is to avoid becoming “orthodoxy’s most sophisticated defenders, assuming that the existing social consensus must be right, and articulating its theoretical ‘justification’.” We would make a mistake if we try to make sense of all of the reasons the rider is able to come up with to support the actions of the elephant (Haidt, 2001; 2012, pp. 87-118; Kahneman, 2011). To find the right level of revisionism is the art of bottom-up ethics. Fortunately, as with all art, there are techniques that can be employed to find this balance.

## Stage 2: Stress Test

When we try to figure out which reasons are real and which are merely apparent, we need to put them under some form of stress test. If, for example, the reason we provide for banning prostitution

is that “sex should never be done for other reasons than love,” we can put this reason to the test by considering if we find its implications plausible in other circumstances and whether the ends on which it implicitly rests are worth pursuing. Only by stress testing our reasons can we know what values to hold on to and give priority to when they conflict. I have two stress tests in mind, the “within-subject” test and the “between-subject” test (Kahneman, 2009).

The within-subject test consists in testing our reasons by looking at different cases, either real or imaginary, to see if the reasons give the right verdict across different scenarios. The idea is that we might have some morally irrelevant reasons to favor or disfavor certain policies or actions. If we test the reasons we provide in favor of particular policies in other cases and they fail to give the right verdict, we have a reason to think that they may have their source in some form of bias. We should, on the flip-side, believe that the reasons that robustly give the right verdict across different cases are more likely to track something of importance (McMahan, 2013b). The within-subject test is the method favored by most philosophers. However, a drawback with the method is that our own reasoning process could suffer from systematic bias: our pre-existing world view may affect both the tests we perform and the way we take into account conflicting evidence (Kahneman, 2009).

We should therefore ideally supplement the within-subject test with what psychologists call the between-subject test. Rather than one person looking at a wide set of cases, different people consider the same set of cases. This can be done systematically, as in experimental philosophy, or it can be done informally as when students are asked to consider thought experiments involving runaway trolleys and people tied to tracks.<sup>10</sup> One benefit of this method is that it makes it apparent that our views are contingent on factors we, on reflection, think are morally irrelevant, such as whether we kill someone by pushing them or by pulling a lever (J. Greene, 2013; Kahneman, 2011). When we realize that a particular moral judgement is likely due to some form of bias, we should discard or put less trust on that particular judgement. Another benefit of the method is that it allows us to see whether our judgements in particular cases are widely shared. This is likely to reduce the likelihood that our views are due to parochialism, ideology and individual tastes. As John Rawls (1951, p. 187) suggests, “individual predilections will tend to be canceled out once the explication has included judgments of many persons made on a wide variety of cases.”

These robustness tests can show us which values are robust across different cases and different people, and thus make it more likely that we reach agreement on which values are



important. That in itself does not say anything about the relative importance of these values; a value can be robust without being very important. Fortunately, the same tests can be used to test which values are more important than others by pitting them against each other in pairwise comparisons over a wide set of cases. The values that win out in competition with other values in these comparisons, are the values that we should put the most weight on.

These methods can be used for different purposes. In moral philosophy and political philosophy, they are often used to construct the most general moral theories and theories of justice. The method John Rawls (1999 [1971]) calls reflective equilibrium in *A Theory of Justice* could be understood as an especially systematic and elaborate form of the stress tests I have proposed here.<sup>11</sup> Rawls uses the method to establish which general ethical principles we endorse in reflective equilibrium, where all our beliefs are aligned. However, this is not the aim of my enterprise here.

When we do bottom-up ethics, we do not use these tests to find *the* right theory or *the* value that is the source of all other values. We accept that people will disagree on what is fundamental, but seek to find agreement on a higher level (Wolff, 2018). People with widely disparate views on the fundamentals can agree on the practical importance of values such as autonomy, well-being, and fairness, and the importance of avoiding degradation, disrespect, exploitation, and threats to people's dignity, as explored in section 2, "How is Fantine Wronged." In other words, we accept, for practical purposes, that there exists a plurality of values that all have to be taken into account when we make collective decisions. Even utilitarians with their reductive views of what fundamentally matters realize that we sometimes need to be guided by what for them are only of derivative value, such as autonomy, rights, domination and exploitation (Mill, 2002 [1861]; Sidgwick, 1981 [1907]). This overlapping consensus underlies the basis for grounding practical conclusions on a set of widely shared values. If a policy promotes people's well-being, we have reason to pursue it, and if it is unfair, we have reason to reject it.

Even if we feel certain that all values can be reduced to one, we have reasons of epistemic humility to endorse a plurality of values. First, we need to depend on norms, conventions and role-specific obligations to be able to navigate in our highly complex societies. In other words, our moral lives are much more multifaceted than most moral theories take into account. A plurality of values will be better able to fit the richness of our moral lives. A second reason is that of peer disagreement. When other people who are equally positioned to explore these matters disagree with us on what is valuable, we would not be justified in discarding their views merely because they do not square

with what we believe (Ballantyne, 2019). Our solution to the problem of value disagreement is therefore to accept a plurality of values.

### Stage 3: *Pro Tanto* Case

The first stage provided us with a wide set of reasons in favor or against a given policy. In the second stage, we put our reasons to the test to see which of them were robust to individual predilection and which values were more important than others. Now, in the third stage, we seek to systematize our reasoning process. We categorize the reasons on each side of the ledger to figure out whether to implement a given policy, such as banning delicate deals. Then we build a *pro tanto* case either for or against, starting with the most robust and widely shared values.

Janet Radcliffe Richards (2012) presents a particularly powerful form of this method in her book, *The Ethics of Transplants: Why Careless Thought Costs Lives*, on whether it is immoral to buy and sell kidneys. She starts with the assumption that allowing people to buy and sell kidneys can save thousands of lives by ensuring that more people get access to kidneys. To save lives is something we have a strong reason to do. People with very different views can agree that saving lives is a very important goal. This is now the target to beat if you want to argue that we should not implement a kidney market. We say that we now have a *pro tanto* case in favor of implementing a kidney market.

We could also add more reasons in favor of this policy, such as respect for the seller's autonomy and ability to make their life better by engaging in a mutually beneficial transaction. These reasons are potentially more contested than saving lives and would need more argumentative support in the form of ethical arguments and empirical evidence, which show that both parties to the trade are likely to benefit. The stronger and more numerous the reasons that count in favor of the policy, the stronger the *pro tanto* case will be. However, this also makes it more difficult to see what is going on when we proceed with our analysis. To avoid missteps and unnecessary disagreement, it can therefore be beneficial to start with the strongest reason in favor of the policy and leave other reasons to the side.

The next step is to consider whether there exist sufficiently weighty reasons to override this *pro tanto* case. We consider them first one by one and see if they independently have sufficient force to outweigh the force of the reason(s) in favor of the policy. If one of them has more weight than the *pro tanto* case for the policy, then saving lives is an insufficient reason for implementing a

kidney market. We thus need to go back and complicate the picture by adding more reasons in favor of the market to see if that changes things.

However, even if none of the reasons are by themselves sufficiently weighty to override the importance of saving lives, we can also consider them all at once and see if they together have sufficient force to outweigh the case for a policy. If they do, then we are *not* justified in implementing the policy. However, if they fail to do so, the policy is not merely *pro tanto* justified, it is justified all things considered. In other words, implementing the policy is what we have *decisive* reason to do.

A potential problem with this analysis, however, is that it becomes complicated if we have more than one reason on each side of the ledger at the same time. To get around this problem, Julian Savulescu suggests a useful tool to think more clearly about the relative importance of reasons. He argues that we should think of reasons as we think of vectors in physics. Vectors vary in length according to their relative importance and they vary in their direction according to whether the reasons count in favor or against a policy. By comparing the lengths and directions of the vectors we come to a conclusion about what to do (Protopapadakis, 2018, pp. 129-130).

#### Stage 4: The Comparative Method

The strength of the *pro tanto* case rests, however, on the strength of its pillars. One pillar is the values on which our reasons rest. The *pro tanto* case is therefore dependent on well executed stress tests of these values. The other pillar is whether our actions bring about these values. This is the final stage of the analysis.

When we try to figure out whether to implement a policy or not, it is crucial that we figure out whether the policy in question does in fact promote or prevent the values we care about. When we choose X over Y, we bring about different futures and we need to think about what future we want to bring about (Sen, 2009, pp. 96-105). When we make an all things considered judgement about what to do, we therefore need to think counterfactually.

I suspect that this is where practical ethics is the least developed. What we ideally would like is a structured way of implementing different bits of evidence into the decision-making process, and to deal with decisions under different forms of uncertainty, such as uncertainty about the likely effects of our actions and the relevance of the evidence at hand. This is particularly difficult when

there is a question of whether some of our actions are in themselves morally objectionable and we disagree on the relative worth of different end states.

This is certainly a daunting challenge and I will not here attempt to make a contribution to solving it. However, I want to suggest some preliminary remarks. First, there are developed methods, such as Bayesian decision analysis, that helps us to make reasonable decisions about what to do. We hold certain prior beliefs about what is the likely effects of a given policy, and we seek a wide set of evidence to make more educated estimations. Second, there are promising attempts to extend such analyses to the moral realm (Bykvist, 2017; Greaves, 2019, Aug. 9; MacAskill, 2014; MacAskill, Bykvist, & Ord, 2020). Third, many of the questions that interest us have been systematically studied by social scientists. We can therefore draw on the work by scholars who are experts in teasing out causal effects from a messy world.<sup>12</sup> Fourth, we can explore the questions in a way that is robust to different estimates of the likely effects of a given policy.

One such method is what I call the comparative method. Its starting point is that any given policy will change the alternatives people have available to them and the costs and benefits associated with these alternatives. We can perform an evaluative analysis of the different alternatives by looking at their normative features with the help of stress tests, such as the ones described above. If we can say something about the tendency a given policy is likely to have on which alternatives people choose, we can say something about whether the policy is likely to be for the better or worse. In section 6.1 “Sex Selection” I will go into more detail about one such method, the method of pairwise comparisons.

### 3.5 Very Practical Ethics

The four-staged method of bottom-up ethics I have proposed is mainly directed towards guiding us in practical circumstances. This raises several questions. First, the question of how empirical practical ethics should be and whether it is the place of ethicists to give clear verdicts on what policies to implement and not to implement. It might be hubristic to think that ethicists can arrive at definite conclusions about what to do, particularly when they are diving into controversial topics in countries far removed from where they live and have to rely on empirical research which they have no expertise in evaluating. We could say, with Nathan Ballantyne (2019, pp. 195-219), that ethicists here will commit an act of “epistemic trespassing.”

Since the opinions of academics are often given special weight by voters and policymakers, scholars arguably have a special responsibility to be considered in their pronouncements. A reason for not doing *very practical ethics* is that ethicists will make mistakes and these mistakes may have negative consequences. Although this is not particular to practical ethics, the mistakes are likely to occur more often when dealing with empirical research, and they might be particularly dangerous when one is dealing with real-life issues with potentially massive consequences for people's lives. Perhaps a division of labor is called for, where ethicists leave the details of particular cases to social scientists and instead explore the possible and provide contingent conclusions.

I certainly would not want to suggest that very practical ethics is the only thing ethicists should do. The question, as I see it, is whether it is worth pursuing, and the answer to that question, in my opinion, is clearly yes. The normative question of what we should do is not only the primary question of practical ethics. It is the primary question for most of us, including policymakers, who are responsible for designing and implementing policies that affect our lives. They will have to act, whether ethicists advise them or not.

These questions are what Ballantyne (2019, p. 200) calls hybridized questions, “ones addressed and answered by combining evidence and techniques from two or more fields.” I believe ethicists have a crucial set of skills that makes it particularly important that they contribute to seeking answers to such hybridized questions. One of the skills ethicists bring is making all things considered judgements, where reasons and facts about what the world is like are brought under the same systematic analysis. However, the difficulty of answering such questions and the lack of expertise in evaluating empirical research from different academic disciplines do suggest we ethicists should adopt a cautious attitude. Our contributions to questions that concern us as citizens is not, and indeed should not be, authoritative in the same way as a physics professor talking about what they know and do not know about their discipline. The contributions ethicists make when they engage in very practical ethics are piecemeal contributions in wider conversations with stakeholders with the aim of coming to the right verdict about what to do. In this way, practical ethics should be a critical, humble and publicly engaged enterprise (Walzer, 1994, pp. 41-61).<sup>13</sup>

Moreover, the complexities and uncertainties described in the previous section provide additional support for the bottom-up approach to ethics I propose in this dissertation. We should seek to build our conclusion on a shared set of values and crucially, we should seek ways to reach agreement with as few conflicts between values as possible. As I see it, this points us in the direction

of seeking constructive solutions to many of the vexed problems we struggle with. In this light, the relevant question is less who is right and who is wrong, but how we can organize policies and institutions so that we can promote more of the things we value.

## 4. The Theoretical Papers

### 4.1 The Bulldozing Fallacy

In “The Bulldozing Fallacy,” we seek to provide guidance on how to address the normative question that occupies us when we think about people like Fantine, who partake in delicate deals out of economic hardship. Remember, the bad-making features of delicate deals seem to provide reasons for intervention, but we are often left without a clear answer on what sort of intervention would make things better. Many theorists point to a double bind, where the bad-making features of a deal seem to call for prohibition, but prohibition risks making things worse. This leads to a state of decision paralysis.

Radcliffe Richards (1996) presents an even more forceful challenge to those who want to help a person by removing an option that person would otherwise choose. It is not only uncertain whether you are making someone better off. We have reason to believe that you are making them worse off than they otherwise would be. In “The Bulldozing Fallacy,” we build on this challenge and ask the following question: Under what circumstances are we making people better off by prohibiting delicate deals?

Radcliffe Richards focuses on kidney markets. However, as Fantine’s case makes clear, the challenge has force for all delicate deals. Fantine sells her hair and teeth and, finally, becomes a “woman of the town” because she sees no other way to help her daughter. If selling sex is the only way she can save her daughter, by blocking this option we thereby condemn her daughter to death, or at least so it seems. In fact, the worse off one is and the fewer options one has available, the worse it seems to be to have one’s options curtailed. To claim that we help people like Fantine by blocking her options, without a good explanation of why that will help, is, we argue, to commit what we call the bulldozing fallacy.

Several attempts have been made to meet this challenge. We survey what we take to be the most promising attempts to justify prohibition without committing the bulldozing fallacy. These are (i) the seller’s ignorance, (ii) the seller’s irrationality, (iii) that she is exploited, (iv) that she suffers

from option-dependent pressure, and (v) that she suffers from option-dependent lack of help. We also explore the possibility of banning a trade for the benefit of other members of society.

In the paper, we do not take a stand on whether these reasons are sufficient to justify banning particular trades. Our primary contribution to the literature is to make it explicit under which conditions it would be better for someone to have an option removed. We show that this is a much more difficult task than many realize.

## 4.2 The Ethics of Emergencies

In the previous section, I explored whether Fantine could have been made better off if she had been prevented from engaging in delicate deals, even though they were her primary means of making her horrible conditions somewhat better. In this section, I explore the other side of Fantine's precarious situation, the lack of assistance from others. Was not helping a moral failure on their part? "The Ethics of Emergencies" addresses one aspect of this issue, our seemingly special duties in emergencies.

The nature and scope of these duties have spurred a long-standing debate in practical ethics, often with reference to Singer's (1972) "Famine, Affluence, and Morality." In the paper, Singer draws a comparison with our obligations to help a drowning child to make the case that we have similar obligations to help people in need outside such an emergency situation. We call his position non-exceptionalism. Others have resisted this conclusion. They argue that there is something special about emergencies that give rise to special duties and these duties are not transferrable to other cases of need. They are exceptionalists about emergencies. One prominent explanation, as we explored in section 2, "How is Fantine Wronged?" is that being close to another person's suffering perfects the imperfect duty of beneficence (Hanna, 1998; Kamm, 2007; Sample, 2003; Snyder, 2008; Temkin, 2017; Waldron, 2000).

In the paper, we provide a novel solution to this debate. We argue that a theory we call the informal insurance model of emergencies best explains our considered judgements. According to this theory, emergencies are informal insurance schemes, where our duty of rescue is the premium we pay for the safety of having other people at our disposal when we are in an emergency. We also suggest that this view of emergencies is compatible with a range of different theories in normative ethics.

Given this understanding of emergencies, it is unlikely that Fantine’s fellow human beings should treat her situation *as an emergency* where they have a strict duty of assistance to drop what they do to come to the rescue. She cannot be helped back on her feet by a one-off intervention. Cases of permanent need, such as hers, are situations that are better solved by means other than duties of assistance.

I want to make it clear that this does not imply that her fellow human beings should not help her. They plausibly have duties to create better markets, social norms, and systems of government provision to assist people like Fantine. Moreover, if these systems fail, they may have duties of beneficence to assist her (Sen, 2009, pp. 383-384; Singer, 1999, Sep. 5). What I argue is that the strict duties of assistance that are characteristic of emergencies should not apply in Fantine’s case.

### 4.3 The Puzzle of Non-Worseness

The two papers also speak to the broader topic of delicate deals. The Bulldozing Fallacy illustrates both the potential and limitations of conceptual analysis. Through a close look at the different strategies for how to avoid the bulldozing fallacy, it is possible to single out the structure of certain arguments that could be used to defend prohibition of delicate deals in particular instances. One of the ways in which a person can benefit from having options removed is through weakening what we call option-dependent pressures. These are pressures that are dependent on the existence of the option. The Thénardiens, for example, may well have abstained from extorting Fantine if they knew that sex work was banned. In that case, they could think that she would not be able to pay, and that extortion would be futile. This would be an instance of option-dependent pressure and this is a weighty reason to ban sex work. Such analyses are useful because they give us a roadmap for how to think about the issue, which then can be filled in with information about the specific case at hand.

What we ultimately want to know, however, is not whether the Thénardiens *could* have abstained from extorting Fantine if sex work had been prohibited, but whether they *would* have abstained. It is too often the case in practical philosophy that we speculate about possible effects that could, *if* they applied in the case at hand, be reasons in favor of prohibition (Rippon, 2014, 2017; Satz, 2010). To move forward the debates about whether to prohibit or regulate delicate deals, we thus need a more systematic analysis that draws on the best empirical research. One way in which such an analysis can be performed is the topic of section 5.1, “Sex Selection in India.”



Our theory of emergencies also speaks to the broader topic of delicate deals. It provides a plausible explanation of why we find deals with people in desperate circumstances so problematic. When we see people in such circumstances, we may think that they find themselves in an emergency and our duties of assistance therefore kick in. If someone is in an emergency, we have an unconditional duty to drop what we are doing and come to the rescue. If Fantine is in an emergency, it is wrong to ask for her teeth before one helps her (Taylor, 2016, August 11; Wells, 2017).

It provides, moreover, a justification for thinking that it would be wrong to demand to be paid to save someone in an emergency. When we drop what we are doing to come to the rescue, that is the premium we pay for the benefit of being part of an insurance scheme where we can expect to receive help whenever we are in need. If one demands to be paid, one is, in effect, asking for double payment. Whether it is always wrong to demand to be paid for doing one's duties will be the topic of "Why States Should Buy Kidneys," which I discuss in section 5.3.

Our theory also sheds light on why we find trades within emergencies, such as hurricanes and floods, so delicate. In emergencies, demand for scarce products increases, and this creates an arbitrage opportunity. Libertarians are in favor of letting the price mechanism allocate goods to the people who are willing to pay the most, who they argue are usually the people who need them the most. Letting prices fluctuate will also serve as a signal to suppliers that there is a need they can meet by increasing production or by transferring goods from other places (Crampton, 2012, Oct. 31; Zwolinski, 2007, 2008). Despite these plausible arguments, it is illegal in many jurisdictions to raise prices in emergencies. Laws against price gouging can be seen as attempts to prevent people from taking advantage of someone's desperate circumstance. Such laws may be justified by an appeal to our duties of assistance to people in emergencies. "A time of crisis is a time for all of us to pitch in," the economist Richard Thaler argues, "it is not a time for all of us to grab." (Henderson, 2017, Sep. 5; Sample, 2003; Snyder, 2008)

The view of duties as part of beneficial norms can also help move this debate further. Libertarians respond to the challenge from those who oppose price gougers in two ways. One is empirical and echoes Locke's (2003 [1661]) concern that if we set a limit on people's ability to profit, "there would be no commerce in the world, and mankind would be deprived of the supply of foreign mutual conveniences of life." In short, people are too selfish to help in emergencies if they cannot profit. The second is normative and has to do with the inconsistency with which we police our duties of assistance. People who have the means to help in an emergency but nevertheless stay

at home are off the moral hook, while we blame the people who do help through mutually beneficial although potentially exploitative deals. Libertarians put a challenge to those who blame people for engaging in price gouging: How can it be worse to do something to make someone's situation better than to do nothing? This is known as the puzzle of nonworseness (Wertheimer, 1996; Zwolinski, 2007, 2008; Zwolinski & Wertheimer, 2017).

A plausible response to the puzzle of nonworseness can be found in the argument we provide in "The Ethics of Emergencies." One of the crucial insights of the paper is to see our duties as beneficial norms. In that light, we can ask what function is the norm against exploitation serving? We can also ask the more revisionist question, What do we want a norm against exploitation to do?<sup>14</sup> What we want the norm to do is arguably to ensure that trade happens on fairer terms (Arneson, 2013). There are three ways to achieve that end: we can empower the weak, we can restrain the powerful through laws, or we can restrain the powerful with the help of norms.

A good strategy in this respect is to empower the weak. This can be done by giving them more opportunities, more information, and access to several trading partners. However, even if we are successful in our efforts to empower the weak, people will find themselves in vulnerable positions. We therefore need to restrain the powerful. We can do so through laws, such as laws against price gouging that prohibit steep price increases in emergencies. Although such laws may be necessary, they will, as libertarians suggest, be crude tools that often prevent deals that are beneficial for people in emergencies. Another way to view this is that proponents of laws that prohibit exploitative trades often will commit the bulldozing fallacy.

A third way is to restrain the powerful through norms which dictate that whenever one is bargaining with someone in a vulnerable position, one has a duty to bargain on fair terms. The aim is to get stronger parties to divide the gains from such trades fairly, even if they could have taken advantage of their trading partners' vulnerability. Norms have the benefit of allowing for more flexibility and taking advantage of the fact that the parties to the trade possess local information that bystanders do not have. When we act for moral reasons, we police ourselves. Since we have more knowledge about the situation we are in than lawmakers do, we are often better placed to judge whether and in what way we should show restraint (Heath, 2014, p. 12).

In light of duties as beneficial norms, we could re-direct the puzzle of nonworseness. The relevant question is not whether it is worse to exploit than not to engage in the deal at all. An

allegation of exploitation is not primarily an evaluative matter that seeks to compare the badness of not taking part in a deal with that of exploiting someone. A norm against exploitation is an answer to a normative question: it seeks to guide the behavior of the strong party in the deal to ensure a better outcome and, secondarily, to signal to bystanders that they should intervene to ensure that trades happen on fairer terms. We can thus address the harm of exploitation without committing the bulldozing fallacy.

What is entailed in the strong not taking advantage of the weak is contested, as we explored in section 2. Are multinational companies doing something wrong when they hire people in developing countries to work in sweatshops for pay that does not enable them to meet their basic needs (Horton, 2019), or are they off the moral hook, as suggested by Locke (2003 [1661]), as long as they trade at “the market price at the place where [they hire]?” Whether multinational companies should see it as their duty to provide better terms than the market dictates, is a pressing question I leave for future research. However, I would like to offer some preliminary remarks about how to think about the issue in light of duties as beneficial norms.

First, notice that the question of which duties we have as market participants is part of a larger question of what role markets should play in solving questions of distributive justice. A way to frame the question we have been concerned with in the previous paragraphs is whether market participants should abide by the norms of the marketplace or whether they should *also* abide by non-market norms.

Locke (2003 [1661]) and Wertheimer (1996) suggest, as we have seen, that the stronger party has an obligation to transact on fair terms, where fair terms are derived from what function markets play. The broader question of distributive justice should, on this view, be settled in other ways, perhaps through providing in-kind services or cash transfers. Theorists such as Joe Horton (2019), Snyder (2008), and Sample (2003), on the other hand, argue that the stronger party has obligations that extend beyond the transaction in question. They should, in effect, make up for some of the injustices that exist before the two parties considered making a deal (Ferguson & Steiner, 2018). For Horton, Sample, and Snyder, the two ends should be at least partly realized within the market, and more specifically within every market transaction.

One way to justify a restricted view of the obligations of market participants is to say, as we argue in “The Ethics of Emergencies,” that our obligations are role- or domain-specific. Our

obligations in the market are derived from the ends markets are meant to serve. Another way to put this is to say that every sphere has its own purpose, its own *telos*, and that our obligations are derived from that purpose (Sandel, 2009; Walzer, 2008 [1983]). What is the purpose of the market? Robert Sugden (2018) suggests that the purpose is to allow market participants to engage in mutually beneficial transactions. Joseph Heath (2014, p. 10) takes a broader perspective and argues that markets are “special-purpose institutions designed to promote efficiency,” and thus that the primary goal, i.e., the end, of market transactions is to use resources efficiently. Following Heath, we could say that our obligations as market participants is to contribute to efficiency and efficiency only.

There are different ways to justify such a moral division of labor. Walzer (2008 [1983]) seems to suggest that it is a requirement of justice that certain goods are allocated according to the value we in our society put on them. However, we could also give it an instrumentalist justification. The reason why people should try to pursue efficiency in their market transactions is, as Heath (2014, p. 11) suggests, due to “the narrow reason that, in a reasonably competitive market, this is the best way to get prices that reflect social cost.”

Given this view of domain-specific obligations, we should not be surprised when critics of markets, such as Michael Sandel (2012b), are concerned when the market creeps into new spheres. If markets only have one end, and that end is mutually beneficial transactions or economic efficiency, and our obligations to our fellow human beings within the market are exhausted by contributing to this end, we should be worried about all the other goods we want to promote in society that are not best realized through pursuing this end.

However, we should not take it for granted that certain activities need to be guided by one end only. If we view our duties as beneficial norms, we should ask how we can best divide up our moral labor to pursue a plurality of values. It is an open question whether this is best achieved if market participants carry bigger moral burdens than they do on more restricted views of our obligations in market transactions.

That markets have several ends has some precedence within firms, as Heath himself suggests. According to a prominent economic theory of the firm, the transaction cost theory, firms are merely the most efficient way of organizing market activity in certain situations; where transaction costs make it more efficient to use the command structure of the firm than if independent contractors bargained in the market (Coase, 1937). However, firms are not merely efficient ways of

solving the problem of economic production. They are also moral units, where role-specific obligations and norms of fairness play a central role. This could explain why wage differentials between workers are bigger between than within firms (Frank, 1987; Tomaskovic-Devey et al., 2020). Workers do not accept big wage inequalities because they believe that all participants are in a cooperative venture where norms of equality should play an important role. Firms could therefore be said to have several ends. They promote efficiency, but they also contribute to a fairer distribution of goods in society. Importantly, the latter end should not merely be understood as a fortunate by-product of the pursuit of the former.

Multiple ends are not limited to firms. The whole economy can be directed to ends other than maximizing economic growth. One example is the system of centralized collective wage bargaining, where the wage is partly set at the level of the economy as a whole. This system has been particularly prevalent in the Scandinavian countries. Some proponents of the system argue that the system contributes to efficiency, but it is also clear that another aim of the system is to achieve a more compressed wage structure, and thus increase equality (Wallerstein, 1999, pp. 675-676). The debate about whether multinational companies should pay a fair wage should thus be understood in light of what the best way to achieve our several ends is.

#### 4.4 Collective Emergencies

Another avenue for future research is to explore how our account of emergencies as informal insurance schemes speak to how we should deal with emergencies as collectives. In “Ethics of Emergencies,” we focus on our individual obligations to come to rescue. A crucial component of our account is that the best way to solve the problems that face us in these situations is if the people close to the situation drop what they do and come to the rescue. War, natural catastrophes, and epidemics confront us with a potentially different type of emergency situation, where instead of relying on individual action, we need to coordinate our actions.

It is noteworthy that it was a famine in Bangladesh that motivated Singer (1972) to write his influential essay “Famine, Affluence, and Morality.” A famine is arguably an emergency in this wider, collective sense, which seems to necessitate an internationally coordinated effort to restore the situation back to normal. A question for future research is whether this effort could be understood as the premium we pay to take part in a global insurance scheme. All societies can face emergencies and may, in those situations, desperately need the help of others. Moreover, since the

obligations are limited to restore a situation back to normal, rather than to eliminate stubborn instances of poverty, it is arguably a scheme that everyone can agree to.

It is not only our obligation to assist people in need that seems to be more extensive in emergencies. We also allow the collectives in which we take part to impose tougher restrictions on our liberties, such as forced quarantine and mandatory testing and vaccinations, than in normal circumstances. Not only do we allow for more coercive measures than we otherwise would. We allow for less efficient interventions and more mistakes when decisions are made quickly on the background of limited information. We have, furthermore, a higher tolerance for sacrificing a few to save the many. We tolerate removing one person from a life-saving ventilator to prioritize the need of another even if that leads to the person's certain death (Emanuel et al., 2020; Truog, Mitchell, & Daley, 2020). As demonstrated during the 2020 COVID-19 pandemic, an effective response calls for extraordinary measures.

Singer and Michael Plant (2020, Apr. 6) suggest that our extraordinary response to the virus may be due to a bias they call the "identified cause effect": "we are focusing on a specific known source of suffering, even if we do not know who suffers, and neglecting other problems." Rather than rushing to give priority to the pandemic, we need to evaluate whether that is the best thing to do, all things considered. In their view, we should ask whether the measures maximize people's well-being. If it does not, we should not give priority to the pandemic at the cost of other sources of harm.

The argument we provide in "The Ethics of Emergencies," however, provides a reason for why we should give priority to pandemic response. Our collective emergency response is the insurance we come to collect now that the harm is upon us. We should engage in such an insurance scheme because this is the best way we can solve the particular problem that epidemics are, i.e., an emergency.

Let us step back and think about how to best deal with epidemics. Epidemics are unexpected and can cause severe harm in a relatively short time if we do not respond effectively. Since they are unexpected, we struggle to plan properly for them. We can prepare, we can store water, food and other crucial supplies, we can establish agencies whose job it is to prevent emergencies, such as agencies that continuously conduct surveillance for new diseases. However, whatever we do, we

can never be fully prepared for epidemics without incurring massive costs when there are no epidemics. One such cost is the healthcare system.

In the current COVID-19 crisis, a source of vulnerability is the lack of capacity of healthcare systems to handle an epidemic. When too many people need professional help at the same time, the healthcare system gets overcrowded. We could prioritize our resources in such a way that we would be prepared for an epidemic. However, that would entail locking away a large proportion of our collective resources rather than utilizing these resources during nonemergency times. In short, the opportunity cost of being fully prepared for an emergency would be substantial. For our resources to be used for the general interest, we need to deprioritize emergencies in nonemergency times. However, that comes with a promise. To deal with epidemics when they arise, we need to be able to quickly allocate our resources away from our ordinary tasks to meet the challenge they pose.

How do we achieve this goal? If we are to avert harm in emergencies such as pandemics, we need to coordinate our actions effectively. The most efficient way to do this is arguably to give extraordinary powers to the authorities so that they can effectively pursue the project of allocating resources from tasks that do not require immediate resolution to deal with the emergency response.<sup>15</sup> This in turn requires demanding duties on the part of citizens to avoid the spread of the disease and potentially demanding duties to help alleviate harm to the people who are affected. Our duties are thus more demanding in emergencies because this is the premium we pay to take part in an insurance scheme that is meant to solve a problem such as this. Our theory of emergencies is thus able to explain both why we may have duties to self-isolate, why we should accept more restrictions on our freedom, and why we should give priority to solving the epidemic even if this comes with a substantial opportunity cost.

#### 4.5 Methodological Implications

The paper on emergencies also speaks to methodological debates within practical ethics. It is common to use emergency cases in practical ethics to shed light on topics of more general concern, such as whether we have demanding obligations to the poor or whether we are justified in torturing an innocent person to stop a ticking bomb from killing thousands (Bentham, 1804; Singer, 1972; Temkin, 2017; Unger, 1996). If our theory of emergencies is correct, neither nonconsequentialists nor consequentialists should feel entitled to draw firm conclusions about our moral obligations in situations which are not emergencies from our intuitions about emergencies.

Since our obligations in emergencies are situation-dependent and therefore do not generalize to other situations, consequentialists are unwarranted in using our intuitions in emergency cases as intuition pumps in a process of reflective equilibrium to show that we have similarly strong obligations in nonemergency situations.<sup>16</sup> The reason our duties in emergencies can be so demanding is that this is the only way we can solve these situations of need and we all benefit from having these duties.

Nor should nonconsequentialists take our intuitions about our special duties in emergencies as evidence that consequentialism is the wrong moral theory. Our special duty of assistance in emergencies is often leveraged to show that act consequentialism gives the “wrong” verdict in cleverly made thought experiments where one can save more lives by ignoring the plight of someone in an emergency. The objections span from consequentialists showing the wrong attitude by having the wrong dispositions (Williams, 1981), to a failure to live up to one’s perfect duty to save the child (Temkin, 2017).

However, as we argue in the paper, a more sophisticated version of act consequentialism takes into account that we act on limited information in a messy and complex world. Act consequentialists should sanction and defer to beneficial norms that usually guide us in the direction that promotes the good (Mason, 1999; Mill, 2002 [1861]; Pettit, 1997; Railton, 1984; Sidgwick, 1981 [1907]). Consequentialists can and should endorse strict duties of assistance in emergencies.

Our theory of emergencies also sheds light on the epistemic status of our moral intuitions. Utilitarian critics, such as Richard B. Brandt, Richard M. Hare, and Singer, argue that we cannot trust our intuitions in particular cases. This is, in Singer’s (1974, p. 516) formulation, due to the fact that our particular moral judgements “are likely to derive from discarded religious systems, from warped views of sex and bodily functions, or from customs necessary for the survival of the group in social and economic circumstances that now lie in the distant past.” If our particular moral judgements are caused by factors that are likely to lead to systematically unreliable judgements, they lack “evidential force” and thus should not be used as evidence in stress tests where we try to see which of our reasons are robust to changing circumstances (Brandt, 1990, p. 272; Hare, 1973; Singer, 2005) “It would be best,” Singer (1974, p. 516) thinks, “to forget all about our particular moral judgments.” Instead we should use pure reason to figure out what principles to abide by and then deduce what we should do from these principles (de Lazari-Radek & Singer, 2014, 2017).<sup>17</sup> In other words, we should do top-down ethics.



We should first note what kind of challenge we are dealing with. Singer and his co-author in recent works on the topic, Katarzyna de Lazari-Radek, do not commit the genetic fallacy of equating a belief's cause with its truth-value. The claim is not that our particular moral judgements will never track what we have most reason to do, but that our particular moral judgements are not a reliable source of knowledge. What they criticize is our epistemic competence, not that our intuitions do not correlate with moral truth.

I agree with the utilitarians that the most plausible explanation of where our moral intuitions come from is that they are the result of evolutionary and cultural programming. What I want to push back on is that this means that our intuitions are unreliable guides to what we have most reason to do. Our theory in "The Ethics of Emergencies," suggests a more optimistic take on our moral intuitions. It seems like our intuitions track the importance of taking part in upholding a beneficial norm. If our intuitions are the product of evolution and cultural programming, how can this be the case?

What seems to emerge as the consensus opinion in moral psychology and moral anthropology is that morality is a system meant to enhance cooperation (Curry, 2016). As Haidt (2012, p. 202) puts it: "moral systems [work to] suppress or regulate self-interest and make cooperative societies possible" More specifically, our moral intuitions are internalized norms that encourage prosocial behavior. Our moral intuitions are, in other words, automated solutions to coordination problems. If this is true, our moral intuitions will tend to track something of moral importance, namely harmonious existence that enables us to reap the fruits of cooperation.<sup>18</sup> Oliver S. Curry, Daniel A. Mullins, and Harvey Whitehouse (2019) provide one particular systematic theory of "morality-as-cooperation":

Morality-as-cooperation draws on the theory of non-zero-sum games to identify distinct problems of cooperation and their solutions, and it predicts that specific forms of cooperative behavior—including helping kin, helping your group, reciprocating, being brave, deferring to superiors, dividing disputed resources, and respecting prior possession—will be considered morally good wherever they arise, in all cultures (pp. 47).

They provide empirical support for this theory through a systematic study of the ethnographical record in 60 societies. Their main finding is that "the moral valence of seven cooperative behaviors was uniformly positive. In every society for which there were data, these seven cooperative

behaviors were considered morally good.” (Curry et al., 2019, p. 55) They argue that this provides support for David Hume’s (1983 [1751]) view that our

moral judgments depend on an “internal sense or feeling, which nature has made universal in the whole species”, and that as a result certain qualities—such as “truth, justice, courage, temperance, constancy, dignity of mind . . . friendship, sympathy, mutual attachment, and fidelity”—are “the most universal, established principles of morals”, “esteemed universally, since the foundation of the world”, “in all nations and all ages”. (pp. 51, page numbers are removed)

Why does this matter for the question of whether we can trust our moral intuitions? We could object that although this is a plausible theory, it does not provide evidence to support the claim that we should trust our intuitions to provide us with evidence about the truth of morality.

We could go even further and say that we have positive reasons to doubt that our intuitions will track what we, on reflection, believe matters. Given our evolutionary history we should, as Joshua Greene (2013) suggests, expect that our intuitions are better adapted to life in small tribes, than to life in complex and pluralistic societies such as ours. More generally, when our societies change and we have different problems to solve or the same problems are best solved in different ways, we should expect our intuitions to misfire. Norms around monogamy and sexual chastity have been ways to regulate reproduction and ensure societal stability (Henrich, Boyd, & Richerson, 2012). Such norms could be less important today, but we may still feel the force of intuitions meant to serve potentially outdated purposes. The same could be true when we use our intuitions to guide us in the face of new technology. When we look back on how many ethicists responded in an alarming fashion to the use of in vitro fertilization to help otherwise infertile couples to have children, we have a reason to be skeptical about the weight we should put on our intuitions in these unfamiliar cases (Rachels, 1991).

This objection is well-taken. However, the bleakest views about our intuitions are built on a quite restricted view of our intuitions. It is certainly reasonable to believe that some of our intuitions are deep features of our nature. However, others are the product of culture and are thus more malleable to new circumstances. Since our intuitions are the product of norms that are adapted to particular cultures and to animals such as us, they provide insight into what behavior is needed to reap fruits from cooperation. We should expect the mechanisms through which these intuitions are connected to beneficial outcomes to be somewhat opaque. As demonstrated by decades of

research on cultural evolution, systematized by Joseph Henrich (2015) in *The Secret of Our Success*, our norms and corresponding intuitions can serve many functions that are not obvious to us.

To discard all our particular judgements and deduce highly revisionist practical implications from contested moral theories, would, on this picture, often be an act of epistemic arrogance. A picture of our intuitions as automated solutions to coordination problems provides us, I take it, with a presumption that they track something of moral importance. More specifically, we should seek to explore how they fit into a set of norms meant to regulate a specific set of actions to solve a specific problem. This invites us to do interpretative work to tease out the hidden wisdom within our cultures, as suggested by theorists such as Seyla Beynabib (1986) and Michael Walzer (1994).

We can understand our moral intuitions as automated solutions to coordination problems without expecting them to give the “correct” verdict on how we should act in thought experiments philosophers design to test moral theories at their margins. Our intuitions are arguably not robust to every twist and turn philosophers can come up with to test our theories; they are, however, geared towards getting certain beneficial norms to work. We should therefore, as David Hume (1978 [1739]) argued, expect them to give guidance on how we ought to behave in the *typical* cases the norm speaks to.

This parallels recent developments within experimental economics. Experiments indicate that people act seemingly irrationally: for example, they reject unfair but beneficial offers in one-shot and anonymous games. However, our behavior in these experiments is perfectly reasonable when understood as a set of heuristics or automated behaviors that serve us well in repeated interactions. Rejecting unfair offers will over time give better offers than if one acted “rationally” in the sense of accepting all offers that are better than nothing. It ensures that we are not taken advantage of by others (Frank, 1987). Similarly, our intuitions will tell us that we should, in general, give priority to emergencies and avoid killing, even if there are extreme cases where we should ignore the pull of our intuitions.

This provides support to the bottom up-way of doing practical ethics that I engage in in this dissertation. To deduce practical implications from the ethicist’s favored moral theory, will in many instances be an act of unjustified epistemic arrogance. We should start from the reasons people provide and put them under critical scrutiny. When we do so, we should seek to provide general moral principles that can explain our particular moral judgements. However, when we seek

coherence among our principles and particular moral judgements, we need to be wary of what purpose these judgements are designed to play in our moral lives. They are likely to be products of evolutionary and cultural programming and they will serve certain functions and not others, and thus give a particular form of moral insight. Our particular moral judgement should not be taken to be independent pieces of evidence that can be used to test a moral theory. Rather, they should be regarded as contextually dependent indications of what the right way to behave is in order to reap the fruits from cooperation within certain domains.

## 5. The Applied Papers

### 5.1 Sex Selection in India

In the first of the three papers on applied issues, I consider the ban on sex-selective abortions and other forms of sex selection in India and ask whether a ban is justified. Sex selection in a context of severe gender inequalities is a particularly vexed problem.

In the paper, I begin by presenting a *pro tanto* case for banning sex selection by Wendy Rogers, Angela Ballantyne, and Heather Draper (2007). They argue that the practice is harmful and discriminatory against girls and women. I defend their argument against two common objections: that the harm of the practice is short-lived and that women's right to procreative autonomy is a more important value than discrimination and harm (Savulescu, 1999, 2001). I then go on to present my own challenge to their argument that has its root in the distinction I introduced in section 3, "Methodology," between the evaluative and the normative question. Even if the practice of sex selection is evaluatively bad, this is insufficient to show that a ban is justified. It may be the case that a ban makes things even worse. If so, we would commit the bulldozing fallacy if we favored a ban.

To figure out whether it is for the better if sex selection is banned, I evaluate the alternatives that are open to Indian parents who would like to have a boy rather than a girl: to resort to black-market sex selection, to keep having girls until they have a boy, or to be satisfied with only girls. I then compare these alternatives in a pairwise comparison with legal sex selection to see if a ban is likely to make things better. Based on this analysis, I suggest that a ban on sex selection is likely to make the situation worse, especially for mothers and their daughters.

The aim of my paper is two-fold. One is to contribute to shedding light on the difficult substantial question of sex selection in India. The other is to contribute to a methodological discussion of how to do practical ethics when we face conflicting reasons in highly non-ideal situations.

## 5.2 Why States Should Buy Kidneys

No less contested than the topic of sex selection, is whether to allow the buying and selling of human organs. Trades in organs are often considered the most delicate deals there are. When we imagine organ markets, I suspect many of us think about the more or less coercive harvesting of poor people's organs. I will not discuss black markets in organs, nor the coercive harvesting of organs that is said to happen in many parts of the world. The question I will explore is whether we should implement a regulated market in organs, or more specifically, in kidneys.

Whether to have a market in kidneys is a question worth considering. Many people who suffer from kidney failure live on dialysis and die prematurely. A market could solve this problem by increasing the supply of kidneys. Some would rather have money than a spare kidney. If we allowed a market in kidneys, more people would survive, and more people with two healthy kidneys who need money would be made better off (Radcliffe-Richards, 2012). This provides us with a *pro tanto* case for allowing people to buy and sell kidneys.

However, a market would not give all of us what we want. Some people might not be able to afford a kidney if they needed one. Another concern with markets is that desperate people might be forced by their economic circumstances to sell a kidney and exploited in so doing. These are reasons that count against allowing a market in kidneys. Concerns about unequal access and desperate exchanges have motivated many to suggest that the government should pay people for kidneys and distribute them according to need (Erin & Harris, 1994; Hippen, 2005; Semrau, 2014; Taylor, 2005).

To the extent that the government is the only agent that is allowed to buy kidneys, we call this a government-monopsony model. That way, access to healthy kidneys does not depend on one's financial situation, and the compensation to the donor can be set at a nonexploitative level. A government-monopsony model thus stands on firmer ethical footing than what we may call a *laissez-faire* market, where individual buyers and sellers engage in deals in an unregulated market. There are nevertheless many ethical objections to the government-monopsony model. I respond to

such objections in two papers and, by so doing, I seek to strengthen the case for a government-monopsony market.

In the first paper, I address Cécile Fabre's (2003, 2004, 2006, 2008) little-scrutinized principled objection to paying kidney sellers. Fabre puts a powerful challenge to proponents of kidney markets. She argues that the healthy have a duty to provide the sick with one of their kidneys. If we have a duty to help someone, she argues, we cannot profit from doing that duty.

There are several ways we can respond to Fabre's argument. We can deny that we have a duty to provide people with a kidney. An organ may not be the type of good that should be included among the resources we owe one another (R. Dworkin, 1983). Even if organs are the type of good we may owe each other, donating a kidney may still be too demanding to qualify as a duty (T. M. Wilkinson, 2007). In the paper, I pursue a different line of argument. I grant that the healthy have a duty to provide the sick with kidneys. However, I deny that our duties to provide the sick with kidneys are of the sort that would prevent us from paying donors.

In the paper, I distinguish between collective and individual duties, and argue that it is only if we assume that the individual is the duty bearer that it is wrong to demand to be paid to do one's duty. I also argue that having a collective duty to the sick involves having what I call derivative duties to allocate the burdens of fulfilling the duty in a way that is fair, equitable, and that minimizes harm. This, I argue, provides us with a *pro tanto* requirement to pay donors to fairly distribute the burdens involved in providing the sick with kidneys. I defend this argument against what I take to be many of the strongest objections to kidney markets.

When we have collective duties, we necessarily have a triadic moral relationship between claimants, the collective, and subsidiary duty bearers. I suspect that this can explain many of our considered judgements about what we find troublesome about kidneys markets, such as why it is problematic that someone who is poor have to sell a kidney to survive. I also argue that the triadic moral relationship provides us with a principled justification for giving more generous compensation to donors than they would have received in a laissez-faire market, where prices are set by supply and demand.

There is also a connection to "The Ethics of Emergencies" that would be worth exploring in future research. One way to think about our current way of solving the problem of kidney failure is that close friends and family treat their loved one's kidney failure as an emergency where one of

them has to step out of her ordinary routines to make a substantial sacrifice. In that light, the opposition to paying donors is understandable. However, if we could find a more reliable way to solve the problem, we would no longer have reason to prefer solving this problem through emergency norms (Herman, 2012).

Another avenue for future research is to specify under what conditions we should collectivize our duties. In the paper, I argue, in line with “The Ethics of Emergencies,” that collectivization should happen when it allows us to fulfill our duties in a more efficient and fair way.

My focus in the paper is on kidneys, but I suspect that the lessons from the paper could be relevant for other cases where we have duties to provide certain goods. It has been suggested that we have individual duties to forego antibiotics (Giubilini, 2019), and that we have collective duties to vaccinate to realize herd immunity (Giubilini, Douglas, & Savulescu, 2018). If we accept such duties, it is a further question of how we should distribute the burdens of fulfilling these duties. Should we tax, incentivize, pay, prohibit or mandate? Alberto Giubilini (2019) favors a tax on the use of antibiotics, and Giubilini, Thomas Douglas, and Savulescu (2018, p. 559) believe our collective duties “strengthens the ethical justification for the imposition of coercive vaccination policies.” It is tempting to conclude that coercive measures are necessary if people have a duty. However, if our duties are collective, we should instead ask, I argue, what the fairest way to distribute the burdens among subsidiary duty bearers is. This may be through tax or coercive measures, but we should not rule out incentives, payment, and other rewards as a matter of principle.

Another avenue for future research is to explore how robust the conclusion in the paper is to what type of duties individuals have. When we have collectivized our duties, it seems to be less relevant whether we otherwise would have had an individual duty to donate one of our kidneys. The collective can have duties to provide kidneys to people in need even if no individual would have a duty to donate one of theirs. When we pay donors through taxes the burdens of donating a kidney are reduced, which allows the collective to take on a burden it would not otherwise be able to shoulder.

### 5.3 Reframing Rewards to Kidney Donors

The third and final applied paper also deals with the issue of human kidneys. In “Reframing Kidney Rewards” I analyze the different ways a kidney donor can be rewarded.

To give someone money can express very different things depending on how it is given. We can use incentives to steer people in the direction we want by appealing to their material self-interest. We do not talk about fair incentives but ask whether they work to get people to do what we want them to do. We can also compensate people for the burdens they have to incur. Compensations are meant to raise someone back to the status quo. A compensation is successful to the degree that it performs that function. Rewards are a third way we can use money. Rewards are meant to express our acknowledgement that a great sacrifice has been made, and that the recipient therefore deserves our gratitude. A reward is thus not a mere incentive to get someone to do something or a compensation meant to get them back on their feet, but to elevate them above the crowd in recognition of their good deed.

I show how a reward could be used to give a prize instead of a price to kidney donors, delivered through a public ceremony. I argue that this model can meet several important objections to a government-monopsony market. This paper thus builds on my arguments in favor of government monopsony markets in “States Should Buy Kidneys.”

I see the paper as an attempt to find agreement between people with diverging views on what is most important. Since paying for kidneys can save many lives, we have a strong reason for doing so. However, as we explored in section 2 of this introduction, “What Should We Do for Fantine?” some are of the opinion that paying for kidneys degrades the good and its giver (E. Anderson, 1995; Sandel, 2000). Others are afraid that replacing acts of altruism with acts of self-interest will have negative effects on the social fabric (Singer, 1973; Titmuss, 1972).

I want to underscore that I do not see these objections as of overriding importance. I believe, as I argue in “States Should Buy Kidneys,” that we have overriding reasons to implement a government-monopsony market. However, I see the reward-model as an improvement on the ordinary model in that it is able to promote several valuable ends, as well as being more likely to receive popular support.

In the paper, I argue that a kidney-reward model could work well for a government monopsony kidney market. An avenue for future research is to see if the model could be a good fit for other delicate deals. Based on the kidney case, I would suggest that the following factors may be of relevance: (i) there exists a collective responsibility for providing the good, (ii) attainment of the good requires a substantial sacrifice from one person, and (iii) the sacrifice is a one-off event.



A promising application could be to reward participants in a vaccination for COVID-19. Nir Eyal, Marc Lipsitch, and Peter G. Smith (2020) have argued that we should speed up the vaccination process by asking healthy, young adults to participate in a human challenge trial. They concede that “challenging volunteers with this live virus risks inducing severe disease and possibly even death,” but argue that the costs are worth it “in the circumstances of a devastating global pandemic.” (Eyal et al., 2020, p. 1) Despite the extraordinary potential upside to speed up a vaccine trial, many people are concerned that it is unethical to impose such a cost on healthy adults (Regalado, 2020, Mar. 25).

One way to reduce the burden on the participants would be to pay them for their participation. However, as Eyal points out in an interview in *Nature*, “I think in this study, ensuring a high level of public trust is important, and I would advise researchers not to attract volunteers through high payments.” (Callaway, 2020, Mar. 26) A reward, delivered through a public ceremony, to the 100 people who participate in this trial to save the potentially millions of people from the pandemic, on the other hand, could be a better alternative. In this case, we recognize that (i) we have a collective responsibility for providing the vaccine, (ii) meeting our responsibilities requires a substantial sacrifice from a few people, and (iii) the sacrifice is a one-off event. A reward could both give compensation to the participant and hence redistribute risks between non-participants and participants, show public recognition of the extraordinary sacrifice these people are making, and at the same time secure public trust.

## 6. Conclusion

Although markets have a bad reputation in many circles, sometimes for good reasons, there are many reasons to favor societies that give people a wide range of freedoms to engage in deals they find beneficial to them. That spans from the most mundane to the most sacred.

In the marketplace, people with widely different backgrounds, interests, and views of what a good life is, can come together for mutual benefit (A. R. Greene, 2019; Sugden, 2018). Whether you are a Muslim or a Christian, you can buy your preferred holy book in the market. Moreover, if you struggle to make ends meet and no one is helping you, there is a small, but nonetheless important, comfort in having the freedom to fend for yourself in the marketplace. What you have to sell can seem repugnant to outsiders, and even to yourself, but at least it is you, not someone with no experience of living your life, who has the power to decide whether the trade-off is worth

making. By giving people the freedom to deal, we respect people's choices, their well-being, and even facilitate peaceful co-existence.

Such virtues of a market society have tempted many to become libertarians or market friendly liberals, for whom there exist few legitimate restrictions on people's freedom to engage in consensual deals (Brennan & Jaworski, 2015; Satz, 2010, pp. 63-90).

However, such defenders of the free market underestimate either the problematic features of markets or our ability to make them better. Certain deals are exploitative and unnecessary harmful. Other deals can be experienced as degrading and demeaning, given the social understanding of the goods in question. Particularly problematic are intimate and invasive deals engaged in by people who have few other opportunities open to them.

The badness of delicate deals has tempted market skeptics to argue in favor of making certain goods inalienable (Radin, 1987; Sandel, 2012b). However, as these theorists often recognize, prohibition is a dangerous tool. It risks making people even worse off than they already were. If we consider helping people by removing one of their options, we need to be careful not to commit the bulldozing fallacy.

There is fortunately a third way that we can pursue to address the bad-making features of delicate deals without giving up on the benefits of markets. This third way consists of regulating particularly delicate deals to ensure they are less harmful to parties to the deal, and to the wider society, and enacting policies that empower the weak party by giving them access to more opportunities. More opportunities can either be provided for in the market or through social rights that make people less dependent on the market for fulfilling their basic needs.

Regulation can benefit the weaker parties to a greater degree than prohibition which rarely leaves them better off than they were. If the problem with prostitution is that women are forced by creditors to sell sex and that they are paid too little because they have few other opportunities, we can seek to regulate these problems directly rather than prohibiting the practice altogether. When compared to either prohibition or a laissez faire approach, there is, for good reason, much less controversy around measures aimed at empowering the weak party to ensure that deals happen on fairer terms.

Even people who have conflicting views on the virtues of markets in delicate goods can agree that deals should ideally happen on fair terms, where both parties are informed and where both parties get their fair share of the surplus created. Sometimes, as with goods such as kidneys, the well-being of participants to the deal is best ensured by heavy-handed regulation, such as making the government the sole buyer of kidneys.

I suspect that it is useful to understand delicate deals in a wider context. We often think of delicate deals as special, and to a certain extent they are, but they also share many features with ordinary deals that have to do with the fact that labor markets are not like other markets. In labor markets, power is central to an extent that is unheard of in other markets. This is caused by two factors. One is that people are dependent on selling their labor power to make ends meet. The other has to do with employers' lack of oversight and enforcement possibilities. Because contracts are not easily enforceable in labor markets, employers demand discretionary power to ensure compliance (Bowles & Gintis, 1990). The fewer alternatives the worker has, the more dependent she is on the employer, and the more power is in play. Instead of being distinct in kind, delicate deals can be understood as the extreme end of a type of relationship riddled with potentially harmful power asymmetry.

I am a big believer in the power of markets to make our lives better. However, we also need to understand their limits. Markets are not neutral mechanisms for allocating goods, but institutions that favor certain life forms over others. According to the economist Fred Hirsch, markets tend to favor “commodities, exclusion, and commercialization” at the expense of “social contact focused on casual meetings and activities or relationships less specifically geared to particular forms of consumption”; they also disfavor “open access, or nonexclusion.” (Hirsch, 2005 [1976], p. 92) In short, markets have a commodity bias.<sup>19</sup>

Moreover, the way we allocate goods is not purely a matter of efficiency, but also a powerful expression of our values. Consider the altruistic procurement of blood that was the topic of Titmuss's (1972) study. Titmuss argued convincingly that altruistic procurement has a disproportionately powerful effect on social cohesion. The general lesson is that certain non-monetary transactions can serve a particularly powerful symbolic expression of solidarity between fellow citizens. The concern is, as Singer (1973, pp. 313–314) has argued, that “a commercial system would have the opposite effect. The laws of the marketplace discourage altruism and fellow-feeling.”<sup>20</sup>

This is most obvious with the use of incentives, which have increased manifold the last decades (Grant, 2011; Sandel, 2012b). We put a price on nature and tax pollution and other negative externalities. Civil servants and CEOs are steered with pay for performance. We tax so called sin goods, such as cigarettes, sugar, and alcohol, to reduce their consumption, to ensure that people do “the right thing”. Incentives can be powerful tools that make people act in accordance with the general interest. However, they can also have negative expressivist effects. They may express that the other person is being treated like a “wanton,” a being with no ability to critically reflect on their desires and thus only able to respond to carrots and sticks, not reason (Frankfurt, 1971; Grant, 2011).

Partly for that reason, incentives may express distrust and therefore crowd out necessary trust between the agent and the principal. When an employer starts using performance pay, the employees may come to see this as a lack of trust in their willingness to do their best. This could even backfire and lead to less effort being put into the work, not more (Bowles, 2016, pp. 79-112). Incentives can also shift behavior in unwanted ways. For incentives to work they have to reward a pre-specified set of goals. If you want to use incentives to improve teaching, you need to specify what you will measure. That is likely to steer behavior away from work that is equally important but difficult to measure. Not only can incentives steer behavior away from useful behavior, the measure can itself be the victim of corruption. “The more any quantitative social indicator is used for social decision-making,” Donald T. Campbell (1979, p. 85) argues, “the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.”

Although many market critics have been tempted to draw the conclusion that markets should stay in their sphere and that incentives will crowd out purer motives (Sandel, 2013), I do not think this is the right lesson to draw. Markets can take many forms; some are morally problematic, while others are beneficial. What we need to do is to take into account the symbolic effects of markets when we design them. In line with my argument in “Reframing Kidney Rewards,” I want to propose that markets can be improved with the help of moral language and ethical analysis.

In emergencies such as wars and epidemics, we are called on to make big sacrifices by an appeal to our moral obligations to our fellow citizens and human beings more generally. I believe there is a case to be made for making this a more prevalent concern in day to day politics. To publicly appeal to people’s pro-social reasons can, compared to monetary incentives, be a preferable way to get people to act in line with the common good.

A drawback with moral language as a replacement of money, however, is that it risks being exploited to demand of people that they make sacrifices without being sufficiently compensated. To give people money is often necessary if we are to fairly distribute the burdens of providing someone with a good, as when they are asked to donate a kidney. We should not assume that we can only be motivated by one reason at the time. The two can be combined to motivate people to act in line with the common good through two channels, an appeal to material self-interest and an appeal to do the right thing. The suggestion of giving kidney donors a prize is only one proposal for how we can combine money and moral language to motivate people to act in a more prosocial manner while also expressing that we are in this together (Bowles, 2016).

To use more moral language to align people's behavior with the common good can also unleash a potentially powerful part of the toolbox that could create more intensity and warmth in modern politics. Many people are disengaged and find politics alien to them. This is not because people do not have opinions about things other than their own lives, but arguably because politics has become more technocratic and expert-oriented, as with many other spheres of life (Sandel, 1996).<sup>21</sup> To reinvigorate public debate, we need to engage in conversation that starts from people's own experiences and the things they care about, such as how we are going to conduct our lives, what responsibilities we have, and how we can live better together. To answer such questions successfully, we need a more embedded and engaged practical ethics.

If we accept this claim, it has consequences for the role ethicists should play in public life. For practical ethics to be an activity that is not only theoretically, but also practically action guiding, it needs to engage with people in their own language and with their own understanding of the world. We can and should leave the public forum for the ivory tower to get the necessary critical distance. However, if ethicists are to contribute to making the world better and more just, it necessitates a continuous conversation with people about their individual ethical commitments and urge to shape the society in which they live. The practical ethicist has a crucial set of skills she can bring to this discussion. However, besides the authority of the ethos she gets from showing herself to be a robustly thoughtful participant in the conversation, she should claim no special authority. Our job as practical ethicists is to engage in debates as equal participants in a public and transparent conversation about what we should do. A more moralized debate over what we want our society to be, and the role of the individual within such a society, may be exactly what we need in our current climate of public discourse.



# Paper 1: The Bulldozing Fallacy

ABSTRACT: Should it be legal to buy sexual services, gestational services, or human kidneys? One argument for why such trades ought to be prohibited is that many providers are in such desperate situations that they have no other viable option than to consent to the transaction. Those who employ this argument for prohibition, we suggest, must be careful not to commit what we call the bulldozing fallacy: the fallacy of believing that when people have a very narrow range of available options, we help them by taking away their preferred option in that range. After presenting the fallacy and explaining why it is imperative to avoid it, we examine six ways in which prohibition can be defended without committing the fallacy. Our aim is to help move the debate about the limit of markets forward by proposing a conceptual scheme and an argumentative way forward that, hopefully, prohibitionists and antiprohibitionists alike can be willing to accept.

## 1. Introduction

Most of us have no objection to the buying and selling of goods and services such as food, books, massages, transportation, and childcare. Many begin to feel uncomfortable, however, when it comes to pregnancies and sexual services, and when we reach human organs, most would say that a line has been crossed. But where do we draw the line? And how do we determine that? These are pressing questions, for how we understand and delimit markets has a profound impact on society, and as technology advances, more and more things become potential commodities.

In this paper, we shall be concerned with a category of transactions that we refer to as *invasive trades*. These are trades in which something bodily or otherwise intimate is brought into a commercial transaction.<sup>22</sup> Typical examples include sex work, commercial surrogacy, and paid kidney donation.

Some theorists hold, or lean toward, a prohibitionist position on invasive trades. Examples include Michael J. Sandel (2012b), Elizabeth Anderson (1995), and Margaret Jane Radin (1996). According to Sandel (2012b, pp. 6-8), although we should welcome a market economy, we should not welcome a market society, in which virtually everything is given a price tag. Other theorists hold, or lean toward, an antiprohibitionist position. These include, at the most extreme, Jason Brennan and Peter M. Jaworski (2015), and Tait Szabo (2008), and, more moderately, Richard Posner (2012, Oct. 21), Richard A. Epstein (2006), James Stacey Taylor (2005), and Janet Radcliffe Richards (2012), all of whom suggest (with some variation in details) that we should expect consensual transactions to be advantageous to both parties, since otherwise they would be unlikely to consent, and that for this reason, prohibition is likely to do more harm than good.

Our aim in this paper is not to take sides in the debate. Our aim, rather, is to seek to move the debate forward by proposing a conceptual scheme and an argumentative procedure that theorists on both sides can accept.

We start, in section 2, by introducing a distinction between three types of sellers who take part in invasive trades: forced sellers, reluctant sellers, and eager sellers. We explain why this is a useful distinction, and suggest that the most ethically challenging type is reluctant sellers: sellers who, although they are not forced by anyone to engage in an invasive trade, do so because this is their only viable way to make ends meet. Should engaging in invasive trades with reluctant sellers be prohibited? In section 3, we argue that those who think that this should be prohibited must be careful not to commit what we call the *bulldozing fallacy*. This is the fallacy of concluding that when people have a narrow range of options, we help them by taking away their preferred option in that range. (This builds on an example proposed by Radcliffe Richards. What it has to do with bulldozers will be made clear in due course.) After presenting the fallacy and explaining why it is imperative to avoid it, we proceed, in section 4, to present six ways in which prohibitionists can defend their view without committing the fallacy. In section 5, we conclude and point to a way forward that we hope that prohibitionists and antiprohibitionists alike may be willing to accept.

In order to avoid too many moving parts, we will use one particular invasive trade as the example that we mainly discuss in this paper. We have chosen to use *sex work* as this example, the reason for which is that sex work is the invasive trade that can most easily be discussed in a meaningful way without going into a range of technical issues in medicine.

## 2. Forced, Reluctant, Eager

People who participate in invasive trades as sellers do so for a wide variety of reasons in a wide variety of circumstances. To illustrate, consider sex work, which will serve as our main example. While some people sell sexual services because they have few or no other ways to make ends meet, others do it in spite of having many options to choose from. Moreover, while some sex workers report that they have high levels of independence and autonomy, large numbers are victims of trafficking or other forms of abuse. There is also a wide variety of services that sex workers perform, and although most clients are men, people of all genders are represented on both sides of the trade. Sex work, like other invasive trades, is highly complex.



Is there a way that we can categorize those who engage in invasive trades that, at once, respects the complexity of the trades and is useful to a more general normative discussion? For the purpose of advancing the debate about invasive trades, we suggest that it is useful to distinguish between three different categories of sellers: *forced* sellers, *reluctant* sellers, and *eager* sellers.

Forced sellers are those that are forced by another person, or by a group of persons, to engage in an invasive trade. In the case of sex work, this category includes those who are compelled into prostitution by, for instance, a pimp who threatens to beat them up or a human trafficker who threatens to burn their passport unless they provide sexual services. The category of forced sellers borders on the category of reluctant sellers. Reluctant sellers are those that, although they are not forced by anyone to sell sexual services, do so in spite of clearly disliking it. This category spans from persons who engage in sex work to escape the hunger or homelessness to those who do so to pay off debt or to maintain an acceptable standard of living. Reluctant sex workers would rather switch to another job if that were an option. Finally, bordering on reluctant sellers are eager sellers. Eager sellers of sexual services are those who like sex work, and choose it over other decent paying jobs.

We hope that theorists on both the restrictive and the permissive side of the debate can accept this conceptual scheme. Although different theorists with diverse perspectives on sex work might hold different views on the relative size and importance of each group, they should all nevertheless accept the scheme. In the case of sex work, some feminists may argue that there are *no* truly eager sex workers. If this is your view, we ask that you think of the set “eager sex workers” as an empty set: a set whose criterion for inclusion no one meets in the world as it currently is. We would like to stress, moreover, that accepting the categories of forced sellers, reluctant sellers, and eager sellers is compatible with holding that it is very often difficult to tell who belongs to which group and that an individual seller might, over time, oscillate between groups. Finally, we ask that readers do not hold this categorization to higher standards (concerning, for instance, being mutually exclusive and jointly exhaustive) than they generally think are reasonable in the complex world of social science.

Why do we think this is a useful conceptual scheme? The reason is that it can help emphasize the extent to which theorists on opposite sides in the debate are in fact in agreement. Let us start with the easiest category on which to reach agreement. To our knowledge, everyone in the academic debate agrees that it should be illegal to force someone to sell sexual services. And although some

would object, we take it that most participants in the academic debate would concede that genuinely eager sex work does not warrant prohibition, at least not prohibition justified by appeal to the interests of sex workers. Admittedly, it might be argued that eager sex work is nevertheless *morally* objectionable, but to hold that a practice is morally objectionable is compatible with holding that it should not be prohibited. It might also be suggested that many of those whom we take to be eager sellers of sexual services are in fact reluctant sellers, or even forced sellers. We do not wish to quarrel with that, but to note that to hold this is compatible with holding that genuinely eager sex work, to whatever extent it occurs, provides no ground for prohibition, at least not grounded in the protection of the interests of sex workers. Even a theorist who holds that there are no instances of genuinely eager sex work could hold that, *if* there were, such acts would not be of a kind that warrants prohibition. While much more could be said, we shall proceed on the premise that we can reach relatively wide agreement as to both the forced and the eager selling of sexual services: specifically, that the former does and the latter does not provide the ground for its own prohibition.

The most difficult category on which to reach agreement—and therefore the category with which we shall mainly be concerned in this paper—is the *reluctant* category. Even here, however, it is possible to reach at least some agreement. One premise that we can presumably agree on, irrespective of our ideological divides, is that it must be very burdensome to be a reluctant sex worker. Taking up sex work reluctantly is arguably a worse experience than going reluctantly into most other lines of work, and it would, all else equal, be better if we lived in a world in which no one had to engage in sex work reluctantly in order to make a living. We may also be able to agree that those who engage in sex work reluctantly should receive more help and, if they want, assistance in transferring to other types of work. While political libertarians might object to the idea of spending government money to help sex workers out of bad situations (unless they are victims of force or fraud), we take it that they would also agree if the healthcare, counselling, job-training programs, etc., were financed through voluntary donations.

In spite of some agreement on the question of legal status, reluctant sex work is a point on which theorists disagree. Some theorists, among them Ole Martin Moen (2014), Juno Mac and Molly Smith (2018), and Brennan and Jaworski (2015), argue that reluctant sex work should be legal. Others are critical of this point of view. Sandel (2000, p. 94) argues that “when people buy and sell things under conditions of severe inequality or dire economic necessity ... market exchanges are ... not truly voluntary,” because the sellers are “coerced, in effect, by the necessities of [their] situation.” The gist of the argument is that in an important way, the situation of a reluctant

seller can be more like that of a forced seller than that of an eager seller. For individuals who have sex with clients in spite of not wanting to do so, it does not always make much of a difference whether they are forced to provide sexual services by a specific person or by circumstances. The harmful effects of refusing could be equally devastating in both cases, and under such conditions, it can reasonably be argued, the sex is not consensual in the way that it would have to be for the practice to be one that should be lawful. Vicente (2016, p. 484), although he thinks that eager sex work should be legal, argues that it can be extremely challenging to sell sexual services reluctantly, and that many who do so because they have no alternative: “they need the money simply to survive.” This, in turn, could be an argument for why, in addition to prohibiting forced sex work, we should target reluctant sex work, whether through outright prohibition on both the seller side and the buyer side, through prohibition on the buyer side only, or, at least, through other government measures to discourage reluctant sex work.

Let us now consider a scenario that can aid us in discussing reluctant selling.

### 3. The Bulldozing Fallacy

Imagine you live in a city that has a terrible slum. One thousand people live in that slum. They sleep in shacks and lack access to clean water and proper sanitation.<sup>23</sup> Understandably, the mayor is very concerned. She looks into the slum dwellers’ situation and finds that living in the slum has substantial negative effects on the slum dwellers’ health. Although she finds that there are in fact a few people who are happy to live in the slum (they are eager slum dwellers), most of the people there would rather live somewhere else (they are reluctant slum dwellers). She is relieved to discover that no one is forcibly held in the slum (those would have been forced slum dwellers). Nevertheless, she concludes that it is unacceptable and unjust that there are so many slum dwellers who would rather not be slum dwellers and who suffer as a result of living in the slum. Having no other options, they are, she concludes, forced by their circumstances to live in the slum. She therefore initiates a measure to eliminate the problem: She hires a company to bulldoze the slum. After all the shacks have been flattened, the mayor proclaims, with some pride, that now the number of people in her city who suffer as a result of being reluctant slum dwellers has been drastically reduced. Indeed, her initiative has been very successful, since it has reduced the number of reluctant slum dwellers to zero.

Would you be impressed? We take it that you would not be impressed, at least insofar as

you were concerned with the welfare of slum dwellers. Even though the mayor was right that it is unhealthy to live in a slum, that it is unjust for people to have to live under such conditions, and that the reluctant slum dwellers were forced by circumstances to live there, it is nevertheless evident that flattening the slum did nothing to improve their situation. Rather, it probably worsened their situation, since it took away from them what little they had and left them in an even more desperate situation. After the mayor's intervention, those who used to live in the slum had to live on the street, and presumably, the reason they had previously lived in the slum was that they preferred it over the street: in the slum, there was at least some shelter, warmth, and privacy.

The bulldozing fallacy is the fallacy of believing that when people are in circumstances so bad that even their best option is very bad, we help them by taking away their preferred option. We commit this fallacy when we fail to take into account that denying them that option is likely to make their situation even worse. People whose preferred options are taken away are usually left with options that, in their own assessment, are even less appealing than what they were previously doing.

The point is obvious in the case of slums, but it also applies to invasive trades. Recall Vicente's (2016, p. 484) claim that some might not want to sell sexual services if it were not for the fact that they "need the money simply to survive." Although this is a very bad situation, notice that if he is right about his stipulation, then taking away this option implies, *ex hypothesi*, that those people will die. Insofar as it is true that certain individuals must sell sexual services in order to get food, to block their access to work of this kind is to block their access to food.

When people are in a bad situation, we usually help them not by making their option range even smaller but by giving them more options to choose from. Just as we help slum dwellers by offering them housing, it seems that we help reluctant sex workers not by removing their source of income but by offering them better sources of income. It is easy to agree with Vicente's (2016, p. 485) suggestion that "we should offer prostitutes who want to leave the job realistic options, realistic help and proper integration," because this would empower them and would do so in virtue of giving them more options to choose from.

It is true that, if we successfully block their option to sell sexual services, their problems stop being *sex-work* problems. It is nevertheless unclear if this constitutes an improvement. The alternative to selling sexual services might be to sell drugs, sell a kidney on the black market, beg on the street, or eat food from garbage containers, and insofar as people take up sex work rather

than engaging in these activities, the reason is presumably that they find it a better option. Notice, moreover, that if we are willing to start bulldozing, we should presumably not stop at bulldozing sex work. If people are eating from a garbage container, this is also unjust unhealthy, and forced on them by circumstances. Thus, this option should, by the same logic, be blocked. This illustrates how bulldozing leads to a regress. If the reason we block an action is that it is unacceptably bad, we should expect that those who would choose it, but for our interference, will, in the absence of their preferred option, resort to something even worse. If this is correct, their new preferred option will also be unacceptably bad, and for that reason, it should also be blocked. And so the logic of bulldozing continues, until we have taken away all the ways by which they could cope with their desperate situation.

The deeper problem, we suggest, is that when we commit the bulldozing fallacy, we overlook the fact that reluctant sellers act, at least in part, for normative reasons. Vicente (2016, p. 481) writes that “prostitution is more or less accessible to everyone: no formation is required; the minimal talent necessary does not particularly restrict access; and one does not have to invest much time or money to start”; he goes on to take this as a reason to believe that people might “end up” selling sexual services even if they do not have a strong desire to do so, absent the economic incentive. Although this is correct as far as it goes, it fails to take into account that the income is not just an *explanation* of why someone does sex work; the fact that these trades can give people a significant income without a need for education or other investments also provides *reasons* for some people to choose to do sex work, just as the fact that being housed in a slum offers various advantages over being homeless provides reasons for people to live in slums. To leap from the premise that an option is unacceptably bad to the conclusion that it should be prohibited is to fail to take into account the reasons people choose that option—and to commit the bulldozing fallacy.

#### 4. Six Ways to Avoid the Bulldozing Fallacy

We hope that theorists on both sides of the debate can agree that, in discussing invasive trades, we should not commit the bulldozing fallacy. But where does this leave us? It might be tempting, for those with a permissive leaning, to conclude that the imperative to avoid committing the bulldozing fallacy implies that sex work, and indeed other types of invasive trades, should be legal as long as it is consensual. It is possible, however, to defend a prohibition on reluctant invasive trades without committing the bulldozing fallacy. Let us now turn to six arguments that can be used to defend prohibition without committing the fallacy.

#### 4.1 The Ignorance Argument

One way to defend prohibition without committing the bulldozing fallacy is to argue that many of those who participate as sellers in invasive trades do so out of ignorance. They might, for example, not know the bad long-term consequences of their preferred actions, or they might have better options available of which they are currently unaware. Reluctant sex workers, for instance, might underestimate the psychological hardships involved in selling sexual services for a long time, or they might be unaware of decently paid jobs elsewhere that they could get if they applied.<sup>24</sup>

If individuals do not know the bad consequences of what they are doing, this might, in some cases, be a reason to block them from doing it. Stated at such a general level, however, this argument has limited force, since for it to work, we would need to make sure that there are genuinely better options available. (Otherwise, we are just bulldozing.) Moreover, we must make sure that what we take to be a better option really is a better option for the people in question. Many people who sell sexual services reluctantly can probably do other kinds of work, but they might not be able to handle long, regular working hours because of parental responsibilities or physical or mental-health issues. Once options that are better, all things considered, are available, however, we must ask why the best way forward is to block their currently preferred choice rather than to inform them of the other options (Radcliffe-Richards, 1996, p. 380).

#### 4.2 The Irrationality Argument

In response to the above, a defender of prohibition might say that some people would sell reluctantly in invasive trades even if we told them about a better option. Some who are already selling would, even if they recognize that the alternative is better, fail to make the transition; some, whether they are already selling or not, would not even be convinced that the alternative is better. In short, some reluctant sellers are irrational, and to help them, it might be necessary to block the option that they currently prefer (or at least make it more difficult for them to choose it).

In some contexts, this can be a reasonable suggestion. We know that poverty can lead to temporary cognitive deficits and short-sightedness (Mullainathan & Shafir, 2013; Shah, Mullainathan, & Shafir, 2019). We also know that we are prone to be overly optimistic and prefer rewards now, even when it will be costly in the long run, and consequently, when we are faced with upfront benefits and long-term harms, we become more prone to behave in ways that we will later come to regret (Frederick, Loewenstein, & O'Donoghue, 2002; Mullainathan & Shafir, 2013). While we should acknowledge this, however, we must be careful about assuming, at the level of

public policy, that people who engage in invasive trades make systematically irrational choices. People in poverty might act in ways that are highly rational in their circumstances, even if those who have never been poor do not understand their reasons. The poor cannot afford, after all, to choose unwisely, and they tend to be on a constant lookout for better options (Banerjee & Duflo, 2011).

Even in the subset of cases where people do act in truly irrational ways, however, we cannot automatically assume that blocking their currently preferred option (or making that option more difficult to choose) will improve their situation. If they really act irrationally, as is assumed in the argument for blocking the choice, how do we know that they will not go on to choose something even worse if they are denied the option to participate in the invasive trade of their choice? To the extent that we posit irrationality on their part, we should also fear that, for example, someone who wanted to sell sexual services but was denied that option might, as a result, turn to robbery, sell a kidney on the black market, or suffer from malnutrition.

This is not to say, however, that the appeal to irrationality cannot be successful in justifying the prohibition of some invasive trades. It seems that it would have the greatest chance for success if the trade in question offers short-term benefits at the expense of long-term harms. We would like to suggest that this objection, if it can justify prohibition, can do so primarily in cases where a large sum is provided up front and many end up regretting their choice.<sup>25</sup>

#### 4.3 The Exploitation Argument

Another argument that can be used to defend prohibition is that even a party who is not forced to engage in an invasive trade might nevertheless be exploited in it. Although there are many ways to understand exploitation, what we shall take to be the central issue here is that one party in a trade takes advantage of the other party's desperation to get an unreasonably profitable deal (Wertheimer, 1996). John Locke (2003 [1661]) provides the example of a ship at sea that desperately needs an anchor. In this case, a ship with several spare anchors could, due to the desperation of the other ship's crew, charge an extremely high price. Because of the distress of the crew on the ship that has lost its anchors, and its lack of other options, it could be pressured into giving up almost everything it owns in order to get access to an anchor that could have been bought cheaply at a harbor.

Exploitation is a serious problem for people in poverty. Does it give us a reason for prohibiting certain kinds of invasive trades?

In considering this, it should first be noted that prohibition does not, by itself, do anything to mitigate the underlying desperation that made the exploitation possible. For the crew on a ship in desperate need of an anchor, it would not be helpful if selling anchors were blocked. Similarly, someone who must, due to desperation, sell sexual services, a kidney, or a pregnancy for a very low price could not be expected to benefit from a prohibition on sex work, kidney sales, or commercial surrogacy.

It would, however, be better if the trade could take place under nonexploitative circumstances. This could be accomplished in two main ways. On the one hand, it can be accomplished by giving the party at risk of being exploited more options to choose from. On the other hand, it can be accomplished through regulation that transforms exploitative trades into nonexploitative trades or at least makes exploitation harder to accomplish. This can be effective if the trade would still be worthwhile to both parties without exploitation. With an enforced maximum price of \$1,000 for an anchor, the trade could still take place (if both parties would rather trade than not trade), but it would be done nonexploitatively. In the case of sex work, paid kidney donation, and surrogacy, in which the potentially exploitable party is on the seller side, this could be accomplished through a minimum price. It can also be accomplished through collective bargaining and through the availability of other buyers.

By contrast, outright prohibition will often provide fertile grounds for exploitation. It leaves less room for regulation and for collective bargaining through labor unions. And it makes it more difficult to find alternative buyers, since it drives people to conceal their interest in such trades. A desperate person who can only find buyers through one brothel or clinic can more easily be exploited than a desperate person with several brothels or clinics from which to choose.<sup>26</sup>

#### 4.4 The Argument from Option-Dependent Pressures

Let us now turn to a fourth type of argument that can be used to defend prohibition on invasive trades without committing the bulldozing fallacy. This argument appeals to what we shall call option-dependent pressures: pressures that a person experiences as a result of having an option to sell.

To illustrate this type of pressure, consider the example of a young woman in the developing world whose city starts attracting sex tourists. This gives her a way to make more money than she previously could; in isolation, having that option would seem to put her in a better position. But



now that sex work is a lucrative option, her family might pressure her to take it up. That might mean outright forcing her (which would make what happens forced sex work), but it might instead mean denying her inclusion, help, safety, inheritance, and the like unless she joins the sex trade. Even if this could make it rational for her to sell sexual services, she could have been better off if selling sexual services had not been an option. In that case, her family would not have had an incentive to put pressure on her, and would have to make money in other ways or live on a tighter budget. This sort of situation has been described by Gerald Dworkin (1982), and it has recently spurred a big debate in relation to paid kidney donation (G. Dworkin, 2014; Radcliffe-Richards, 2014; Rippon, 2014; Satz, 2010; Semrau, 2015; Taylor, 2017).

Do option-dependent pressures provide a good reason for prohibiting invasive trades? While we concede that they might, a few things should be noted. The first thing is that insofar as what pressures a person into engaging in an invasive trade reluctantly is that person's individual poverty, this is not an example of an option-dependent pressure, since in that case, the need to earn money to buy food, clothes, etc., exists irrespective of whether the option to sell sexual services is available (Semrau, 2015). Moreover, even in cases where people are pressured by their families to sell sexual services reluctantly, it is an open question whether the pressure is option dependent. The pressure to bring in money might have been the same whether or not sex work was an option. And without the option of sex work, that same pressure might have driven the person to an even worse way to get money (Satz, 2010, pp. chapter 9, footnote 27).

This is not to deny, however, that many people engage in invasive trades because of option-dependent pressures. Such people might benefit if these trades could effectively be removed from their option range. While acknowledging this, we must be careful not to let our argument generalize too widely. In most cases where one is able to work in ways that benefit others, one is at some risk of being pressured to do that kind of work. We do not, however, want to block all ways in which someone's work can benefit others. It is, after all, *prima facie* good that one's work can have this effect.

Option-dependent pressures are most weighty as reasons for prohibition in cases where individuals' families have the largest incentive to pressure them and where it is most harmful to be pressured. The sale of organs may be an example. It is a relatively quick and salient way to get a very significant amount of money, and as Simon Rippon (2014, 2017) argues, the harms associated with being pressured into selling a kidney can be extensive and life-long.

In cases where there are not strong incentives for pressure, however, or where it is not very harmful to be pressured, appeals to option-dependent pressures do not provide very forceful reasons for prohibiting invasive trades. In these cases, it might be more advisable to pursue other solutions. One way to mitigate harm from option-dependent pressures is to have a generous welfare state with a high level of redistribution of wealth, since this makes people less dependent on their family in order to live a decent life, which can in turn reduce the family's means of exerting pressure. For each kind of invasive trade, it should also be considered whether there are regulatory models that could help mitigate pressure.

#### 4.5 The Argument from an Option-Dependent Lack of Help

It might also be suggested, as an addition to the previous argument, that we must not consider only option-dependent positive pressures; we must also take account of option-dependent lack of help. While relatives might specifically pressure someone into engaging in an invasive trade, they might also require that that person make use of all available options before they offer assistance, and in that case, the person might be made worse off in virtue of having certain options. This can also be a challenge in relation to the state and to private charities. Since more opportunities can change the way someone's need for help is assessed, decriminalizing invasive trades entails some risk that selling sexual services or a kidney will become a prerequisite for obtaining certain welfare benefits (Drenik & Perez-Truglia, 2018).

To what extent is this a reason for prohibiting invasive trades? It seems, *prima facie*, that it is not a reason for prohibiting them but, instead, a reason for not making government benefits conditional on having engaged in them. Here it might be suggested, in response, that it might be difficult, once these trades are legal, to convince the public that it should be possible to receive welfare benefits unless these options have been attempted. While that might be, it must be seen in relation to the fact that it is not common for these benefits to be made conditional on seeking work as a stripper or a porn actor, even if such work is legal in most countries. Moreover, we must be careful not to take away a source of income unless we can be very confident that those we deprive of it will receive other income to replace it. Unless we can be very confident about that, we run the risk of making people even worse off.

#### 4.6 The Argument from Negative Externalities

Finally, it might be argued that we have reasons to prohibit invasive trades because of the negative effects these trades can have on third parties. It can be argued that sex work bolsters a negative view

of women, reduces their sexual bargaining power, or promotes immorality (Pateman, 1983; Satz, 2010). It might also be argued that sex work, commercial surrogacy, and kidney trade all have negative effects on society at large, for example, by inculcating the norm that human bodies are a commodity.

Are these reasons to prohibit invasive trades? To consider this, it might be helpful to think of negative externalities as a form of pollution—as negative effects on others or the environment that are not taken into account by the parties who engage in a trade. It is, moreover, arguably justifiable to seek to prevent negative externalities, even when the externalities, as in the case of invasive trades, are cultural rather than chemical.

In seeking to prevent negative externalities, however, it is important that we do so in a way that is least harmful for all parties. We should not fight pollution by banning all factories or all cars; rather, we should tax the pollution so as to make manufacturers and drivers internalize their costs. If one is serious about the belief that invasive trades have significant negative externalities, one should be in favor of an added tax on invasive trades. Here it might be objected that it is inhumane to put additional taxes on sex workers, kidney sellers, and surrogate mothers, since they are often already in very difficult economic situations. However, if we are concerned about worsening their situation through a tax, we should presumably also be concerned about worsening it through prohibition. A prohibition works, in effect, like a very high tax, yet in contrast to other taxes, it fails to generate revenue for the government.

It might be suggested, however, that a tax will not be sufficient: prohibition is needed in order to prevent the negative social effects of invasive trades, which taxing those trades would not do. We concede that this might, in some cases, be a weighty argument, but those who defend prohibition on this ground should be transparent about what they are defending: they are defending bulldozing.

If the mayor in our initial example was not concerned with the welfare of the slum dwellers but, rather, with making the city look better, her decision to bulldoze the slum, while arguably callous, would not rest on the bulldozing fallacy. We think that those who defend prohibition on similar grounds, should be open and honest about what they are doing: they should say that a reduction in the welfare of some marginalized persons is acceptable sacrifice in order to avoid harms to other parts of society, rather than pretending that it is in the interest of these people to have their

source of income taken away. A good example of a sex-work–critical theorist who recognizes this tradeoff is Radin (1987, p. 184), who argues that the commodification of sex may threaten the personhood of all members of society (which is an externality): she adds that if we prohibit sex work, “we might deprive a class of poor and oppressed people of the opportunity to have more money with which to buy adequate food, shelter, and healthcare in the market, and hence deprive them of a better chance to lead a humane life.” We suggest that theorists who defend this approach to other invasive trades should be equally transparent in their reasoning.

## 5. Conclusion

In this paper we have suggested a framework for discussing invasive trades that, we hope, theorists on both the restrictive side and the permissive side of the debate can accept. We started by proposing a conceptual scheme of those who engage in invasive trades as sellers: forced sellers, reluctant sellers, and eager sellers. This scheme, we suggest, can be accepted irrespective of one’s view of the comparative size of each group; indeed, it can be accepted even if one takes one of the categories to be an empty set. Even if it might be tempting for those with activist inclinations on the restrictive side to focus on the forced, and for those with activist inclinations on the permissive side to focus on the eager, we hope that theorists on both sides of the debate can agree that the most challenging group is the reluctant sellers.

In discussing whether reluctant variants of an invasive trade should be prohibited, it should be made clear, first, that the question of whether those who engage in such trades should receive more help is independent of the question of whether these trades should be prohibited. It is perfectly possible to defend (or oppose) much more extensive help while either accepting or rejecting prohibition. It should also be made clear that prohibition, by itself, does not improve the background conditions in which such actions take place, and in most cases, we make people’s situations worse, not better, when we deny them the option they prefer within the option range they would otherwise have. We usually help people by giving them more options, not by taking options away. We challenge those who hold restrictive views by insisting that they should not commit the bulldozing fallacy, and that if they wish to bulldoze, they should be explicit about what they are defending.

Our framework also, however, challenges those who hold permissive views. While the imperative not to bulldoze gives rise to a reason to oppose the prohibition of invasive trades, this is only a *pro tanto* case and thus not sufficient to settle the debate. Even though people are usually not

helped by having their preferred option removed, or made more difficult to use, factors like ignorance, irrationality, exploitation, option-dependent pressures, option-dependent lack of help, and negative externalities make it possible that, in some cases, it is best, either for the people involved or for society overall, to block trades even if both parties in the trade would rather trade than not trade, given the situation that they are in. We do not argue that this is an exhaustive account of considerations that can justify the prohibition of an invasive trade, but we think these are at least the central ones and that they are considerations that anyone who holds a reasonable position on the issue must concede have some force. If one does not concede that, it seems that we would have to accept any financial contract as long as both parties consent, including a contract that puts one person in debt for life because they urgently needed a simple good (such as a band-aid, a phone, or a lighter) that could only be provided by one other person, and that person acted in a maximally exploitative way. This is a case where those with a libertarian bent will have to either bite the bullet or, alternatively, concede that some consensual transactions between consenting adults should be prohibited.

In discussions about invasive trades, those who defend prohibition should be expected to explain how they avoid the bulldozing fallacy. Those who oppose prohibition should be expected to explain why appeals to ignorance, irrationality, exploitation, option-dependent pressures, option-dependent lack of help, and negative externalities are insufficiently weighty to warrant prohibition.



# Paper 2: The Ethics of Emergencies

ABSTRACT: Do we have stronger duties to assist in emergencies than in nonemergencies? According to Peter Singer and Peter Unger, we do not. Emergency situations, they suggest, just make more salient the very extensive duties that we always have. Against this view, theorists like Frances Kamm, Jeremy Waldron, and Larry Temkin suggest that emergencies are indeed normatively exceptional. While their view is more in line with common-sense, it is theoretically less simple, and it has proven difficult to justify the exception. In this paper we propose a model of emergencies that we call the Informal-Insurance Model and explain how this can be used to combine theoretical simplicity with common-sense emergency norms.

## 1. Introduction

Emergencies have become the bread and butter of applied ethics. In journals and seminar rooms, we are discussing whether it would be right to divert a runaway trolley to kill one instead of five, how much we must sacrifice to save a child drowning in a pond, and whether it would be right to torture a terrorist in order to save thousands from a ticking bomb.<sup>27</sup> Presumably, we want to figure out how it is right to act in such situations not because we wish to be prepared for the unlikely event that we will ever find ourselves in one of them but because we believe that we can learn something of more general importance from considering emergency cases. Emergency cases, we think, put our principles to the test.

On the face of it, however, it seems problematic to use emergency cases to test our general ethical principles. This is because emergencies, almost by definition, are cases out of the ordinary. Emergencies are exceptional circumstances in which special rules and norms apply. On the one hand, *more is permissible* in the case of emergencies: we may, for example, rightfully break the speed limit in order to rush someone to the hospital. On the other hand, *more is mandatory*: we might have a duty to help someone who is drowning in a pond right next to us, even at substantial cost and risk to ourselves.<sup>28</sup>

In this paper we are concerned with our duties to assist in the case of emergencies. Do special normative principles kick into place when an emergency arises? Some theorists, such as Peter Singer (1972) and Peter Unger (1996), argue that emergencies are, in principle, just like nonemergency situations. In their view, we should do the action that brings about the best consequences, and this principle applies equally in emergency and nonemergency cases alike. While this view is theoretically simple, it appears, as we shall see, to have a number of highly revisionist implications. Resisting such implications, theorists like Frances Kamm (2007), Jeremy

Waldron (2000), and Larry Temkin (2017) argue that a special set of norms and principles apply in emergency cases. The challenge with these accounts, however, is that while they preserve common-sense emergency norms, they appear to be able to arrive at these norms only by being theoretically very complicated and, possibly, *ad hoc*.

Our aim in this paper is to try to combine the best of both worlds: to make room for common-sense emergency norms within a theoretically simple framework. After sketching the theoretically simple approach and the common-sensical approach, we investigate more closely the nature of emergencies, and propose a model that we call the *informal-insurance model of emergencies*. With this model, we further argue, it is possible to justify common-sense emergency norms within a theoretically simple framework. While our account of emergencies might be seen most obviously as a good fit for a contractualist approach to ethics, we argue that it also fits the act consequentialist theories defended by Singer and Unger.

## 2. The Puzzle of Emergencies

Common sense suggests that emergencies place special demands on us. Consider the case of a child drowning in a shallow pond, from Singer (1972), which may be the most commonly discussed emergency case in contemporary philosophy. We have modernized and adapted the case to make for easier comparison with other cases:

*Shallow Pond:* You are walking past a shallow pond, and you see a child about to drown. You can save the child's life at no risk to your own life, but you will ruin your new clothes and your expensive new smartphone. To replace them will cost you approximately \$3,000. Do you have a moral obligation to rescue the child?

In this case, it seems clear that you have a moral obligation to rescue the child. Although a \$3,000 loss is significant, saving a child's life is much more important. Someone who failed to save the child in this case, we think, would clearly be doing something morally wrong. Now consider this alternative case:

*Effective Charity:* Against Malaria Foundation (AMF) is a highly effective charity. For every additional \$3,000 it receives, it can be expected to save one additional life. Do you have a moral obligation to donate \$3,000?



While most would probably concede that it would be good to donate \$3,000 to AMF, our duty in this case, it seems, is far weaker than our duty to save the girl who is drowning in the shallow pond. To give large amounts of money to charity, most of us think, is supererogatory, i.e., good beyond what is mandatory.<sup>29</sup>

But why is there a moral difference between the two cases? The expected good one can accomplish and the expected cost of doing it, which would seem to be the two crucial features, are the same in both cases: the expected good is to save a life, and the expected cost is \$3,000. In order to be justified in treating the two cases differently, however, we need to point to a morally relevant difference between the two cases.

### 3. The Theoretically Simple Solution

According to the view that we shall call the theoretically simple approach, emergencies are not unique. We should thus use the same standard to assess actions in emergencies and nonemergencies alike.

In the debate about emergencies, the most common variant of this approach is consequentialism, which is the view that we should always act in the way that brings about the best outcome. By appeal to consequentialism, Singer (1972, p. 241) and Unger (1996, p. 143) argue that we ought to help as long as we do not have to give up something of comparable moral importance, irrespective of whether we find ourselves in an emergency case. If we have problems being motivated as strongly to save the child dying from malaria far away as to help a child that is drowning right before us, this is a failure on our part; it does not show us that saving the child dying from malaria is any less important.

To consider emergency cases can be helpful, in their view, because it makes it clear to us that we have very significant duties of assistance towards other people. While our duties are made more salient in emergency cases, however, they are equally strong in nonemergency cases. This is a theoretically simple view that helps explain why we have strong duties in emergency cases: We have strong duties to assist in emergency cases because we have strong duties to assist in general.

The problem with this solution, however, is that the price for simplicity is a range of counterintuitive implications. On the one hand, the view has counterintuitive implications *outside of* emergency cases. Singer (1972, p. 241) has argued that we should give away our money until the

expected increase in the recipients' wellbeing equals the expected loss in your own wellbeing. Unger (1996, p. 143) has suggested that "it's seriously wrong not to send to the likes of UNICEF and OXFAM, about as promptly as possible, nearly all your worldly wealth" to help people in extreme poverty. While this might be correct, it seems counterintuitive.

Consequentialist views like Singer and Unger's, moreover, also seem to yield counterintuitive implications *in* emergency cases. Temkin (2017) asks us to consider the following case.<sup>30</sup>

*Rolex:* You have been convinced by consequentialists that you should donate money to effective charities. Your first decision is to sell your expensive and uninsured Rolex and donate the proceeds to save three girls from malaria. On your way to sell it, you see a girl drowning. You can only save her if you dive right in, and you have no time to remove your watch. If you save the girl from drowning, you will be unable to save the other girls. There is no one there, so you do not have to care about the consequences of breaking a beneficial norm. What should you do?

In a case like this, it seems that consequentialists would have to say that we should ignore our duty to rescue and instead walk past the drowning child so that we can sell the watch, because that can be expected to save more lives. This is a counterintuitive conclusion. Temkin (2017) argues that consequentialism is counterintuitive in virtue of failing to give emergencies primacy in cases where the most good will be produced if we do not come to the rescue.

The theoretically simple views of Singer and Unger also appear to have counterintuitive implications in cases like the following:

*CEO in Car Accident:* A person has been in a car accident and suffered a broken leg. Without your help, he will get nowhere. It seems that you have an obligation to drive him to the hospital, even though it is a 15-minute drive in the opposite direction from where you were headed. As you are helping him into your car, however, he tells you that he is a CEO and that he wants you to drive him to a very important business meeting instead. This is just a 10-minute drive in the opposite direction of where you are headed. Getting to the business meeting on time, he argues convincingly, is more important than getting to the hospital. He can get from the business meeting to the hospital later.

Even though the business meeting is more important, and it would be nice to take him to the meeting, we may think that our obligation is restricted to getting the CEO to the hospital. It seems,

however, that a consequentialist would have to say that, if the meeting is in fact more important, we must drive him there.

It seems that if we accept the Singer and Unger's theoretical foundations, we cannot get anywhere close to standard emergency norms. We would have nonstandard emergency norms, according to which we are allowed to let the girl drown in the Rolex case and are obligated to drive the CEO to the meeting.

#### 4. The Common-Sense Solution

In light of the problems we face if we hold that emergency and nonemergency cases should be assessed by the same standards, it is tempting to turn to views according to which emergency cases should be assessed by a different standard. It might be argued that there is something normatively special about emergencies, and that this can help justify more common-sensical moral judgments. If we have stronger duties to assist in emergencies than in nonemergencies, this could explain why it is morally worse to not save the drowning child than to not donate to the Against Malaria Foundation, morally wrong to drive past the drowning child in order to sell the Rolex, and morally permissible to refuse to drive the CEO to the board meeting.

But what, we must then ask, is it about emergencies that make them special? It seems that if one holds that emergencies should be assessed differently, one must provide an explanation of why this is so since, presumably, the burden of proof is on those who posit an exception.

Waldron (2000, p. 1075) argues, in a discussion of the parable of the Good Samaritan, that “the key . . . is something like proximity, the persons in question being there, on the spot.” When you are face to face with the victim, you are thereby caught in a causal nexus that grounds moral obligations: “The person that faces a victim of an emergency ha[s] to go out of their way to break the relation of sheer proximity that [generates] a perfect duty on them, also, to help.” (see also Hanna, 1998; Kamm, 2007; Lévinas, 1995; Temkin, 2017)

While it is easy to see how spatiotemporal proximity could work as a proxy, since we are usually only able to help those who are spatiotemporally close, it is difficult to see how less spatiotemporal proximity could, by itself, justify us in letting a person die instead of saving them. It seems that if you saw an accident through a camera when you were a thousand miles away and you could help at the same cost, you could still have emergency duties (Unger, 1996, pp. 33-40).

It might be suggested that the scope of persons towards whom we have emergency-based duties to assist must be restricted since, otherwise, morality would be too demanding (Haydar & Øverland, 2019; Schmitz, 2000, 2009; Sinclair, 2018; Wollard, 2015). While this is perhaps reasonable, it seems that emergencies can indeed make extreme demands on us. Consider the following case, adapted from Unger (1996, p. 136):

*The Uninsured Bugatti:* You have poured all your life savings into a very expensive Bugatti that you have parked at an abandoned train station. You can't even afford to insure the car. You see a runaway trolley headed toward a trapped child. The only way you can save her is to divert the trolley to another track, where it will crush your uninsured car to pieces.

Should you divert the runaway trolley so that it crushes your Bugatti? Even though it would leave you destitute, it seems that you have a duty to sacrifice the car and save the child. If this is right, our obligations in emergencies can indeed be highly demanding.<sup>31</sup> Moreover, if it were the level of demandingness that mattered—in the sense that we can only be required to assist up to a certain aggregate limit—then, by donating money to the Against Malaria Foundation, one could exempt oneself from the duty to rescue anyone one sees drowning in a shallow pond. This, however, is counterintuitive: It seems that we have a duty to save the child no matter how much we have donated to the Against Malaria Foundation or how many drowning children we have already saved (Forcehimes & Semrau, 2019). The demandingness objection therefore has difficulty explaining why we have different obligations in emergencies than in nonemergencies.

For all we argue here, it might be possible to defend a set of moral principles that can justify common-sense emergency norms. This seems, however, to be difficult, and even if it could be done, it would seem to require that we accept a set of complex, seemingly *ad hoc* moral duties that kick into place specifically in the case of emergencies.

In light of the above, we seem to be confronted with an uncomfortable dilemma. We can choose to endorse common-sense emergency norms, but it seems that we can do so only at the cost of giving up on theoretical simplicity. Alternatively, we can choose theoretical simplicity, but it seems that we can do so only at the cost of rejecting anything resembling common-sense emergency norms.

Might it be possible to get the best of both worlds, i.e., both theoretical simplicity and

common-sense emergency norms? We argue that it is. To see how this can be possible, however, we need to look more closely into the nature of emergencies. In what follows, we first defend what we call the *informal-insurance model of emergencies*. This is a descriptive theory that seeks to explain common-sense emergency norms. Thereafter we show how the *informal-insurance model of emergencies* can be used to justify common-sense emergency norms within a theoretically simple framework. We start by explaining how it can justify common-sense emergency norms within contractarian and rule-consequentialist frameworks. Then we explain how it can justify common-sense emergency norms even within what is arguably the theoretically most simple framework, the act-consequentialist theories of Singer and Unger.

## 5. The Informal-Insurance Model of Emergencies

Why do we have emergency norms? In order to understand such norms, it might be useful first to briefly zoom out and consider how different sorts of needs are met in different sorts of ways. On the one hand, there are needs that are most easily met by the person with the need. Your need to get dressed in the morning, for example, is usually best taken care of by you. Although some need help with getting dressed, self-dressing is the norm and other-dressing is the exception.

In the case of other needs, however, it makes sense that we meet them for each other. Examples could be haircuts or massages, which are awkward to do for oneself, or goods or services that require special equipment, such as the production of clothes, computers, cars, and houses. Here it makes sense that we coordinate our efforts and help satisfy each other's needs. If you provide me with a haircut and I repair your car, we can both be better off than if we had tried to meet our own needs without trading. Since the beginning of the industrial revolution, more and more needs are met through the division of labor, and exchanged via money, which allows for more differentiation and specialization.

Yet other needs are of such a kind that it makes more sense to meet them through insurance. These are, in particular, relatively large needs that have to be met if we are unlucky. As a contemporary example, consider the need to get a replacement car in case one's car is stolen. Since cars can be rather expensive, we would not like to unexpectedly have to pay for a new car out of our own pocket in such an event. Thankfully, however, cars are not stolen very often. Let's say, for the sake of the example, two out of every hundred cars are stolen every year. If we assume that a car costs \$10,000, then, instead of those whose cars are stolen having to bear the full cost, one

hundred people could each pay \$200 per year in premium. The pooled resources could be used to buy replacement cars for the two people who, statistically, have their cars stolen that year.

Not all needs are well suited to be met through insurance. Constant and predictable needs, such as your need to get the car washed when it gets dirty, are not well suited for insurance. Although it would be nice for you to have your insurance cover car washes, others who take part in the scheme would also want to have their car washes paid for this way. There is thus nothing to gain from solving this through an insurance scheme. There is, however, something to lose. For insurance to be beneficial, it is important that people do not become reckless or wasteful when insured. Without car-wash insurance, you try not to get your car dirty, and you accept it being somewhat dirty for a while. If you had insurance, however, you might not care that much about trying to prevent it from getting dirty, and once it got dirty, you might want it washed on the same day, since you would then share the cost with all the other insurance holders. This phenomenon is called *moral hazard* in insurance jargon, and it is a problem that all insurance programs have to deal with. Insurance therefore only works when we can trust people not to take undue advantage of the fact that we collectively pay for their losses. To avoid moral hazard, we mainly insure against relatively large unforeseeable negative events that need to be dealt with quickly, and there needs to be a criterion for pay-out that is unambiguous and difficult to fake.

Insurance is usually formally agreed upon, whether privately or through the government. In some of the cases where we suddenly and unexpectedly need help from those in close proximity to us, however, it would be too difficult to organize the help formally, through written insurance contracts. Sometimes what we need is that the people around us step out of their ordinary routines in order to help. If you choke while eating in a restaurant, if your house catches fire, if your foot gets stuck in a railroad track, or if you are about to drown in a pond, you urgently need people around you to do whatever is necessary to help you escape the immediate danger. The norms that oblige us to help you in such events are emergency norms, and we suggest that they work like informal insurance schemes. You benefit from the scheme in virtue of getting help when you urgently need it. The premium that you pay to take part in this scheme is not monetary. You pay with your willingness to come to rescue in case others are in urgent need.

As in the case of formal insurance, it would be beneficial to you, as a recipient of assistance, if a wider range of negative events were covered by emergency norms. It would be convenient if others rushed to assist you if you struggled to meet a deadline on a paper, paid your restaurant bill

if your account was overdrawn, or babysat your children when you had a headache. The trouble is that others would want you to rush to their assistance in similar cases, and this makes inclusive emergency norms much less attractive. It would be inconvenient if, every day, you had to stop what you're doing in order to meet all sorts of needs of the people around you. Moreover, with more burdens being shared, there is the moral hazard problem that people might take less care to meet their deadlines or save money and be less willing to endure discomfort. Thus, you do not want to live in a society that has very expansive emergency norms. You want to limit emergency norms to cover predominantly cases that are relatively serious and rare, so you do not have to assist all the time, and that are sufficiently unexpected so as to minimize the problem of moral hazard.

## 6. The Informal-Insurance Model and Common-Sense Emergency Norms

If we understand emergency norms as informal insurance schemes, the example of a person drowning in a shallow pond would be close to an archetypical example of what would be covered by emergency norms. The reason is that this is a very serious danger, it happens unexpectedly, it can only be solved through an immediate response from people nearby, and once someone is saved from drowning, they will usually be right back at their normal level of functioning.

What about someone risking malaria infection through a lack of bednets? Even though dying from malaria is as bad as dying from drowning, there are some notable differences. First, it is not a need that arises unexpectedly; it is a need that we can anticipate. Moreover, the problem can, in principle, be solved by someone else who has sufficient funds to make a donation to the Against Malaria Foundation. Finally, even if someone is saved from a malaria infection in virtue of getting a bednet, the lack of bednets is a symptom of a more general problem, poverty, and this would be a continuing problem even after one receives a bednet.

Should we seek to solve predictable and constant problems, such as problems caused by poverty, through emergency responses? Unger (1996, p. 20) asks us to imagine a future where “whenever well-off folks learn of people in great need, they promptly move to meet the need, almost no matter what the financial cost.” This may at first glance seem like a utopia. However, if we were to act on a duty of rescue every time we come across someone in poverty, we would, at least in today's world, be living in a constant emergency. If we always had to rush to help, it would be very difficult to function as friends, parents, or productive members of society, and this, in turn, could

have very serious negative effects in the long term.<sup>32</sup> It seems that when it comes to solving predictable and constant problems, it is more advisable that we do so through institutions rather than through expansive emergency norms.

Admittedly, you might have strong duties of beneficence to help people cope with predictable and constant problems. Thus, you might have a duty to donate a substantial portion of your income to the Against Malaria Foundation, or to another effective charity. We suggest, however, that when it comes to your duty to save a person drowning in a shallow pond, this is not a duty that is merely, or even predominantly, a duty of beneficence. While your duties of beneficence do count in favor of saving the person, so does the fact that this is an emergency. When you are called on to save the person about to drown in a shallow pond you are called on to pay the premium on an informal insurance-scheme from which you also benefit, since the scheme makes your life much less risky than it would otherwise have been.<sup>33</sup> This could explain why failing to save a person drowning in a shallow pond is rightly condemned much more harshly than failing to donate money to the Against Malaria Foundation. Someone who fails to save a person drowning in a shallow pond attempts to freeride on, and thus acts in a way that undermines, a life-saving scheme.

What about the Rolex case? Given the informal-insurance model, we should expect our emergency norms not to permit a person to drive past a person drowning in a shallow pond in order to sell a Rolex and give the money to charity. The person drowning in a shallow pond can most likely be solved only by one, or only by very few, people, whereas any number of people could donate to charity. Moreover, we need emergency norms that make it difficult to freeride. Our emergency norms would collapse if we allowed people to fail to rescue by saying that they were on their way to donating their belongings to a charity. Emergency norms must require strict compliance.

Given the informal-insurance model, we should also expect our emergency norms not to oblige us to drive the CEO to the board meeting. It is important to restrict the scope of help required by emergency norms to only get the person out of harm's way, since otherwise, the system would be too costly to be worth it. Even if it might be a nice gesture to offer to drive the CEO to the board meeting, this would not be mandated by emergency norms. Getting CEOs to board meetings, even important board meetings, is a need that CEOs must meet themselves or pay others to help them meet. Therefore, while it could arguably be contrary to emergency norms to refuse to drive him to an emergency room, it would not be contrary to emergency norms to refuse to drive him to the



board meeting.<sup>34</sup>

The informal-insurance model, we suggest, can explain both the *force*—how much weight we should put on this duty relative to other concerns—and the *scope*—to what set of cases does the duty apply—of our duties of rescue in emergencies, something which few, if any, accounts have managed (Rulli and Millum 2016). If the risks are equally distributed, the risks of moral hazard are small, and there do not exist more efficient ways to solve the problem, there is a high likelihood that we will call such situations emergencies and that we will assign duties to rescue. As a general rule, the smaller the cost to the agents of adopting such a norm, the more cases can be included within our duties of rescue. However, the cost to the agent may be extremely high, as in the Bugatti case, as long as the duty of rescue is the only plausible way to solve this type of problem.

## 7. The Informal-Insurance Model and Theoretical Simplicity

Having looked at the ways in the informal-insurance model predicts common-sensical emergency norms, let us now turn to how the model can help justify common-sense emergency norms within a theoretically simple framework.

One such framework is contractualism, according to which we have a moral duty to act the way it is rational for people to commit to act, or that it would be rational for people to agree to behind a veil of ignorance, if others agree to do the same.<sup>35</sup> Contractualism would mandate compliance with emergency norms insofar as reasonable people agree to pay the premium of having to help others in emergencies in exchange for the security of having other people at one's disposal if need be. This, moreover, is a way to defend common-sense emergency norms while preserving theoretical simplicity. On a contractualist view, the normative principle is simple. The complexities that arise in emergencies are the result of game-theoretical complexities involved in human interaction.

Another such framework is rule-consequentialism, according to which we have a duty to act in the way that, if everyone acted this way, would be likely to create the best possible outcome. Rule-consequentialism would mandate compliance with common-sense emergency norms insofar as compliance would create the best possible outcome, which is another way to justify common-sense emergency norms without a complex set of normative principles.<sup>36</sup>

Might the informal insurance model also justify common-sense emergency norms within an

act consequentialist framework, which is arguably the simplest normative framework? According to act consequentialism, we should act in the way that is expected to create the best possible consequences. This is the view of Singer and Unger, and as we saw above, there seems to be some tension between this framework and common-sense emergency norms. It seems that, on this view, it would be equally important to save a person from malaria as to save a person drowning in the shallow pond. Moreover, since all that matters, always, is to act to create the best possible future, it seems that act-consequentialists would have to say that a person could have a duty to drive by a person drowning in a shallow pond in order to sell a Rolex and to drive the CEO to the board meeting if it is very important that he gets there.

Act consequentialism certainly entails that, seen in isolation, you should indeed do these things, given that you would in fact produce the most overall good that way. However, in a complex and non-transparent world, act consequentialists have strong reasons to defer to norms we expect will produce the most good. This is all the more important when we think about the self-serving biases that affect our thinking. Since we don't know the full consequences of our actions, and we have a tendency to use agential leeway to benefit ourselves and the people we care most about, act consequentialists should require extremely strong reasons before breaking emergency norms.<sup>37</sup>

Moreover, even in a case where one was in fact justified in driving by the drowning person to sell the Rolex, other consequentialists would be wise to blame them, and perhaps legally prosecute them, for breaking the emergency norms that we depend upon for our safety. A way to describe the action of the consequentialist in cases where disregarding an emergency is the right thing to do is *blameworthy rightdoing*, in contrast to blameless wrongdoing (Tännsjö 2017, 193).

It could be objected that if we accept this, we come dangerously close to adopting a rule-consequentialist or even a nonconsequentialist view.<sup>38</sup> What nevertheless distinguishes the act consequentialist view from these alternatives is that if you are sufficiently certain rescuing someone will be for the worse, act consequentialism dictates that you should break the norm. One could, e.g., crank up the numbers in the Rolex case to see the intuitive plausibility of this view: If you could save the lives of one hundred faraway people over the next year by letting one child drown right here and now, that would be the right thing to do.

Nevertheless, insofar as act-consequentialists would be well advised to endorse common sense emergency norms, and act to uphold such norms in society, it can serve as a theoretically

simple foundation for common sense emergency norms.

## 8. Conclusion

In this paper we have argued that emergency norms are informal insurance schemes, and that this model can help us combine common-sense emergency norms with theoretically simple normative frameworks, including contractarianism, rule-consequentialism, and act-consequentialism.

An implication of this view is that whether a situation is an emergency does not depend merely on how bad the situation is; it also depends on whether it is bad in a way that it is effective to seek to solve through an informal insurance scheme that requires bystanders to step out of their ordinary routines to offer immediate assistance. Since we cannot function in a constant emergency, constant and predictable needs will usually be best solved institutionally.

The view that we defend should be taken as a cautionary note for philosophers who use emergency cases to test our general ethical principles. Our duties in emergencies can be extremely demanding, which they must be to ensure that people get help in situations we are unable to prevent and where we are unable to help ourselves. We cannot, however, use the demandingness of our duties in emergencies as evidence for equally strong duties in nonemergency situations.



# Paper 3: Sex Selection in India:

## Why a Ban Is Not Justified

ABSTRACT: When widespread use of sex-selective abortion and sex selection through assisted reproduction lead to severe harms to third parties and perpetuate discrimination, should these practices be banned? In this paper I focus on India and show why a common argument for a ban on sex selection fails even in these circumstances. I set aside a common objection to the argument, namely that women have a right to procreative autonomy that trumps the state's interest in protecting other parties from harm and argue against the ban on consequentialist grounds. I perform a pairwise comparative analysis of sex selection and its plausible alternatives and argue that that the ban fails to improve the state of affairs relative to a scenario without a ban. The ban makes the situation worse, especially for mothers and their daughters. India should therefore repeal its ban on sex selection.

### 1. Introduction

Although a few countries allow certain forms of sex selection, often restricted to facilitate family balancing, in most countries it is banned (Bayefsky, 2016). The practice is especially controversial in many Asian countries, where there are substantial inequalities between the sexes and parents have a strong preference for sons. In this paper I will concentrate on India and explore whether the government is justified in banning sex selection.

I will present a common argument for a ban on sex selection in countries like India. As presented by Wendy Rogers, Angela Ballantyne, and Heather Draper (2007), this argument holds that governments have an obligation to prevent harms and discrimination, that sex selection in India is harmful and discriminatory, and that the government should therefore ban sex selection. I aim to show that even if a common objection against this argument, that women have a right to procreative autonomy that trumps the state's obligations to prevent discrimination and other third-party harms, lacks force in the Indian context, the argument for a ban on sex selection still suffers from a structural and devastating weakness. When we ask whether we should ban a practice, it is insufficient to focus narrowly on the moral status of the practice in question and the consequences it brings about. We need to demonstrate that the ban makes the situation better (Semrau, 2017, p. 355). This is rarely done by those arguing for a ban.

While others have argued against a ban on sex selection from a consequentialist standpoint, these analyses have often been rudimentary.<sup>39</sup> To provide a more structured analysis, I make pairwise comparisons between sex selection and the other options that are available to Indian parents who want sons when sex selection is banned and ask whether these options are preferable,

all things considered, to the use of sex selection. These options are black market sex selection, to have children until you have a son, and to aim for the preferred number of children and hope that nature gives you a son. I will focus on the reasons Rogers et al. give for the ban and defend the tentative conclusion that India is wrong to ban sex selection.

In India, sex-selective abortions have been available with the help of ultrasound since the mid-1980s. The abortion law that legalized some forms of abortions in 1971 did not predict the availability of sex selection, and because of worries about the law being misused, the use of sex selection was banned in 1994 with the Pre-Natal Diagnostic Techniques Act. The law had, however, little effect on the actual use of sex-selective abortions. The law was therefore amended in 2002 with the Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. Some studies seem to indicate that the amendment has worked to reduce the number of sex-selective abortions (Nandi, 2015; Nandi & Deolalikar, 2013). Sex selection is nevertheless still widespread. It is estimated that approximately 500,000 female fetuses are selectively aborted every year (Bongaarts & Guilimoto, 2015, p. 242).

The ban on sex selection in India is a ban on the use of technology for sex selection for nonmedical purposes. The ban is aimed at the medical profession, not the parents: doctors, not parents, are the ones who face sanctions if it is violated. For convenience, I will refer to the ban as a ban on sex selection.

There are several ways to perform sex selection. In India, the most common method is to use ultrasound and abort the fetus if it is of the wrong sex. One can also use assisted reproduction, either through sperm sorting or embryo selection, but I will mainly discuss sex-selective abortion. I will assume that the harm an abortion does to the fetus itself is not morally relevant and, more generally, that non-selective abortions are permissible. I admit that these are contested assumptions.<sup>40</sup>

## 2. The Argument for a Ban

The core argument for a ban on sex selection presented by Rogers et al. goes like this:

1. “Societies have an interest in, and a duty to ban harmful practices in order to protect individuals and preserve social stability and security.”
  2. Societies also have an obligation to prevent “discrimination on the grounds of sex.”
  3. Sex selection causes harms.
  4. Sex selection perpetuates discrimination.
- 

Therefore, sex selection “should be prohibited by law, and such laws should be enforced.”<sup>41</sup>

“Harmful practices” are, according to Rogers et al. (2007, p. 523), practices “where public health is at risk and the harms are serious, [such as] female genital mutilation [or] smoking”. In these instances, the government may be justified in interfering to prevent harms. Similarly, the government may be justified in banning discriminatory practices, such as picking candidates for jobs based on their race or sex. I will assume, along with Rogers et al., that governments have a further duty to prevent practices that lead to discrimination, even if the practices themselves are not discriminatory.

I write “may be justified” because a government’s duties to prevent harms and discrimination are *pro tanto* duties: duties that have to be weighed against other concerns. If the only way to get rid of discrimination is through measures that will radically interfere with people’s privacy, it is not clear that the state should fulfill its duty. Here, we might say, a right to privacy trumps the government’s duty to prevent discrimination. With these caveats in mind, I grant the two normative premises, numbers 1 and 2.

What about premise 3, the claim that sex selection causes harms? Despite objections to the contrary by Ruth Macklin (1995), Julian Savulescu, and Edgar Dahl (2000), the evidence clearly suggests that widespread sex selection in India causes harms to third parties, mainly through its impact on the sex ratio: Indian parents who use sex selection overwhelmingly choose to have sons. Murder rates in India are “highly correlated with the female-male ratio in the population.” (Drèze & Khera, 2000) Violence against women and violent crime more generally share the same pattern (Amaral & Bhalotra, 2017, Oct.). Systematic sex selection also makes it difficult for men of

marriageable age to find a wife, which may create lasting problems because children are the most important source of support for parents in old age (Das Gupta, 2010). A surplus of men is also associated with an increase in sexually transmitted infections and the trafficking of women (Edlund, 1999). I take this to be sufficient to show that sex selection causes harm.

There is also a solid amount of evidence in favor of premise 4, that sex selection perpetuates discrimination through its effect on the sex ratio. Rather than making women valued because they are scarce, as Macklin and Savulescu suggest, in India a shortage of women is associated with bad outcomes for women: they have more controlling husbands, experience more domestic abuse, hold less decision-making power, suffer poorer health, and are constrained by more conservative gender roles (Amaral & Bhalotra, 2017, Oct.; Hussam, 2017, September). These effects might reduce the momentum for social change in the Indian society and explain the slow improvement in women's status (Ghani, Grover, Kerr, & Kerr, 2016 ). When a large share of the female electorate is "missing," this could also reduce women's clout in politics and make it less likely that their political interests will be successfully represented. Sex selection is therefore likely to perpetuate discrimination and social injustice.

### 3. Procreative Autonomy

Although it appears that its premises are true and its conclusion follows from them, the argument for a ban on sex selection will only succeed if it can be successfully defended against a common objection, that parents have a right to procreative autonomy. This is because the normative premises of the argument are only qualifiedly true: the duties they identify are not absolute but *pro tanto*, and this right may trump it. To the extent that having a child of a specific sex is an important part of parents' pursuit of the good life, there is a presumption in favor of including sex selection in their right to procreative autonomy (Robertson, 2001).<sup>42</sup> The right to procreative autonomy may be so important that even substantial harms to third parties are insufficient to justify measures that infringe on this right, such as a ban on sex selection (Savulescu, 1999, 2001). The procreative-autonomy argument could be framed as a "but" clause to the first two premises of the argument for a ban: The state should protect its citizenry against harms and discrimination, but not by means that would violate parents' rights to procreative autonomy.

However, if the reason we appeal to procreative autonomy is that it allows individuals to live the lives they really want to live, where their actions flow from their own conceptions of the



good, it is questionable whether we can ground a right to sex selection in India. For their acts to qualify as autonomous, individuals need to be informed and not under undue pressure from other people or economic and social circumstances (Rogers et al., 2007, p. 521).<sup>43</sup> In India, women have weak autonomy. They are dependent on their husbands and their husbands' families and expected to bring them sons. The use of sex selection may in some cases be outright forced on them, but more commonly their freedom is severely constrained because of the negative consequences that are likely to occur if they choose otherwise. Some women may also suffer abuse and divorce if they fail to deliver a son. Rogers et al. and other proponents of a ban therefore conclude that using sex selection is not (necessarily) what the Indian women who use it really want and that an appeal to procreative autonomy therefore is insufficient to ground access to sex selection in India (Bumgarner, 2007, p. 1306; Rogers et al., 2007, p. 523).

When we take into account the harms and the increased discrimination that follow from the practice, we have further reasons to doubt that an appeal to procreative autonomy is sufficient to work as a satisfactory objection to the argument for a ban on sex selection.

#### 4. A Comparative Analysis

If procreative autonomy cannot be used as a “but” clause in the argument in favor of a ban on sex selection, Rogers et al. (2007, p. 520) believe the conclusion of their argument stands: Sex selection “should be prohibited by law, and such laws should be enforced.”

However, it is not sufficient to weaken the case for procreative autonomy to make the argument for a ban on sex selection work. Other “but” clauses may succeed. Most obviously, even though we cannot be certain that using sex selection is what women would do under ideal circumstances, we can still ask whether it is something they should be free to do in these nonideal circumstances. If a woman has few opportunities available other than using sex selection, she is not as free as she should be, but when evaluating whether a policy improves someone's life, we would make a mistake if we compared it to an ideal society where the background conditions were different. Given that the situation is as it is, she may be made even worse off if she is prevented from using sex selection to make her life better. To know whether it is in Indian women's best interest to have access to sex selection, we need to compare sex selection to the alternatives they have available.

A second reason why the argument presented so far cannot justify a ban, is that for a ban to be justified we need to know whether it is successful in preventing harmful and discriminatory actions, not just that the practice in question is harmful and leads to discrimination. If it is likely that a ban causes more harm and discrimination than it prevents, that ban is arguably not justified. Again, to know whether this is the case, we need to compare sex selection with its alternatives.

There are three main alternatives available to Indian parents if they cannot access sex-selection technologies legally. One is *black-market sex selection*. If we make a sought-after practice illegal, we cannot assume that this will stop people from doing whatever is banned. Often, we end up creating a black market where people can get what they want. And as I have already mentioned, the consensus is that many Indian women are indeed using sex selection illegally. Another option is to continue to have children until nature gives you a son. This *continuing method* is also a common practice in India. According to a recent estimate, it has created 21 million “unwanted girls” under the age of 25 (Jayachandran, 2018, February 25).<sup>44</sup> These girls would not have been born if their parents got a son as the first or second child. There is one last alternative to the use of legal sex selection. Parents may hope to have a son, but if the *natural lottery* gives them only girls, they will leave it at that. This is the primary aim of a ban on sex selection, and when people support a ban, they do so because they expect this to be the result. Unfortunately, because of the strong son preference among Indian parents, the black market and the continuing method are the two main alternatives to sex selection.

I will now explore how these alternatives compare for women in their capacity as mothers, for their children and other third parties.

## 5. Mothers Are Made Worse Off

If a ban on sex selection is to make women in their capacity as mothers (or potential mothers) better off, they need to be freed to do what they really want to do, or at least to do something they would rather do. If, when sex selection was legal, women who would have preferred not to use it were pressured into using it anyway, the ban may enable them to do something they would rather do (G. Dworkin, 1982). To see whether this is the case in India, let us look at the alternatives to sex selection in turn.

Unsurprisingly, if women continue to use sex selection despite its illegal status, the ban does not make them better off. In fact, it makes them worse off, as black-market abortions often are more

expensive and may be more dangerous. In India, between 4,500 and 6,500 women die each year as a result of unsafe abortions (Stillman, Frost, Singh, Moore, & Kalyanwala, 2014).

Women who, because of the ban, use the continuing method instead of sex selection are made better off in one respect: they are spared one or more abortions they do not want. However, instead of unwanted abortions, they get unwanted births and unwanted children. This outcome is unlikely to be better. Every additional month of pregnancy and every additional birth a woman goes through involves additional risk to her life and health.<sup>45</sup> Additional children also reduce a woman's ability to participate in the labor force and add to the demands on her resources, which are often limited (Stillman et al., 2014). Using the continuing method is therefore likely to be worse than sex selection would be if it were legal.

What about the option of settling for having only girls? Even this scenario looks less appealing. First of all, women may risk abuse and divorce if they cannot deliver a son. As divorced women in India have a staggering death rate (S. Anderson & Ray, 2018), this is an outcome that is far worse than the ones involved in sex selection. Indian women also have economic reasons to favor sex selection over the natural lottery. The dowry system, where the bride's family is expected to pay the groom's, makes girls a liability and boys a source of income. Even though dowries have been banned since 1961, the system remains widespread.<sup>46</sup> In rural India, a daughter's dowry can cost her parents' household two thirds of its total assets (Rao, 1993); nationwide, a dowry is typically more than the bride's family's annual income—by a factor between three and four (Borker et al., 2018, February 5). Since girls move to live with the family of the men they marry, they are often seen as a “double loss”: They are an economic cost and they are often not there to help their parents when the latter get old. The dowry and patrilocality are not only unjust, they also provide parents with prudential reasons to use sex selection. So does the fact that many Hindus believe sons are necessary participants in funeral rituals. In sum, it is better for women in their capacity as mothers to be legally free to use sex selection if the alternative is to only have girls.

## 6. Children Are Made Worse Off

Mothers are not the only ones that are affected by a ban: so are their children. Black market sex selection benefits no one and harms some. To the extent that women suffer from an additional risk to their life and health when using black market sex selection, that may have a negative effect on their children as well. What about the natural lottery?

Julian Savulescu argues that sex selection may be better for the children than the natural lottery. The reason is that men are expected to live better lives than women in India, so when parents can choose to have sons rather than daughters, more children will end up living better lives (Savulescu, 1999). On the other hand, it may be better, as Michael Sandel (2007) argues, for the children if their parents do not use sex selection to have the children they want, as the act of choosing the sex of the child may demonstrate an attitude that is contrary to good parenting: Good parents should arguably love their children unconditionally.

Sandel's argument could also count in favor of the continuing method, because then at least women do not have abortions just because they expect the child to be of the wrong sex. However, to have girls as means to get a son, is clearly not an act of unconditional love, and the consequences are likely to be much worse. Parents who have daughters because they decided to keep having children until they had a son are likely to neglect their girls and treat them as regrettable means toward the desired end, a son. This increases the likelihood that these girls suffer and die. When Indian parents use the continuing method, they end up distributing the food unevenly and spending less on their daughters' medical treatment, which is shown to stunt girls' growth, worsen their health and reduce their cognitive ability (Anukriti, Bhalotra, & Tam, 2018; Jayachandran & Kuziemko, 2011). This treatment has deadly consequences. In a recent paper, Anukriti et al. (2018, p. 3) estimates that "60,879 excess postnatal female child deaths were averted each year" as a consequence of Indian women's access to sex-selective abortions from the mid-1980s.<sup>47</sup> One of the reasons for this reduction in deaths is that girls are treated better when parents can choose sex selection rather than the continuing method.<sup>48</sup> Disregard for girls is not the only explanation for the unequal investment in children of different sexes, however. When parents use the continuing method instead of sex selection, more children have to share the same amount of resources, resulting in a smaller share for each child even if the girls get as much as the boys (Jayachandran, 2018, February 25).

It might, however, be argued that even though unwanted girls are treated badly, it is better for them to be brought into existence than not to get the chance to live at all. This is one sense correct. Many of the girls that are not born when parents have access to sex selection would arguably have had lives worth living. However, many of the girls who are born because of the continuing method are born to lives of underinvestment, hunger, sickness, and early death, and these lives are arguably not worth living. We could also question the notion that it is bad not to bring new people into existence. Although we would not want to say, as Rogers et al. (2007, p. 522) put it, "that

female children are such a worthless burden that their births should be prevented,” we do not normally treat hypothetical children’s nonexistence as a loss.<sup>49</sup>

## 7. Third Parties

What about third parties? Here the alternatives to sex selection seems to be preferable. As shown above, sex selection causes substantial harms to third parties through its effect on the sex ratio. These harms include violence, crime, a shortage of available brides, a reduction in women’s autonomy within the household, and increased discrimination. If more parents would accept what the natural lottery gave them, it would improve the sex-ratio imbalance and thus be better with respect to the harm argument and the discrimination argument. The same is, in one respect, true for the continuing method, since it does not directly contribute to the sex ratio imbalance (Jayachandran, 2018, February 25).

Unfortunately for the argument in favor of a ban on sex selection, many Indian parents choose the black market, which is just as harmful to third parties as legal sex selection. The best estimates we have indicate that the ban has had little effect on the use of sex selection (Bongaarts & Guilmo, 2015, p. 242). Admittedly, if the ban is enforced more strictly, as suggested by Rogers et al. and others, that could change. Some recent studies suggest that the amendment of the law in 2002 has led to a reduction in the number of female fetuses that are aborted (Nandi, 2015; Nandi & Deolalikar, 2013). The effect is, however, small compared to the 500,000 sex-selective abortions that are performed annually (Bongaarts & Guilmo, 2015, p. 242).

The ban has also led many Indian women to believe that all abortions are illegal. Although this could arguably be counteracted by information campaigns, it seems difficult for such campaigns to be successful given that studies suggest that approximately 85 percent of men and women believe abortions are illegal. The ban has also led to restrictions on women’s access to regular abortions and unrelated health services (Stillman et al., 2014, pp. 14, 28, 38).

As long as parents have a strong preference for sons the most likely alternative to black market sex selection is the continuing method. This method comes with its own problems for third parties. We saw in the previous section that parents who use the continuing method invest less in their daughters than do parents who use sex selection or simply accept the results of the natural lottery. This also affects third parties. When girls as a group receive less parental investment, it is likely to reduce both economic growth and the likelihood of a much-needed social change towards

a more gender-equal society. This effect is enhanced by the negative effect higher fertility rates are expected to have on economic growth and female empowerment (Anukriti et al., 2018, p. 6). A larger population also puts an unfortunate strain on the environment and scarce resources like clean water. While the total effect on third parties is difficult to assess, it is clear that sex selection and the continuing method both lead to significant harms to third parties.

## 8. A Ban Is Not Justified

As we have seen, when parents engage in black-market sex selection and the continuing method, it arguably makes the situation worse overall. And the natural lottery comes with a significant cost to women in their capacity as mothers, because of the unfortunate circumstances Indian women find themselves in. For these reasons, I suggest that the argument fails to justify a ban on sex selection in India.

There are, however, other arguments that could help justify a ban. One could hope, as Rogers et al. seem to do, that people's attitude toward women will change for the better if sex selection is banned. While a plausible speculation, the evidence does not seem to bear this out. The ban has been in place since 1994, with few attitudinal changes to show for it (Jaitley, 2018, January). The main reason why the ban fails to change people's preferences and behavior is arguably that the unjust background conditions make it rational for parents to strongly favor sons over daughters.

It may be that a ban should be preferred because it has symbolic value, because the state expresses that the collective does not endorse sex selection and that women are valued on par with men (Rogers et al., 2007, p. 523). But again, the continuing method fares no better; it might even be worse. When girls are treated as mere means, receive less investment, and sometimes die from lack of treatment and nutrition, this expresses a negative valuation of women to at least the same degree as sex selection. Admittedly, one could say that when parents use the continuing method it is their behavior that expresses a negative valuation of women, while if the government were to remove the ban on sex selection, it would be the collective doing the expressing. However, when women themselves and their daughters suffer from the ban to the degree that they do, what the ban actually expresses is up for interpretation. The ban could be interpreted as expressing that the state does not sufficiently take into account the interests of all women and thus that the collective is sexist. Even if the ban expresses what we want it to express, expressing that message surely seems

like a small upside compared to the significant burdens the ban imposes on Indian parents and their daughters.

Would the state be justified in enforcing the ban more strictly, so as to push more Indian parents to use the natural lottery or the continuing method? At first sight, this seems unreasonable, as it would impose a substantial burden on two of the groups that are not given their due, mothers and their girls. However, it could be justified on the grounds that those who cause harms forfeit their right to avoid having an otherwise unreasonable burden imposed on them by a policy that seeks to prevent these harms from occurring. As the harm argument demonstrates, there is no doubt that women who use sex selection cause severe harms to third parties. When considered in the context in which women make their choice, however, this justification seems mistaken. Women use sex selection to make the best of their situation in an unjust society. The root cause of the problems is therefore the way the society is structured, and this is arguably the responsibility of society at large. In this context, it seems unreasonable to say that women who use sex selection forfeit their right not to be unreasonably burdened. Thus, this argument fails to provide a case for a stricter enforcement of the ban.

Even if the ban, standing alone is unjustified, could it be the case that India would be justified in banning sex selection if it did so as part of a larger policy package that aimed to make it more lucrative to have girls? That aim might be pursued by directly subsidizing girls, by implementing policies that empower women, or by changing the background conditions so that daughters do not impose significant costs on their parents.

Let me first say that packaging a harmful practice together with beneficial practices is clearly insufficient to make it the case that the harmful practice should be considered beneficial. In this case, the beneficial practices would be doing all the work. The contribution of the ban would be to make things worse relative to a similar policy package that excludes the ban. For this *cumulative-effect argument* to be able to justify a ban, it needs to be shown either that the ban is necessary for the success of the other policies or that the other policies would make a ban more effective and less harmful than the current ban is. Let me address these possibilities in turn.

One of the few ways a ban could increase the success of policies that improve the status of women or make it more lucrative to have girls would be if a ban on sex selection itself communicated, or could be used as an opportunity to communicate, that parents should be glad to

have girls. While we should not exclude the possibility that this could be made more effective, a cause for concern is that this general strategy has failed to bring significant results in the 25 years the ban has been in place. This failure is not surprising. As long as having a son is rewarded to the extent that it is, efforts to communicate that girls should be valued equally is likely to fail to bring about the desired outcomes.

This suggests another way the cumulative-effect argument could work. If other policies could weaken the son preference by making it more attractive to have girls, then a ban might be able to deter people from using sex selection. However, this version of the cumulative-effect argument is at best an argument for banning sex selection *after* these other policies have had the intended effect. Because of the ban's negative impact on mothers and their daughters, we should avoid using it as long as it is not necessary to produce the intended effects.

I will end with a general lesson from the comparative analysis performed in this paper: Even if we can point to several morally problematic aspects with a practice, we should not jump to the conclusion that we are justified in banning it. Whether we should, depends on a comparative analysis that looks closely at every plausible alternative. Only that way can we form a justified opinion of whether a ban is likely to direct the behavior in a better direction. This way of approaching the problem is not only fruitful in the case of sex selection. I hope the comparative method can be used to think more clearly about many contested issues.



# Paper 4: Why States Should Buy Kidneys

Abstract: A government-monopsony market in kidneys is one in which the state is the sole buyer. In this paper I defend such markets against a principled objection that has hitherto received little scrutiny in the literature. Cécile Fabre argues we have duties of justice to provide people in need with kidneys and it is wrong to profit from doing one's duty. She, therefore, believes that a government-monopsony model is ruled out on principle. I argue Fabre's argument fails because it mistakenly assumes that the duty bearer is the individual, not the collective. Because the duty is a collective one, paying people for their kidneys is a necessary feature of a just system for procuring and distributing kidneys to people in need. This framework enables us to respond to several of the most pressing ethical and practical objections to markets, including Ronald Dworkin's concern that our body parts should not be included among the goods we owe each other.

## 1. Introduction

Currently, two million people suffer currently from kidney failure worldwide (UCSF, 2019). To survive, most of them have to live difficult lives on dialysis; a highly suboptimal treatment. Patients only have a 35 percent chance of surviving five years following initiation of dialysis and are often unable to pursue many of their most essential life projects (Wyld, Morton, Hayen, Howard, & Webster, 2012). The only other treatment available is to receive a healthy kidney through a kidney transplant. A kidney transplant is, compared to dialysis, a highly effective treatment. The five-year survival rate is 80 percent, and most recipients can live good lives with their transplanted kidneys (SRTR, 2017).

We currently procure kidneys from healthy people in most countries through altruistic donations from the living (as opposed to from the deceased); most live donors are friends or family members of the person in need. The state is at most merely a facilitator of the transfer between the two parties, and most, if not all, forms of monetary compensation are prohibited. Despite laudable efforts to find matches for nonmatching live donors with the help of sophisticated algorithms and nudges to get more people to agree to donate their organs when they die, we fail to provide a sufficient number of kidneys to meet demand.<sup>50</sup> In the United States, approximately 100,000 people are on waiting lists to receive a kidney, and in 2018, approximately 20,000 patients received a transplant. Among these, under 20 percent received a kidney from a living donor, which is the best kind for the recipient. That same year, approximately 9,000 patients on the waitlist for a new transplant either died or got too sick to receive a transplant (SRTR, 2017).

The failure of the current system has spurred proposals on how to organize the procurement of kidneys to ensure that more people receive a new kidney. Several philosophers and economists

have suggested that we should allow the buying and selling of kidneys (Becker & Elías, 2007; Brennan & Jaworski, 2015; Cherry, 2015; Erin & Harris, 1994; Hippen, 2005; Radcliffe-Richards, 1996, 2012; Radcliffe-Richards et al., 1998; Regmi & Harris, 2012; Savulescu, 2003; Semrau, 2014; Taylor, 2005; S. Wilkinson, 2004; T. M. Wilkinson, 2011).

There are several ways to do this. One could simply decriminalize the buying and selling of kidneys and thereby open up a *laissez-faire market*, where individual buyers and sellers can trade in organs. A *laissez-faire market*, however, suffers from well-known problems. People on low incomes may be unable to afford kidneys or sell their kidneys out of desperation. Research on Indian kidney sellers suggests that many, if not most of them, end up regretting their decision (Goyal et al., 2002; J. Koplin, 2014). Another is that kidneys should not be used as any other market good. Consider Sandel's (2012a) image of "a wealthy, eccentric collector [who] wanted to buy a human kidney, not for the sake of saving a life, but for the sake of displaying it as a conversation piece on his mantle." Even if the collector pays a nonexploitative price to a seller who is not desperate and he gets more satisfaction from the kidney than the its former owner did, many would still object to a bodily organ being used in this way.

For such reasons, many philosophers who defend kidney markets prefer a model where the government is the sole buyer of kidneys, it pays a fixed minimum price, and the kidneys are distributed according to need, for free or at a highly subsidized price (Erin & Harris, 1994; Hippen, 2005; Semrau, 2015; Taylor, 2005). Ideally, a government-monopsony market can ensure that the needy get access to a new kidney without exploiting poor kidney vendors. Moreover, only people in need of a kidney would be eligible to receive one. Kidneys would therefore be used in accordance with one plausible interpretation of their purpose, their *telos*: to allow people to live decent lives. Iran is the only country in the world which has implemented such a market, with mixed results (J. Koplin, 2014).

Kidney markets have been extensively debated. However, one intriguing principled objection to kidney markets, by Cécile Fabre (2003, 2004, 2006, 2008), has received little scrutiny. Fabre (2003, p. 132) argues that the healthy have a duty to give one of their kidneys to those who suffer from kidney failure and that it is, therefore, "unjust to deny one's organs to those who need them". Because it is wrong to profit from doing your duty, it is wrong to let the market be the primary mechanism for providing people in need with new kidneys. Fabre prefers, as a matter of

ideal theory, a compulsory kidney lottery, where every adult citizen would have an equal chance of being picked to donate one of their kidneys to a person in need.

In this paper, I will explore Fabre's objection to kidney markets and argue that an appeal to our duties of justice supports a government-monopsony market, not a kidney lottery. In section 2, I explicate Fabre's views and argue that her suggested lottery would impose too heavy a burden on the duty bearers. In section 3, I argue that Fabre is mistaken in her conclusion that it is unjust to pay kidney donors. Her argument rests on a mistaken view of the individual as the duty bearer. I argue that our duties to people who suffer from adverse health conditions are collective, and I show how we can thus get around Fabre's objection. I end the section by arguing that paying people for their kidneys is a *pro tanto* requirement in a just system. In sections 4-7, I defend my argument against several objections: Richard Titmuss's objection that markets would crowd out altruism, Simon Rippon's objection that poor people would be made worse off, Debra Satz' objection that markets increase unfairness, and Ronald Dworkin's objection that body parts should not be included among the resources we owe each other.

## 2. Fabre's Argument

Fabre (2008, p. 139) argues that it is unjust to pay people for their kidneys. The reason is that the healthy have a duty to provide the sick with a kidney, and one should not profit from doing one's duty.

Fabre's starting point is that we have duties of justice to protect and promote others' ability to live self-directed lives, up to a point. Since organ failure is a significant threat to our ability to lead the lives we want to live, people in this situation have a *prima facie* claim on treatment that enables them to live sufficiently autonomous lives. A kidney transplant is, as we have seen, the necessary treatment to achieve this goal. Given that "what is at stake is the possibility for [the sick] to lead a decent life, let alone to survive," Fabre (2003, p. 132) argues the sick have "a moral right against the healthy that the latter give them (some of) their body parts." It is, of course, controversial to include body parts among the resources we owe each other. However, Fabre (2003, p. 132) argues that as long as the good in question can be transferred while remaining "the kind of good it is" and losing the good would not "undermine our personhood," it can, in principle, be included among the goods we owe each other. Given that we can donate a kidney without being less of a person and the kidney continues to serve the function it served, Fabre takes these conditions to be satisfied.

I grant that kidneys are, in principle, goods that we can owe each other and that people who suffer from kidney failure have a claim on healthy people's kidneys. This is nevertheless insufficient to ground duties for the healthy to provide the sick with a kidney. For a claim to ground a corresponding duty, an additional criterion must be met: the transfer of a good from the duty bearer to the claimant must not make the former "less than minimally autonomous as a result" (Fabre, 2003, p. 136). This criterion would not be satisfied in the case of, say, a heart transplant. However, because most donors live good lives with one kidney, and the risks are sufficiently small, Fabre takes this third condition to be satisfied in the case of kidneys. Healthy people, therefore, have a moral duty to provide the sick with one of their kidneys.

So far it seems that Fabre's argument is compatible with a government-monopsony market, where the government buys kidneys to ensure that the sick receives what they have a claim on. However, Fabre argues that such a model is ruled out on principle because it is unjust to profit from doing your duty. She provides two different reasons for this claim. The first reason, which I will call the profiteer-argument, is that a market gives the duty bearer a chance "to improve his financial situation," i.e., to profit. "At the bar of justice," Fabre (2008, p. 139) argues, "I do not see how one can justify allowing the healthy so to burden public resources—in those cases at least where the medically needy do have a claim to be helped." The other, which I will call the duty-argument, is that markets give people "the right to decide whether to sell." (Fabre, 2006, pp. 127-128) Fabre does not spell out exactly why that would be wrong. It seems, however, plausible to say that if we have a duty to provide the sick with one of their kidneys, we are not permitted to make the fulfillment of their duty conditional on being paid.

Instead of a market, Fabre prefers a compulsory kidney lottery, where healthy donors are picked by a lottery to give one of their kidneys to people in need.<sup>51</sup> If they failed to comply, they would be forced to do so. Fabre argues that the use of force in this context is justified similarly to the way the state is justified in forcing us to pay our taxes to meet our other duties of justice. Even if people have a right to their property, their rights are arguably restricted by what they owe others in taxes. Similarly, Fabre thinks that even if people have a right to bodily integrity, this right is restricted by what the healthy owe to the sick. Our duties are thus prior to and specify the boundaries of our rights to resources, including our body parts.

I accept Fabre's claim that receiving a kidney transplant when one suffers from kidney failure is a sufficiently pressing need to include it within our rights. Kidney failure is, as we have

seen, a devastating threat to people's health and wellbeing. Presumably, this is why taxpayers fund dialysis in developed welfare states. U.S. government spending on dialysis is \$34 billion annually (UCSF, 2019). I also accept that there are no principled objections against including our body parts among the resources we owe each other.

Fabre's proposal furthermore has several benefits in comparison to the current system. Assuming that the lottery is implemented successfully, people in need of a new kidney will receive one. Additionally, since the organ is claimed as a matter of right and the donor is compensated by the government, the recipient does not have to rely on the charity of others, put pressure on family members and friends, or feel she owes the donor gratitude she can never repay.<sup>52</sup> It would also save taxpayers money. According to one recent estimate, each kidney donation reduces health-care costs by \$1.3 million over a recipient's lifetime (Held, McCormick, Ojo, & Roberts, 2016). We could expect even more savings, as many people with a new kidney would be able to work and get off social assistance. Moreover, a lottery where someone is picked to be a donor is *procedurally fair* since everyone has an equal chance of being picked. The *outcome* at the group level is also fair, as no group of citizens is underrepresented among the recipients or overrepresented among the donors. This is not the case today. According to a recent report from the U.S. government: "only 12.5% of living donor kidney transplants in 2017 were performed in black recipients, while 32.6% of candidates [for donation] in 2017 were black. In contrast, 65.9% of transplant recipients were white, though they made up only 36.2% of the waiting list." (SRTR, 2017)

However, there are also severe problems with Fabre's lottery.<sup>53</sup> One problem is that donating a kidney is too burdensome. Burdens can come from two sources. One is the harm involved in the procedure itself and the long-term consequences of living with one kidney. The rate of mortality is 3 in 10,000, and the morbidity rate is 10 percent, though the complications are minor in the vast majority of cases where there are any at all (Lentine & Patel, 2012; Maggiore et al., 2017). The risks are, to put it in context, similar in magnitude, although somewhat more significant, to working in the construction industry (Taylor, 2005, pp. 129-130). These risks may be so substantial that donating a kidney is supererogatory. Even so, I want to grant the claim that we have a moral duty to provide the sick with one of our kidneys, considering that the gain to the recipient is substantial.

The other source of harm stems from the way in which Fabre says kidneys should be procured. Most of us believe that there is something special about our bodies that grounds protection against far less invasive measures than a forced removal of one of our kidneys. If we were forced

by state officials to undergo surgery, most would find this to be a highly traumatic event. This is likely to substantially reduce our ability to live the life we want to lead. The point is not to argue that the invasiveness of the procedure grounds a right to bodily integrity, nor that it is for the best that we think of our bodies in the way we do. However, because we do think of our bodies as special and we would react fiercely against nonconsensual invasive surgery, a compulsory kidney lottery would be likely to amount to a substantial reduction in our autonomy (Eyal, 2009; T. M. Wilkinson, 2007). The harm involved in the procurement would arguably be too large to justify a compulsory lottery.

Fabre could respond that this reduction in our ability to lead the life we want to live could be made up for by a sufficiently generous monetary compensation. In fact, Fabre (2003, p. 140) favors compensating the donors to “distribute the burden of donating more fairly” and cover costs such as “higher life insurance premiums, lost income whilst in hospital, etc.” We frequently accept risks to our health in exchange for pecuniary and other benefits, such as driving our car to work. Moreover, that we receive compensation for physical and psychological harms suggests we can be satisfactorily compensated for events that otherwise would set back our ability to lead the life we want to lead.

However, both analogies are lacking in crucial respects. First, when we voluntarily take on risks to achieve some benefits, the crucial component is that it is voluntary. When we learn people were forced by their family members or creditors to donate a kidney, we find that wrong—even if we think they had an independent moral duty to act and they received compensation for their loss. Second, even though we receive monetary damages in tort, we rarely believe money is sufficient to make up for physical or psychological harm. The monetary compensation is the only way to provide people with some form of recognition and compensation when the harm, unfortunately, has occurred. It is, however, far from a perfect substitute. That is why people react with such strong emotions when they learn of firms that treat inflicting harm and paying damages as a purely monetary matter. Monetary compensation is therefore unlikely to make up for the psychological burden forced surgery would impose on donors.

If we accept that the healthy have a duty to provide the sick with one of their kidneys, we lack a mechanism to ensure compliance when Fabre’s kidney lottery is ruled out. We should therefore look closely at her argument for why it would be wrong to implement a market in kidneys.

### 3. Paying for Kidneys is a Requirement of Justice

Remember, Fabre gives two arguments for why a monopsony market is unjust, the profiteer-argument, that it is wrong to profit from doing your duty, and the duty-argument, that we are not allowed to make doing our duty conditional on being paid. I will address the two arguments in turn.

There are several problems with the profiteer-argument. First, it cannot be the profit *per se* that makes the difference. We profit when we receive more than our reservation price, i.e., the sum where we are indifferent between keeping the kidney and receiving the money. Theoretically, either a price or compensation could be set at the donor's reservation price to avoid letting the donor profit. In practice, both schemes are likely to allow some donors to profit since we do not know people's reservation prices.<sup>54</sup> Second, if kidney donors should not be allowed to profit, why should doctors?

Fabre recognizes that there is a potential incoherence here, but argues that doctors are not profiting. Their salary "should be understood as compensation for years spent in training and for the time devoted to operating." (Fabre, 2006, p. 130). Even if we grant this implausible claim, it leaves unexplained why the doctor should be able to choose whether to become a doctor or not, while the organ donor has to have their organ confiscated. Moreover, if the problem Fabre has with markets is that the donor should not be able to "demand whatever price she deems fit in exchange for transferring her body parts to individuals who have a claim to them" (Fabre, 2006, p. 131), she lacks the resources to argue against a monopsony market. With such a system it is the government that sets the price. This explanation is, therefore, unsatisfactory to show why a monopsony market is unjust.

The duty-argument is more promising. To appreciate the force of this argument, think about our duties to save a child who is drowning in a shallow pond (Singer, 1972). It would be wrong to demand to be paid before we jump in to save the child (Wells, 2017). It would, however, be perfectly fine and even appropriate if the rescuer is compensated afterwards if she loses some of her personal belongings in the process. Similarly, since we owe our fellow citizens one of our healthy kidneys, it would be wrong for us to make them pay for it. It would, on the other hand, be appropriate for the public to compensate the donor for her loss.

There are, nevertheless, several ways we can resist the conclusion that it is, therefore, wrong to pay people for their kidneys. We could deny that we have a duty to donate a kidney. If donating a kidney is supererogatory, it is not wrong to ask for money to do it, at least according to this

argument. Although this is, as we have seen, a plausible objection, I want to pursue a different line of argument in this section. I want to show that even if we grant that we have a duty to do something, it is not necessarily wrong to be paid to do one's duty. A closer look at the drowning case should suffice to make this clear.

Although we are not in a position to profit or demand to be paid before we save a drowning child in a shallow pond, we are certainly permitted to work as a professional lifeguard at the public swimming pool. It is therefore not necessarily wrong to profit or to be paid to do something we, in other circumstances, would have a duty to do (Brennan & Jaworski, 2017, p. 4).

How can it be wrong to make rescuing a child conditional on payment in one situation but not the other? One suggestion is that lifeguards are paid to do other things than to rescue. We do not have duties to patrol shallow pools to look for shallow ponds or train to be better helpers.<sup>55</sup> This certainly points to differences between the cases. However, this is not the most plausible explanation of why we find it permissible to pay the lifeguard.

Think about the following case. A group of villagers want to build a swimming pool for their children. They have an obligation to keep their children safe. They consider several ways they can fulfill their duty. They consider the option of each villager looking after their own child, but come to the conclusion that this would be too inefficient. Then they consider the option of taking turns. Although that would be a much better solution, they believe this would disrupt too many of their other projects that they depend on for a living. They thus decide to pool some of their resources to give one of the villagers the job of looking after their children. They offer this opportunity to all the adults in the village and one of them accepts to take on the role. Although he is, in effect, paid to look after their children, including his own, and is making the payment a condition for fulfilling his duty, he is clearly permitted to do so.

A better explanation for the difference in the two cases, I take it, is that in the shallow pond case, the duty bearer is the individual, while in the case of the villagers, it is the collective. In emergencies, such as the child drowning in the shallow pond, the moral relationship is dyadic: I owe you. When we are in a dyadic moral relationship, we are in no position to demand payment before we perform our duty. When a village decides to build a swimming pool, however, all of the villagers collectively are the duty bearers. To fulfill its duties, the collective has to allocate the subsidiary responsibility to an individual who can act on its behalf. The collective is then connected



to the right holder and the subsidiary-duty bearer in a triadic relationship. And when we act on behalf of the collective, we are not in the wrong if we demand payment from the collective.

As the two drowning cases show, there is nothing about the type of need that dictates whether it is the individual or the collective who is the duty bearer. It depends, rather, on the way we solve problems. A benefit of acting as collectives is that we are better able to meet people's needs (Goodin, 1988, p. 50). Take the case of dialysis. It would arguably be beyond the call of duty for any individual citizen to pay for other people's dialysis, which in the United States costs \$90,000 a year (UCSF, 2019). However, when we direct our claims to the collective, these costs are manageable, which may explain why this cost is covered by taxpayers. Another benefit of collectivizing duties is that the right holders can get what they are owed without having to rely on private charity (Herman, 2012, pp. 408-409). A third benefit is the ability to distribute the burdens of fulfilling duties fairly. It would arguably be unfair if just a few citizens had to cover the cost of dialysis. All citizens should pay their fair share in taxes. We can put this in even stronger terms: When the collective is the duty bearer, it has derivative duties not to impose unreasonable burdens on citizens when fulfilling its obligations toward the needy and to distribute the burdens fairly among the duty bearers.

Currently we do not include kidney transplants from living donors within our collective duties. Although we collectively pay for dialysis, the need for kidney transplants is treated more like the case of a child drowning in the shallow pond: individuals (in the kidney case family members or friends) are expected to come to the rescue. When we look through this dyadic lens, it is no wonder that we think it would be wrong to be paid to donate a kidney. Fabre, however, challenges this paradigm and argues that the healthy have duties in the capacity of citizens to provide the sick with kidneys. Fabre's kidney lottery is an attempt to design a system for the collectivization of our duties. The compulsory lottery ensures that everyone with a claim on a new kidney receives one. It also distributes the *ex ante* risk of having to provide a kidney equally among all duty bearers. The compensation distributes the burdens more fairly *ex post* among the taxpayers and the donor. However, as we have seen, the burdens the lottery model puts on the duty bearers who contribute in kind are too significant.

Another way the collective can meet its duties to people who suffer from kidney failure is to buy kidneys from healthy donors and distribute kidneys according to need. It seems as if we paid sufficiently for kidneys, we could motivate a sufficient number of donors, and hence fulfill our

collective duty to people in need. Paying donors is also less burdensome than a lottery, which means that it imposes fewer costs on the duty bearers. Yet, like the lottery, the payment could ensure that the burdens of providing kidneys are distributed more fairly than they are now. Some citizens would pay their fair share in taxes, while some would contribute in kind and get compensated monetarily for doing so. Since paying donors ensures that the sick receives kidneys and the duty bearers are compensated for their loss, it is therefore not merely permissible: it is a *pro tanto* requirement of a just system when the collective is the duty bearer.

There are, nevertheless, several objections to this argument. Will paying donors actually motivate a sufficient number of donors to provide people with the kidneys they have a claim on? Are the burdens imposed on people too substantial? Are the burdens distributed unfairly? Finally, is it too dangerous, as R. Dworkin (1983) suggests, to include kidneys among the resources we owe one another? I will respond to these objections in turn.

#### 4. Crowding Out

The most compelling reason for paying kidney vendors is to motivate a sufficient number of donors to meet the claims of the sick on kidneys. However, a concern is that paying vendors may crowd out altruistic donors without attracting a sufficient number of vendors to make up for the loss (J. J. Koplin, 2017; Rippon, 2014). This is known as the crowding-out effect, after Richard Titmuss's (1972) comparative study of the different systems for procuring blood in the United States and the United Kingdom. The objection is intriguing and could be true for blood (although the empirical research shows mixed results). However, as suggested by Debra Satz (2010), Luke Semrau (2014), and Gerald Dworkin (2014), it is unlikely to be true for a government-monopsony market that operates within one country. Even if all the current donors would opt out if we introduced this market, we could crowd in a sufficient number of vendors by raising the price. A government-monopsony market is therefore likely to meet the right holders' claim to a kidney transplant (Semrau, 2019).

Some see it as a problem if we crowd out altruistically motivated donors and replace them with donors who are in it for the money. Perhaps there is, as suggested by Titmuss (1972), a value in having a sphere where we act out of solidarity, not self-interest. I want to grant that there is value in acts of love or altruism that risk being crowded out by the market. However, we should not hold the market in kidneys to a higher standard than we apply in other cases. Even if we lose acts of

substantial value, this is arguably not a sufficiently weighty concern to object to a scheme that is expected to save thousands of lives (S. Wilkinson & Garrard, 1996). Moreover, a government-monopsony market is a way of institutionalizing solidarity that allows the sick to receive the health care they need without having to rely on extraordinary acts of altruism by their fellow citizens.

## 5. Duty Bearers

A more plausible concern is that the burdens imposed on the duty bearers who contribute in kind are too significant. This was the primary reason why Fabre's lottery failed. There are, first of all, substantial risks in donating a kidney. Furthermore, when money is involved, people may be unduly induced or even coerced. Michael Sandel (2000, p. 94) argues that "a peasant may agree to sell his kidney or cornea in order to feed his starving family, but his agreement is not truly voluntary. He is coerced, in effect, by the necessities of his situation." These concerns are particularly worrying when seen through the lens of the triadic moral relationship. If the reason people live in poverty is that they suffer from economic injustice, the proposal would, in effect, demand that they donate a kidney to receive what they are owed (Rivera-López, 2006).

I will first address the significant risks involved in the procedure. Although the risks involved in donating a kidney are significant, they are not so large that we prevent people from donating kidneys without compensation. Moreover, when selling a kidney is optional, we expect the benefit of the sale to be bigger than the burden for the donor. The reason why they are selling one of their kidneys is arguably because they think the money is more important than having two kidneys (Radcliffe-Richards, 2012). The price can furthermore be set at a substantially higher level than the market price to ensure that the sale improves the lives of sellers.

I will not take a stand on how high the price should be. However, I would like to note that the triadic moral relationship provides a justification for raising the price above the market price. The price serves two functions. The price can motivate a sufficient number of donors, which can be fulfilled by the market price. In 2007 this was estimated to be \$15,000 (Becker & Elías, 2007). The other function is to fairly distribute the burdens among the duty bearers. However, it is not an aim a market would necessarily meet. Desperate sellers might seek to outcompete each other in a struggle to solve their financial problems, and this might drive the price down. This would be exploitative on several theories of exploitation (Ferguson & Steiner, 2018). Moreover, what we consider a fair distribution of burden to the people who contribute in kind to ensure that the

collective is able to fulfill its duties is not in any clear way connected to the market price. A fair compensation may call for a much more generous monetary compensation than the market price.

Raising the price seems, however, to exacerbate the problem of undue inducement, raised by Sandel (2000). We seem to find ourselves in a bind, where a low price is exploitative, and a high price unjustly inducive. The bind is nevertheless more apparent than real. Undue inducement is primarily a concern about invalid consent (Radcliffe-Richards, 2012; Wertheimer, 2010). The idea is that when the benefits are too tempting, we are unable to properly consider the costs. However, a high price is also a weighty reason for accepting the offer, especially if one has few other opportunities. It is indeed unfortunate and unjust if people who are not given their due have to sell a kidney. However, we should be careful not to conflate the injustice that is caused by unjust background conditions with the comparative improvements a government-monopsony market can bring. People who are unjustly treated would, in most circumstances, benefit from having the option of selling a kidney open to them (Radcliffe-Richards, 1996, 2012).

Arguably, we should exclude certain groups of donors: those who have a health problem that makes the risk of donating excessive, those who are unable to consent, and, perhaps more controversially, those who are in *temporary* difficult circumstances and are likely to regret selling one of their kidneys. To exclude the people in the last group may be justified on paternalistic grounds. When we are in a desperate situation, we may exaggerate the need to solve the problem by any means. We may suffer from focus illusion, where we fail to see all the alternatives we have open to us (Mullainathan & Shafir, 2013). What we should not do, however, is to exclude everyone in a difficult position from the pool of potential donors. We should instead give them information and other opportunities (Erin & Harris, 1994; Radcliffe-Richards, 2012; Semrau, 2014).

Is it unfair that some donors would give kidneys to recipients who are responsible for their kidney failure? As T. Martin Wilkinson (2007, pp. 329-330) reminds us, “a major cause of renal failure is type 2 diabetes, and a major cause of that is eating and drinking too much and not taking enough exercise.” Although my proposal is compatible with screening out responsible claimants, I nevertheless think that we should avoid doing so. Any screening process which aims to select for responsibility would be riddled with enforcement problems and risk threatening the legitimacy of the system. Moreover, duty bearers have less reason to complain when seen through the lens of a triadic moral relationship. When what is at stake is the forced removal of someone’s kidney, each claimant must have a rightful claim on other people’s body parts. However, when the sellers are

paid and their primary relationship is with the collective, this is not an issue. The sellers have a right to be given a fair price. However, they do not have a right to complain that the recipient is undeserving. If they want to avoid giving their kidney to an undeserving recipient, they should abstain from selling.

## 6. Group Fairness

If we pay donors a fixed price, we should expect people with low incomes to be overrepresented among the donors, since a fixed price is more valuable for someone with low income. This raises the issue of group fairness. It would certainly seem unfair for the burdens to fall disproportionately on those who are most likely to suffer from injustice. However, it is not obvious that that is how the burdens would fall. If we assume that every individual vendor would be likely to be made better off by the trade and that people on low incomes would be overrepresented among donors, it follows that people on low incomes, as a group, would be made better off than they otherwise would be.

A better way to understand the concern of group fairness is in symbolic terms. Satz (2010) is concerned that kidney sales would come to be associated with something marginalized people do out of desperation. In short, people could come to see them as spare body parts for others. This might threaten the status of low-income people in the eyes of others, which in turn might impact their self-esteem and ability to be effective members of society. Even though the sellers would be made better off in material terms, large groups of people might be made worse off in terms of their status and perceived dignity (Panitch, 2020; Rippon, 2017; Satz, 2010). In Iran, many kidney sellers do not speak openly about what they have done, allegedly because they see it as demeaning (J. Koplin, 2014; Taylor, 2005).

One response to this objection is to endorse a policy of picking donors from different groups. If the government picked people representing a wide set of different class backgrounds from the pool of willing donors, it could, arguably, avoid this problem. A complementary response is to propose using the triadic moral framework to express that donors are doing something dignified: Kidney vendors are contributing to the fulfillment of our collective duties. Even though they receive fair compensation for their sacrifice, they make a substantial bodily sacrifice on behalf of others so the rest of us do not have to. If we can adequately express this moral message, people may come to see kidney vendors as exalted, not degraded.

## 7. The Prophylactic Line

It was the fear of proposals such as the lottery model that motivated R. Dworkin (1983, p. 39) to suggest that we should adopt “a prophylactic line that comes close to making the body inviolate.” To avoid arguments for the compulsory taking of organs, he proposes that body parts should be kept outside of the resources that we owe each other as a matter of justice. How does the view I defend in this paper square with Dworkin’s concern?

Dworkin gives two interrelated reasons for excluding body parts from the resources we owe each other. He concedes there could be much to be gained by distributing body parts more evenly. However, the state should abstain from such ventures because of the difficulty in drawing a hard line and the risks involved in drawing it in the wrong place. Dworkin is particularly concerned that policymakers and intellectuals may come to argue in favor of draconian measures, such as compulsory kidney lottery. To include body parts within the resources we owe each other would not, in his opinion, protect persons to a sufficient degree.

However, when we can use markets to fulfill our duties, we do not have to fear the slippery slope logic involved in Dworkin’s argument. Although people react negatively to markets in body parts, there is no reason to expect a majority to prefer confiscation over a market. Besides, the triadic moral relationship provides a much more forceful moral justification than Dworkin’s slippery slope argument for why the state cannot use people’s body parts as resources they can distribute at will. The collective has derivative duties not to impose unreasonable burdens on the duty bearers when fulfilling its duties to people who suffer from kidney failure. These derivative duties will work as trumps against any system that includes the compulsory taking of body parts.

## 8. Conclusion

I have argued that it is permissible to pay people for their kidneys and, additionally, that our duties of justice speak in favor of paying people. This amounts to an argument in favor of using a government-monopsony market to ensure that the people who have a right to a new kidney get one.

I will not settle the issue of whether it would be better, all things considered, to have a future market, where people are paid for giving up their kidneys when they die, rather than a current market, where donors have to give up a kidney while still alive.<sup>56</sup> I think, however, that we have good reasons for exploring a current market. A current market avoids many of the complexities of

a future market, and kidneys from live donors are a better treatment. Crucially, we arguably have a duty to donate our organs to the sick after our death for free, given the potentially substantial benefit to the recipient and the negligible burden of doing so.

An avenue for future research is whether to implement similar schemes for other body parts, such as corneas, pieces of liver, and eggs, or other contested transactions, such as surrogacy. These questions are partly ethical and partly practical.

Given that there is much opposition towards paying kidney donors, we also need a constructive discussion of how we frame the rewards we give to kidney vendors. I want to suggest that the moral framework that I discuss in this paper could lay the groundwork for a more palatable framing of a government-monopsony model. One can stress the unique character of the sacrifice made and why it is appropriate to share the burdens of providing people with kidneys by paying the donor. If we stress these moral aspects of the exchange, people may see the market as the proper way of dealing with the problem of organ failure, not as a wrongful intrusion into a sphere where money should play no role (E. Anderson, 1995; Sandel, 2012b).





# Paper 5: Prize, Not Price:

## Reframing Rewards for Kidney Donors

Abstract: In the United States alone, approximately 100,000 people are currently on the waiting list for a kidney transplant. One possible solution to the kidney shortage is for the government to pay donors for one of their healthy kidneys and distribute kidneys according to need. There are compelling objections to this government-monopsony approach. In this paper, I offer a small but important adjustment to the model, taking advantage of the fact that rewards can come in many forms. I suggest that we reward kidney sellers with both money and a ceremony that celebrates their sacrifice. They should, in other words, receive a prize rather than a price. I show how this model avoids the central objections to a government-monopsony model.

### 1. Introduction

In the United States alone, approximately 100,000 people are currently on the waiting list for a new kidney. To solve the problem, philosophers and economists have proposed that we pay kidney donors. Since money is a powerful motivator, we expect more people to receive kidneys if they can pay for them. Being paid would presumably also benefit the sellers. The reason why people want to sell one of their kidneys is that they need the money more than they need two kidneys (Radcliffe-Richards, 2012).

There are nevertheless powerful objections to organ markets. Poor people in need might not be able to afford a kidney. Others might feel forced to sell one (Rippon, 2017). The preferred model for dealing with these concerns among many defenders of kidney markets is one where the government is the sole buyer of kidneys from healthy donors, it pays a fixed price, and kidneys are distributed for free to people according to need (Erin & Harris, 1994; Harris & Erin, 2002; Hippen, 2005; Semrau, 2014; Taylor, 2005).

There are several *prima facie* upsides to a government monopsony market in kidneys, as I discussed in paper 4, “States Should Buy Kidneys”. Need, not willingness or ability to pay, will dictate whether one receives a kidney. The price can be set higher than necessary to induce a sufficient number of people to sell a kidney, which could ensure that donors receive enough money to make a meaningful difference in their lives (Semrau, 2014). We could also implement checks and balances such as screening procedures to make sure that only the physically and psychologically healthy could sell a kidney. We could, furthermore, offer follow-up care, and provide information and waiting periods, so as to minimize the possibility that people in desperate economic circumstances make decisions they later come to regret (Erin & Harris, 1994; Radcliffe-Richards,

1996, 2012). The savings on dialysis and social assistance, when people are enabled to go back to work can easily cover setting the price of a kidney price at around \$100,000 (Held et al., 2016; Semrau, 2014). It therefore seems that a government monopsony market helps meet the demand for kidneys while giving donors a fair price.

A government-monopsony market in kidneys, however, can be met with a number of ethical objections. In this paper I shall consider three objections in particular: a kidney donation is not the type of act that is appropriately valued by a market a price (the degradation objection); a market might crowd out altruistic behavior (the crowding-out objection); and poor people would be made worse off by the option to sell a kidney (the demeaning deal objection). My aim in this paper is to suggest and defend a way to procure and distribute kidneys that can get around these ethical objections to a government monopsony. I call the model the kidney-reward model, which consists in giving donors a prize delivered through a public ceremony instead of a price.

## 2. Three Objections

### 2.1 The Degradation Objection

Many of us believe that there is something special with the body and the act of giving someone a body part, which makes it wrong or suboptimal to buy and sell organs. Elizabeth Anderson (1990, 1995) argues that the *quid pro quo* norm that characterizes the market is not the appropriate way to value goods that are intrinsically valuable and cannot be used at will.

To donate a kidney is a bodily sacrifice, we may think, that should not be equated with a mere payment. The human body and its parts, pope John Paul II (2000, Aug. 29) argues, “is a constitutive part of the person who manifests and expresses himself through it.” When we “consider them as items of exchange [we] use the body as an ‘object’ and this “is to violate the dignity of the human person.” Kidneys are constitutive parts of people who are ends in themselves and can therefore not be treated as mere means to satisfy our own ends. Michael Sandel (2000, p. 94) similarly suggests that “the sale of human body parts [is] intrinsically degrading, a violation of the sanctity of the human body.”

We are, on the other hand, permitted to use other people’s body parts if they are given as a gift: The wrong seems to consist in how we consider the body part when we put a price on it. Following Anderson (1995, p. 11), we could say that a mere market price does not show the

appropriate gratitude to the donor. It signals that a *quid pro quo* transaction is done and the deck is cleared. Since kidney donations are bodily sacrifices, they require admiration on the part of the recipient and bystanders. A monopsony model may, by itself, therefore not allow for the appropriate way of valuing the donors' bodily sacrifice.

### 2.1 The Crowding Out Objection

There is also great value in the act of giving, which could be threatened when a government monopsony is introduced. When we introduce a market where there is a functioning system for gift giving, we could *crowd out* such acts of virtue and replace them with acts of self-interest. This could have a substantial effect on the public morale more generally. "It is likely," Richard Titmuss (1972, p. 111) argues, "that a decline in the spirit of altruism in one sphere of human activities will be accompanied by similar changes in attitudes, motives, and relationships in other spheres."

Altruism may work, as Peter Singer (1973, p. 319) puts it, "like sexual potency—much used, it constantly renews itself, but if rarely called upon, it will begin to atrophy and will not be available when needed." More importantly, we take cues about how to behave from the social practices that surround us. A practice where people do good for others may be an essential reminder that we live in the kind of society where people act altruistically toward each other. When this is common knowledge, this could justifiably increase our trust in others and make us act more cooperatively (Bowles, 2016). The concern is, according to Singer (1973, pp. 313–314), "that a commercial system would have the opposite effect. The laws of the marketplace discourage altruism and fellow-feeling."<sup>57</sup>

### 2.3 The Demeaning Deal Objection

The expected shift in who donates and why, could also lead to a loss in the social status of the sellers, and hence make them worse off. Currently, a donor is portrayed as someone who makes a great sacrifice for a person in need. In Iran, however, it seems like many donors see the act as demeaning (J. Koplín, 2014; Taylor, 2005). This is especially a risk if people with low incomes are overrepresented among the sellers. The enterprise may be tagged as something desperate people do, which might impact their self-esteem and ability to participate fully in democracy and civic life. This might, in turn, as Debra Satz (2010) argues, erode community solidarity and threaten the legitimacy of the system. Recipients might also suffer: knowing that one's new kidney was sold under such conditions is likely to make the experience less satisfactory.

In light of these objections, we should explore whether there are ways to improve a government-monopsony market. In the following, I will suggest that we can meet these objections if we reward donors differently, that is, through a prize delivered at a public ceremony where they are honored for their contribution.

### 3. The Reward Model

Imagine a splendid ceremony in one of the city's finest buildings. The minister of health is addressing the people in the room, who are all dressed in their finest clothes:

We are here to celebrate the brave people who have shared one of their kidneys with one of their fellow citizens so they can live a longer and better life. I'm sure the recipients are grateful for the sacrifice. But it is first and foremost we, as a people, who ought to be grateful for these praiseworthy acts by some of our finest citizens. After all, it is we who bear the responsibility of providing people in need with the necessary means to live decent lives. For the great sacrifice that is made on our behalf, a reward is in place. To show our gratitude, we offer each person that has given one of their healthy kidneys a prize worth \$100,000. Today we celebrate life and the great deeds that extend it.

One after another, the prize recipients are welcomed on stage, where they receive an envelope, a bouquet, and a standing ovation from the crowd. The ceremony is streamed online, where one can watch and read interviews with the donors and recipients. Here they tell their stories, about what motivated them to give, and how it changed their lives.

I offer this image to make the kidney-reward model specific and show how it could look in practice. However, I want to stress that I am not committed to the specifics of this proposal. I nevertheless see it as a plausible and attractive way of rewarding kidney donors. The model takes advantage of the fact that a reward, or a prize, differs from other ways of using money. We use *incentives* to encourage people to do something they otherwise may not do and *compensation* to make sure that people are not set back by their actions. When we *reward*, we want to publicly recognize that someone has done something extraordinary.

These categories are not mutually exclusive. Compensation works as an incentive, as it removes a barrier against acting. Similarly, when people work because they receive pay, they are incentivized and compensated for what they have to forego to be at work. Despite their

commonalities, the different categories signal something particular about the transactions they describe. They tell us something about the intention of the party that provides the money and the meaning we collectively ascribe to the transaction itself and the parties that engage in it. When we frame something as a reward, we intend to make it known to the world that someone has done something extraordinary and that they, therefore, deserve praise. A reward is itself a vehicle through which we give praise and a way we publicly recognize that an extraordinary act has been performed.

A monetary transaction alone does not constitute a reward. We must frame the act of giving money in a publicly recognized way for it to be understood as such. Nor is money necessary; we can think of non-monetary rewards. A reward may e.g., come in the form of a medal, a diploma, a public ceremony, or a statue. One can get one's name on public buildings or scientific discoveries. However, money may play a part in giving weight to a prize, by showing that it is more than cheap talk. The payment of one million dollars that accompanies a Nobel Prize is meant to reflect the magnitude of the contribution to the world. The monetary and ceremonial aspects can, therefore, reinforce each other (Frey & Gallus, 2017).

One could object that the kidney-reward model I propose, is not a proper reward. Rewards, such as medals in war or the Nobel Prize are given after a good deed has been done. The person performing the deed may have the reward in mind, but there is not a straightforward relationship between performing the deed and achieving the reward. In the kidney-reward model, on the other hand, every donor can expect a reward. People can therefore donate with an eye to get the reward, not with an eye to the good that we seek to reward. This could be said to be against an essential feature of rewards. However, it is not a necessary feature of rewards that they are awarded with discretion. When students are awarded a place on the dean's list for having excellent grades, the criteria for high-attainment are often clear. In fact, transparent criteria for receiving such rewards are often seen as a virtue.

## 4. How the Reward Model Can Avoid the Three Objections

### 4.1 The Degradation Objection

When money is framed as a reward, it escapes the objection that the price of a good fails to reflect the value of the contribution. The monetary value of the prize is clearly not meant to reflect the value of what is rewarded. Moreover, the reward and the ceremony express the idea that the act of

giving a kidney is not an ordinary market transaction but rather a great sacrifice to help someone in need. It, therefore, better reflects the meaning of the act than mere incentive or compensation.

Admittedly, a reward does not guarantee that the participants in the transaction have the right attitude. Recipients could treat kidney sellers as mere means to satisfy the recipients' own interests, rather than as ends in themselves. However, this is an unavoidable feature of any system. We have no guarantee that everyone in the current altruistic system is treating the kidney donor as an end in herself. From the point of view of the collective, the best we can do is to organize a system that allows for and expresses the right attitudes. The kidney-reward model achieves these aims.

#### 4.2 The Crowding Out Objection

The reward model may also increase solidarity rather than crowd it out. As shown by a substantial empirical literature on the crowding-out effect, systematized by Samuel Bowles (2016) in *The Moral Economy*, it is not money *per se* that crowds out other-regarding motivation. It is the meaning that is attached to the money that causes people to behave differently. When a fine is seen as a legitimate punishment for free riding, it *crowds in* ethical behavior. I suggest that a reward model can do the same.

Moreover, the kidney-reward model demonstrates that people are willing to make a substantial sacrifice for people they do not know and that the community is willing to reward people who do so generously. This is not something the current system does. Very few live donors give kidneys to strangers. To the extent that people donate during their lives, they donate to their friends and relatives. If one of the aims of protecting a gift sphere is to express that we do good deeds for our fellow human beings, the reward model is arguably better than the current gift model.

#### 4.3 The Demeaning Deal Objection

When kidney donations are framed as heroic and highly moral acts, and the prize is set at a sufficiently generous level, it will, furthermore, be less likely to be demeaning. It will thus protect the sellers against the expected loss in their social status. Calling attention to the goodness of sellers' act and character might even exalt their status in the eyes of others.

Since the moral framing supplements the price in motivating people to donate a kidney within the kidney-reward model, the hope is that many would seek out the opportunity to do something of great importance for others and be rewarded for their sacrifice. This would allow the

government to deliberately choose donors from different income brackets to avoid having only people on low incomes be sellers. The lost opportunity for some people with lower incomes may be a cost worth accepting for the sake of the legitimacy of the system. The primary aim of the reward model is not to alleviate poverty but to make sure that people receive a kidney when they need one. If we have to increase the size of the reward to attract people with higher incomes, that would also benefit people with low incomes who become donors. The combination of a moral message and a generous material reward is likely to answer concerns raised by Rippon (2017), Satz (2010), and Eduardo Rivera-López (2006) that we are unlikely to be able to attract a sufficient number of donors who are not desperate.

The final point is that the reward model is likely to be more robust than a government monopsony that operates in market terms. With all the moral language surrounding the scheme, it would arguably be more difficult for politicians to cut back on the reward. For the same reason, the government would be unlikely to make selling a kidney a precondition for getting access to welfare services, a prevalent concern in the debate (Rippon, 2014; Satz, 2010).

## 5. A Reward Is Not Manipulation

Although the reward model successfully deals with many ethical objections to markets in kidneys, one could object that framing the reward as a prize comes close to manipulating people into selling their kidneys. Manipulation is ethically problematic, and moreover, if people see the policy as manipulative, it would make it both less desirable and likely infeasible (Mahoney, 2009).

Although this is a concern we need to keep in mind when designing policy, to reward people for the sacrifice they are making in giving a kidney to a person in need is not a form of manipulation if, by manipulation, we mean intentionally misleading someone to gain an advantage. It instead reflects what we think of as the appropriate response to the act. As Michael Walzer (2008 [1983], p. 267) puts it: “Public honor is not a gift or a bribe but a true speech about distinction and value.” The reward model expresses the view that *good citizens* are doing *good deeds* by donating a kidney and that they, therefore, are rewarded for this by a grateful collective. The reward is in line with the *telos*, the purpose, of the act. To emphasize the sacrifices made and the appropriateness of a reward is thus not best understood as manipulation but as a way of highlighting the morally relevant aspects of the exchange.

Finally, framing is nothing new when it comes to procuring kidneys. “Exchange of awkward goods” is, as argued by Kieran Healy and Kimberly D. Krawiec (2012, p. 650), “often accompanied by a considerable amount of practical and symbolic work that signals the transaction’s social meaning and dictates the basic principles by which the exchange is governed.” This is true for the current gift model and the kidney chain, as well as for the procurement of blood (Healy, 2006; Healy & Krawiec, 2012, 2017; Roth et al., 2005)

We should, moreover, with Cass Sunstein and Richard H. Thaler (2003), point out that there is no neutral way of designing the systems within which we make our choices. Every choice architecture, as they call it, makes certain features visible and downplays others.

## 6. Conclusion

I have proposed a model for how a government-monopsony market can meet several compelling ethical objections, by utilizing the fact that rewards express very different things depending on how they are given. I do not claim to know what exact features a kidney-reward model, such as the one I have proposed, should have. However, I am confident that a prize is the right way to show our gratitude to kidney donors.

An avenue for further research is to consider whether the reward model may be the appropriate model for other contested trades. I suggest that it may be a particularly good fit for trades where (i) we recognize a public responsibility to provide the good, (ii) it requires a substantial sacrifice from one person, and (iii) it is a one-off transaction.

Finally, I do not want to claim that the model I propose is necessary for a government-monopsony market to be permissible. I do believe that the importance of saving lives is sufficiently weighty for such a model to be permissible without the changes I propose here. However, I do believe that this model is an improvement: It can save lives while at the same time addressing other ethical costs. I also believe it more likely to be implemented.



# Notes

<sup>1</sup> The citations are from volume 1, book 5, chapters 8-11.

<sup>2</sup> I was first made aware of “Venditio” through Russ Roberts’ *EconTalk* (Munger, 2012, Nov 12).

<sup>3</sup> Matt Zwolinski and Alan Wertheimer (2017) argue that the “just price” doctrine in Christian thought is a precursor to the Lockean view; the just price being the competitive market price. What is essential is that the market price is not whatever price market participants agree to, but rather the price that emerges in a market with informed and sufficiently numerous buyers and sellers. If one of the parties, on the other hand, takes advantage of monopoly power or fraud to set a price above the competitive price would have been, that price is unjust.

<sup>4</sup> References are given in the standard Akademie pagination. When I refer to *The Grounding of Metaphysics of Moral*, I use James W. Ellington’s translation (1993). When I refer to *The Metaphysics of Morals*, as here, I use Mary Gregor’s translation (Kant, 1996).

<sup>5</sup> For a treatment of expressivist effects, see Bjørn Hoffman (2017).

<sup>6</sup> In the jargon of political philosophy, we would say that this is a contribution to non-ideal theory instead of ideal theory. I assume neither strict compliance with the principles of justice or morality, nor particularly favorable circumstances, which John Rawls (2001, pp. 13, 47, 101) argues are the two necessary features of ideal theory. For a discussion of ideal and non-ideal theory, see Zofia Stemplowska and Adam Swift (2012).

<sup>7</sup> Some philosophers believe that certain values are fundamentally incommensurable, which seems to suggest that we would have no basis on which to make decisions when these values conflict (E. Anderson, 1995). Although this would be a substantial obstacle for our ability to make reasoned decisions, we do not seem to find trading off different values as difficult as this objection implies. Take the dilemma of whether to spend more time with our children or take an extra shift at work to earn more money. Although we could classify this as a trade-off between our relationship with our children and material gain, we are perfectly able to make such decisions without suffering from decision paralysis (Epstein, 1995). Neither do we find it unreasonable to make such trade-offs. Some values are more important than others and we should therefore sacrifice less important values if necessary. Imagine a man who has been in a car accident and desperately needs to get to the hospital. There are few cars around, but finally someone shows up. However, instead of helping the man right away, the driver demands 1000 dollars to drive the injured man to the hospital. This would certainly be an egregious case of wrongful exploitation. However, imagine that you could either let the deal happen or stop it from taking place with the consequence that the man never reaches the hospital. It seems that you would be well-advised to allow the exploitation to happen. It is more important to survive a car accident than to avoid exploitation. Value incommensurability is not only implausible. It also seems to be self-defeating. A responsible agent is forced to make choices between incommensurable values. If we try to avoid making choices whenever values conflict, that is itself a choice that will have impact on which values will be brought about and which values that will be deprioritized. Value incommensurability is therefore of neither practical nor fundamental concern.

<sup>8</sup> These concepts overlap with what Jeff McMahan (2013b, p. 106) calls “The Theoretical Approach” and “The Intuitive Approach,” Jonathan Wolff’s (2018) distinction between “Applied Philosophy” and “Engaged Philosophy,” and Amartya Sen’s (2009) distinction between “The Transcendental Approach” and the “Comparative Approach.”

<sup>9</sup> I do not intend the concept of overlapping consensus to perfectly overlap with Rawls’s (1987) use. However, it shares the core tenet, that of seeking consensus on certain values among people with a widely divergent set of values.

<sup>10</sup> This branch of philosophy is sometimes called “trolleyology” for the heavy use of such imaginary cases (Edmons, 2013).

<sup>11</sup> Reflective equilibrium has clear parallels to the scientific method, as is clear from Rawls’s (1951, p. 177) first treatment of the subject in his paper “Outline of a Decision Procedure for Ethics.” His suggestion was that we subsume our reasons under general ethical principles, tease out their implications in practical cases, and see if they hold up against our considered judgements. To allow for a test of the principles without risking circularity, these judgements should be “*intuitive* with respect to” and hence independent of “ethical principles.” (Rawls, 1951, p. 183). That our considered judgements are intuitive means that they are not inferred from our ethical principles and that they do “not provide any reasons for the decision.” (Rawls, 1951, p. 186, see also McMahan 2013b) This is why we often call them moral intuitions. Through an iterative process, we refine our principles to better fit our considered judgements. In turn, the “subclass of considered judgements” that “is felt to be mistaken when the principle fails to explicate it” is discarded (Rawls, 1951, p. 188). We continue the process until we reach a state of reflective equilibrium, where we are left with one or more principles that explicate “all considered judgments ... with the greatest possible simplicity and elegance.” (Rawls, 1951, p. 186) The principles that survive this process should guide our behavior. This process can be both wide and narrow. The wider it is, the more leeway do we have for discarding some of our pre-existing beliefs (Daniels, 1996). We can also include non-moral beliefs, such as the belief that certain moral beliefs are not to be trusted because they are confabulations of our mind. When we use the method to establish how we ought to organize society, we end up, according to Rawls (1999 [1971], 2001) with two principles of justice, where one, the greatest equal liberty principle, has absolute (lexical) priority over the other one, which confusingly is divided in two, the difference principle and the equal opportunity principle.

<sup>12</sup> Social scientists have different methods they can use to make informed decisions about the likely effects of our actions. Take the question of whether we should ban a delicate deal. To answer this question, we can compare countries or cities with different policies to see whether there is a difference, or we can study the effects of a policy change in a given country by comparing the state of affairs before and after the policy came into being. We can also exploit random variation in when a policy is implemented to identify the causal effects of said policy.

<sup>13</sup> Elsewhere I have argued in favor of what I call provocative public philosophy (Sterri, 2018). The public philosophy I argue in favor of here is broader than the version I defend in that paper. However, they both seek to be action guiding and they are egalitarian in the sense that propose that philosophers engage in a conversation with people about issues that matter to them. In that way, they both have common roots in the Socratic approach.

<sup>14</sup> For a defense of the need for a functional analysis in ethics and political philosophy, see Michael Sandel (2009). Sally Haslanger (2000) argues for revising our concepts in line with our broader normative commitments. In recent years, this revisionary enterprise has become its own research program under the title conceptual engineering (Cappelen, 2018)

<sup>15</sup> We should, however, be very cautious when people in power argue that we are in an emergency. There are myriad example of leaders misusing our willingness to step up and do our duties in emergencies to engage in unjust wars (Walzer, 1977), to increase their hold on power or to engage in coups (Gassebner, Gutmann, & Voigt, 2016).

<sup>16</sup> For a treatment of intuition pumps, see Daniel C. Dennett (2013).

<sup>17</sup> Singer and Katarzyna de Lazari-Radek (2014, 2017) suggest, in a friendly polemic with Derek Parfit (2011), that pure reason is a better method of grasping the moral truth. Although our ability to reason about abstract truths are also the product of evolution, “once we are capable of reasoning, we may be unable to avoid recognizing and discovering some truths that do not aid our survival. That can be said about some complicated truths of mathematics or physics. It can also, as Parfit has suggested, be the case with some of our normative epistemic beliefs; for instance, the belief that when some argument is valid and has true premises, so that this argument’s conclusion must be true, these facts give us a decisive reason to believe this conclusion.” (de Lazari-Radek & Singer, 2014, pp. 182-183)

<sup>18</sup> Such theories have precedence in the writings of early moral sentimentalists, such as David Hume, Adam Smith and Frances Hutchinson.

<sup>19</sup> However, there is a recent intriguing proposal for how to fund public goods within a liberal regime. Hitzig, Buterin, and Weyl (2019) suggest a mechanism called quadratic financing for the funding of public goods that I believe has great potential.

<sup>20</sup> This criticism of markets should not be swallowed without challenge, however. Cross-cultural evidence indicates that market societies are the most trustworthy and have the most solidarity, and there is little evidence for the claim that markets in general erode beneficial norms (Brennan & Jaworski, 2015; Choi & Storr, 2019; Gintis, 2012; Henrich et al., 2004; Teague, Storr, & Fike, 2020; Zak, 2008). There are nevertheless reasons to be worried about the harmful effects of the market. Even if we concede that markets tend to foster trust, we should not assume that every new market has this effect. To feel the intuitive force of this idea, consider the less controversial claim that markets in general are conducive to economic growth. Just because markets tend to increase growth, we would not expect every new market to do so. Markets in votes may, e.g., undermine the beneficial effects of the market order and therefore negatively impact economic growth. The same can be true for other beneficial consequences markets have, such as trust and other virtues (Fumagalli, 2020). The economist Samuel Bowles (2016) suggests that the impersonal, one-shot interactions that are increasingly prevalent in our advanced economies may not be conducive to trust in the same way as other markets. As Hirsch (2005 [1976], pp. 88-89) puts it: “The more that is in the contracts, the less can be expected without them; the more you write it down, the less is taken—or expected—on trust.” In other words, trust is generated when contracts are incomplete and you therefore get the chance to learn that the other party is trustworthy (Bowles, 2016).

<sup>21</sup> However, see Jason Brennan (2016) for an argument that voters fail to engage because it would be irrational of them to do otherwise.

<sup>22</sup> Such trades in what Margaret Jane Radin (1996) calls “contested commodities,” Debra Satz (2010) calls “noxious markets,” and Alvin E. Roth (2007) calls “repugnant markets.”

<sup>23</sup> We here build on Janet Radcliffe Richards’s example of a slum being destroyed, which she introduces (but does not elaborate on) in “The Case for Allowing Kidney Sales” (Radcliffe-Richards et al., 1998). Several authors have made similar points. See Savulescu (2003), G. Dworkin (1994), McGrath (2006), Semrau (2015).

<sup>24</sup> Matt Zwolinski and Alan Wertheimer (2017), in their Stanford Encyclopedia of Philosophy entry on “Exploitation,” suggest such a soft paternalistic justification “for interference with some mutually advantageous exploitative transactions.”

<sup>25</sup> The invasive trade that is most likely to fit this profile is kidney sales. An influential study of Indian kidney sellers found that a substantial majority ended up regretting what they did and advised others not to sell their kidney (Goyal, Mehta, Schneiderman, & Sehgal, 2002; Rippon, 2014; Satz, 2010, pp. 91-114).

<sup>26</sup> Many feminists, such as Catherine A. MacKinnon (1993) and Andrea Dworkin (1993), and market critics, such as Radin (1987) and Elizabeth Anderson (1990, 1995), concede that criminalization leads to extra harms to sex workers. For a good treatment of the benefits of decriminalization, see Mac and Smith (2018).

<sup>27</sup> For the original sources of these dilemmas, see Philippa Foot (2002 [1976], p. 1075); Peter Singer (1972); Jeremy Bentham (1804).

<sup>28</sup> For an interesting early discussion of emergency ethics, see Ayn Rand (1964). She argues that special principles apply in emergency cases, and that we cannot find out what would be right in everyday situations based on what it would be right to do in a “lifeboat situation.”

<sup>29</sup> In fact, most people believe people can be saved for much less than what the most effective charities can offer (Wiblin, 2017). We nevertheless abstain from donating a significant amount of money to charities.

<sup>30</sup> This is a slight modification of Temkin’s example.

<sup>31</sup> Bashar Haydar and Gerhard Øverland (2019) argue that our obligations in emergencies only are superficially demanding. When we take into account the likelihood of coming across an emergency the expected cost is low. That is correct. However, the Bugatti nevertheless need to be sacrificed when push comes to shove. Thus, the actualized cost is concentrated and can be substantial.

<sup>32</sup> David Schmitz (2009, pp. 444-445) makes a similar point.

<sup>33</sup> Admittedly, there is something out of the ordinary with the premium we pay in these cases. In other insurance schemes, we pay an annual fee that equals the value of the good multiplied with the likelihood of it being in need of replacement, and receive full compensation if we need it. The cost is therefore small and distributed. As suggested by Haydar and Øverland (2019), this is also true for the expected cost in the case of emergencies. However, the realized

cost is usually born by one person since we have no way of distributing the cost when the accident occurs. In short, we are both insurance holders and insurers in emergencies. This explains why duties in emergencies can be so demanding. The reason why we accept this heavy premium is because it is the only way to solve situations such as these.

<sup>34</sup> This may be another way of explaining the difference between preferences and need in T.M. Scanlon (1975).

<sup>35</sup> See Scanlon (1998) for the best-developed version of a contractualist view.

<sup>36</sup> see Hooker (2000) for a defense of rule-consequentialism.

<sup>37</sup> See Railton (1984), and Pettit (1997), and Mason (1999) for a general argument in favor of this view of consequentialism.

<sup>38</sup> Our account of emergency norms as informal insurance schemes can even be said to have certain structural similarities with nonconsequentialist theories of emergencies that see emergencies as the residual individual obligations we have when other collective obligations fail to deliver needed results (Herman, 2012, pp. 408-409; Sinclair, 2018, pp. 51-52).

<sup>39</sup> They are rudimentary in the sense that they do not sufficiently balance the costs against the benefits, nor do they look closely into whether the alleged benefits are likely to materialize, see Ruth Macklin (1995) and Claude Sureau (1999).

<sup>40</sup> For a defense of this view, see Jeff McMahan (2002).

<sup>41</sup> This argument and all quotes in it are drawn from Rogers et al. (2007, p. 523).

<sup>42</sup> For a contrary opinion, see Inmaculada de Melo-Martín (2013).

<sup>43</sup> More generally, see Gerald Dworkin (2015).

<sup>44</sup> Unwanted girls and missing women are related in the sense that the easier sex selection becomes, the fewer unwanted girls will be born and the more women will be missing, and vice versa. Both are also (at least partly) caused by Indian parents' preference for sons.

<sup>45</sup> This risk increases with the number of children they give birth to (Stillman et al., 2014).

<sup>46</sup> The government is criticized for not enforcing the law, see Purna Manchandia (2005).

<sup>47</sup> They have data for births until 2006.

<sup>48</sup> But see Nandi (2015) for a somewhat contrary opinion. He argues that the law from 1996 has not increased mortality rates among girls.

<sup>49</sup> Regarding the badness of non-existence, see Jeff McMahan (2013a).

<sup>50</sup> For an overview of the algorithm, see Roth et al. (2005). For opt-out nudging, see Arshad et al. (2019).

<sup>51</sup> Harris (1975) famously argued in favor of an even more extreme version of an organ lottery. Rakowski (1991) argues in favor of a voluntary kidney lottery.

<sup>52</sup> For a philosophical treatment of debts of gratitude, see Herman (2012).

<sup>53</sup> For further criticism of Fabre, see Eyal (2009), and Wilkinson (2007, 2011).

<sup>54</sup> We could, however, imagine mechanisms for ensuring that people receive compensation according to their reservation price. We could, in theory, allow each citizen to decide how much they would need to be compensated for donating a kidney and then impose a tax that equals the sum and the likelihood of being picked out as donors by the lottery. They would then have an incentive to reveal their reservation price. Disregarding any practical issues with such a scheme, we may nevertheless favor a transfer that is equal for all citizens. One reason for that could be to avoid having people with higher incomes receive higher compensation for their kidneys than people with lower incomes.

<sup>55</sup> Thanks to James S. Taylor for bringing my attention to this point in personal communication, Mar. 15, 2020.

<sup>56</sup> See Cohen (1991) for a treatment of this issue.

<sup>57</sup> Whether markets crowd out altruism is, as we explored in the introduction, contested. I find it plausible that non-market exchange sometimes can serve as powerful expressions of solidarity and that we therefore lose something if we replace them with markets. For the purpose of this discussion, I treat it as a concern that may materialize and that it is therefore a risk that should be taken into account.

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