The Dutch Health Insurance Act and the Jordy Zwarts Case

IS IT MORALLY JUSTIFIBLE FOR GOVERNMENTS TO REQUIRE THAT CITIZENS BUY HEALTH INSURANCE FROM PRIVATE COMPANIES?

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Abstract:

This thesis delves into a lawsuit regarding the Dutch basic health insurance. In the lawsuit, it is argued that since the compulsory basic health insurance in the Netherlands is regulated by private health insurance companies, the coercive character is impermissible. This thesis will analyze this argument. First, it will examine the moral permissibility of a private health insurance company, by delving into the debate on the commodification of healthcare. Then, it will question whether the coercion of the insurance is morally permissible, by looking at several conceptions of freedom and how they apply to this argument.

It concludes that the norms used in the market sphere of health insurance are not characteristic of a typical market, as described by Elizabeth Anderson. For this reason, the private health insurance company is just as morally permissible, if not more, than a public one. Furthermore, it shows that the arguments in the court case are based around a libertarian conception of freedom. This account on freedom argues for a free choice, but does not realize that one is not free if one does not have access to all the basic liberties. In order to be free, then, this thesis advocates for an relational egalitarian account where health insurance is seen as a basic liberty. This way, a person is only free if she has both the choice to use it, and the duty to provide it for others. This can only be done in a mandatory form.

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1. Introduction

In the Netherlands, all citizens are obliged to purchase a basic health insurance. This way the government prevents Dutch residents from being uninsured and, therefore, unable to receive compensation in case of illness.[1] Insurance is distributed via private insurance companies with the state making sure everyone participates fairly. They force their citizens into purchasing health insurance with one of the companies, and compel the companies to accept the citizens. Although many people are quite happy with the system, and the rankings show some positive numbers,[2] critics in the field are increasing. Not just by voice, but also by lawsuits.

One of these critics is a 41 year-old man named Jordy Zwarts. In 2018, he fought in court against his compulsory basic insurance. He is not at all he pleased to be forced into a basic health insurance, but even more so to be forced into such a contract with a private insurance company. Zwarts claims that since the health insurance companies have a private character, being forced into a contract with them by the state should never happen. He states that the statutory administrative premium is illegal: "Under administrative law, the government tries to compel you to conclude a commercial private law contract, and that is a criminal offense".[3] Since the health insurance companies are private, Zwarts means that no one can be forced into contracts with them. Ever since 2006 he has refused to take out health insurance.

Even though the Dutch law allows citizens to consciously object by their faith or creed, Zwarts would need to object against any form of insurance on the basis of his religion or philosophy of life. Only then a citizen is able to opt-out of the health insurance system as a conscientious objector: someone who objects against this mandatory risk-pooling on the basis of his beliefs. Zwarts merely objects against the private nature of the enforced insurance and is therefore not seen as a conscientious objector. And although he might seem like an outcast, he is not alone in his fight.

Being so furiously against the public-private system of mandatory basic insurance,

[1] "De basisverzekering in Nederland," Zorgverzekering Nederland, accessed April 30, 2020, https://www.zorgverzekering-nederland.nl/zorgverzekeringen-in-nederland/basisverzekering-nederland/.
[2] "Best Healthcare In the World 2020," World Population Review, accessed March 18, 2020, https://worldpopulationreview.com/countries/best-healthcare-in-the-world/.
[3] Eelke van Ark, "De Zorgverzekeringswet deugt niet, dus ik doe er niet aan mee," *Follow The Money*, October 8, 2018, https://www.ftm.nl/artikelen/de-zorgverzekeringswet-deugt-niet-dus-ik-doe-er-niet-aan-mee. Translated by the author.

Jordy Zwarts established the National Union against Government Affairs.[4] With this union he tries to connect all objectors and inform them about their possibilities to sue the state for their mandatory premium. At the time of writing, already 13.769 members have joined him.[5] Zwarts can assist them because, as he proudly proclaims, he won his lawsuit and will never pay a health premium again.

He did have a lawsuit against the premium claimed by the VGZ, a Dutch health insurance company, but the gain is disputable. Zwarts was placed as uninsured by the Dutch Central Administration Office (CAK). Zwarts was not insured since 2006, the year where the Dutch healthcare system shifted from a public one to one with private insurance companies, Zwarts was never enrolled with a healthcare insurer. Since there had never been an agreement with Zwarts and VGZ, he stated in court to not be insured there. And he won. VGZ was unable to demonstrate it had ever entered into a contract with Zwarts and, therefore, was not able to prove itself. Experts, such as Ernst Hulst, specialist and assistant professor Law & Health Care at the Erasmus University, however, believe the judge ruled this way mainly because this case was about the law of evidence. VGZ was unable to demonstrate the existence of an agreement. Therefore, VGZ was unable to prove its claim and lost the case.[6]

1.1. This thesis

Given the great number of followers, and the fact that Zwarts by rights won, it is important to examine this situation further. Therefore, this thesis will be a case study into the problem that was fought in court. Because the result was disputed, and might cause notable consequences in the Dutch healthcare system that is based on the solidarity principle if more people withdraw from the mandatory premium, it is important to investigate the arguments and examine whether it indeed would be morally wrong to be forced into a contract with a private party.

In this thesis I aim to use this particular case to explore broader questions. I want to investigate what the anti-market values are, and whether they should be given a more prominent space in the Dutch healthcare system. In addition I wish to examine to what extent enforcement of this private health insurance ought to be allowed. For this reason, my research question will be: *To what extent are the moral arguments against a compulsory private health insurance, as seen in Jordy Zwarts' court case, justified?*

[4] "Opzegservice zorgverzekering en CAK," Nationale Bond tegen Overheidszaken, accessed June 18, 2020, https://www.bondoverheidszaken.nl/Opzegservice_Zorgverzekering.html.
[5] The time of writing was March 15, 2020.
[6] Ark, "De Zorgverzekeringswet deugt niet."

1.2. Overview

In order to answer this question, I will examine two separate issues. First, is it moral for a health insurance company to be a private company? Second, is it moral to be forced into this (private) contract? After providing an overview on the Dutch health insurance system, the public/private structures, and a deeper analysis of Jordy Zwarts' objection in the second chapter, I will in the third chapter, explore the ethical permissibility of private insurers within the Dutch healthcare system.

To do this, I will touch upon the debate about the commodification of care, since privatization is a consequence of commodification. I will analyze arguments presented by Edmund Pellegrino, Joseph Heath and Elizabeth Anderson. I will conclude that the private insurance companies are ethically justified, because the norms within the insurances are not determined by the market, but by the government. Instead of looking at the type of transaction, we should thus examine whether the norms are justifiable and, if being forced into a basic health insurance is moral.

Hence, in the next part I will investigate whether the non-arbitrariness of the basic health insurance is a justification for the enforcement of it. I will explore the republican political theory and ask what it is to enjoy freedom in a certain society. When you benefit from paying insurance, does this justify it morally? Herewithin also the question, what kind of forcing is compatible with freedom, matters. For this I will in the fourth chapter dive into the moral arguments made by both Zwarts and compare this to the libertarian political philosophy. I will describe its difficulties and will provide a new concept of freedom in the fifth chapter: a republican freedom, which, as we will see, is similar to an egalitarian equality. In the sixth chapter, I will discuss what this concept of freedom implies for the argumentation on a compulsory basic health insurance.

2. The basic healthcare insurance system in the Netherlands

2.1. The Health Insurance Act

The Dutch healthcare system is divided into four system laws: the *Zorgverzekeringswet* (Health insurance act), the *Wet langdurige zorg* (Long-term Care Act), the *Wet maatschappelijke ondersteuning* (Social Support Act) and the *Jeugdwet* (Youth Act).[7] Where the latter three acts arrange the more complicated or specialistic care, the former ensures a universal system of basic care for all Dutch citizens. The care is accessible to everyone, because the Health Insurance Act regulates that all adult citizens or employees are, by law, required to purchase a basic insurance. This basic insurance costs about 1.200 euros per year and the insured healthcare includes, among others things: medical care by general practitioners, medical specialists and midwives; district nursing; hospital stay and mental healthcare. This basic insurance can be supplemented with additional insurances if desired. An additional insurance is available for, but not limited to: the dental insurance; alternative cure; glasses/contact lenses; maternity care and wider physiotherapy. Additional insurances are always private and never mandatory.[8]

The Health Insurance Act was implemented in 2006 as a substitute for the former *ziekenfondswet* (health insurance law). In the former act, a distinction was made between health insurance funds and private insurance companies. However, this was changed in the new act. As already stated in the introduction, the mandatory basic insurance is funded by the state, but managed by private insurance companies. The Dutch government has the responsibility over the content and scope of the legally insured care package that is accessible to everyone. Health insurance companies can arrange, within the prescribed framework, who provides the care and where. They contract selectively, based on their knowledge about the quality, efficiency and customer experiences. Their duty to care means they must ensure that the care included in the basic healthcare insurance package is available to all their policyholders, and an insurance company is always required to accept every application for a basic insurance. Besides that, the budget for healthcare is fixed and health insurers are also therefore encouraged to purchase efficiently.[9]

[7] "Het Nederlandse zorgstelsel," Ministerie van Volksgezondheid, Welzijn en Sport, last modified February 9, 2016, 3. https://www.rijksoverheid.nl/onderwerpen/zorgverzekering/documenten/brochures/2016/02/09/het-nederlandse-zorgstelsel.
[8] Idem, 7-8.
[9] Idem, 3-4.

2.2. Market incentives

In 2006, the health insurance thus moved to the market. On the market, the private companies are supposed to compete with each other. A governmental report about the Dutch healthcare system notes that almost all of the insurance companies are cooperative institutions and, therefore, do not aim to make profit out of the insurances.[10] The shift to the market was made in order to switch the supply-driven system to a demand-driven one, reduce waiting lists and bureaucracy and improve the expedience and quality for patients and policyholders.[11] Market incentives would do a better job at this. Moreover, market competition should make care more affordable since health insurers negotiate with healthcare providers about the price for the care to be delivered.[12]

It was realized however, that a perfect market does not exist, also not for health insurances. This is also a common observation in lots of business ethics.[13] For this reason, the government would have the ultimate say in the way the insurance companies act. Insurers must offer the basic care at a fixed price and must accept every insured person for the basic health coverage. On the other hand, all citizens are required to purchase a basic health insurance as a way of risk-pooling and to prevent free-riding. The document describes its motivation by "well-known international principles: access to care for everyone, solidarity through a publicly accessible and mandatory health insurance and good quality of care."[14]

Furthermore, the strong role for the government would maintain solidarity and the social character of the insurance. Nonetheless, citizens and healthcare providers are part of this market relationship alongside the insurers and the government. Citizens are, in fact, able to pick and choose, and thus switch, from insurance companies. The companies have to work for their favor, or they will walk away. In addition, citizens are also able to solve any dissatisfaction, either via the health insurance company itself, or through a body of representatives, of which many exist. It should also be recognized that healthcare providers are the ones who decide how to deliver care and, as a professional group, have drawn up quality regulating guidelines.[15]

Given the structure and motivation of this Health Insurance Act, we can now look

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[10] Idem, 4-5.
[11] *Ibid*.
[12] "Hoe is de zorgverzekering in Nederland geregeld?," Rijksoverheid, accessed April 30, 2020, https://www.rijksoverheid.nl/onderwerpen/zorgverzekering/zorgverzekeringsstelsel-in-nederland.
[13] Joseph Heath for example writes about it: Joseph Heath, *Morality, competition and the firm : the market failures approach to business ethics* (New York: Oxford University Press, 2014), 10-11.
[14] "Nederlandse zorgstelsel," 3.
[15] Idem, 9.

further at the normative claims made within the court case Zwarts. How should this Act be seen? Zwarts claims it to be illegal. This is also where the lawsuit (partially) dealt with. However, this thesis will not deal with these questions in a legal fashion, but looks at whether it is moral or not. Since laws are shaped by politicians, the moral aspects of such laws are crucial to examine in order to either respect or change them.

3. The moral permissibility of a private health insurer

In this chapter, the question is asked whether the privatization of the insurance system is morally objectionable. In line with privatization is the debate around the commodification of care. By commodification, healthcare becomes a product that can be traded and is expressed in a monetary value and by a private organization. It shifts to the market. Since the main objection in Zwarts' lawsuit[16] was to having a mandatory contract with a private party, in this chapter the moral permissibility of this private party will be examined.

Privatization is a result of commodification. Within the debate around the commodification of care there are several authors who either objected or consent to the commodification of care. In this chapter, I will outline the arguments of three of these authors: Edmund Pellegrino, Joseph Heath and Elizabeth Anderson. All three disagree on the subject. First I will describe the thoughts of Pellegrino. He objects to the commodification on grounds of the ethics of patient care. Then I will analyze Heath's work on the commodification of care. Not healthcare, but insurances are a common good, he claims. And since markets fail to efficiently regulate the insurance system due to market failure, the strong role of the state is justified, but a monopoly is not. Because both Heath and Pellegrino base their arguments around integrity and distribution, they will first be analyzed in the context of each other's argumentation. Subsequently, I will describe Anderson's view. Her argument stretches further than the distribution debate, and is based around the principles of the market itself. She takes a middle ground, since she does not follow Pellegrino nor Heath. Not the type of institution, she argues, should matter, but the norms that are used during a transaction. If a certain good is more efficiently spread while being in the market, it may even be necessary to commodify it.

In the conclusion of this part, I will suggest that since most of Pellegrino's arguments are based on the American system, these counterarguments do not apply to the Dutch system. They can be viewed in a cultural context that does not apply to the Netherlands. Nevertheless, they are still interesting to discuss. The argumentation provided by Pellegrino shows the danger of commodifying healthcare without the state having the ultimate control about the price range and accessibility of health insurances. However, it would be also difficult to directly follow Heath's line, since he makes a hard claim about the effectiveness of commodification that could be disputed.

Therefore, it is good to look at Anderson's argumentation. She charazterizes the norms of the market. By looking at those norms, it becomes clear that the state should ensure that

[16] Court of The Hague April 18, 2020, ECLI:NL:RBDHA:2018:4819.

those market norms are not ruling the market relationship, for the health insurance system to be morally justified. Applying her provided market norms to the Dutch insurance system, I will conclude that the commodification, with the strong governmental regulations as applied in the Dutch system, is morally justified. Insurance companies can thus be private.

3.1. Edmund Pellegrino

Edmund Pellegrino was an American bioethicist. He wrote the article "The Commodification of Medical and Health Care: The Moral Consequences of a Paradigm Shift from a Professional to a Market Ethic".[17] In this article, he argues that treating healthcare as a commodity is deleterious to the ethics of patient care. Health is a human good, Pellegrino argues, which a good society should protect from the market ethos. Evidently, Pellegrino talks about the commodification as seen in the United States. There, commodified care is seen as managed care plans, where the price, cost, quality, availability, and distribution of healthcare are increasingly left to the workings of the competitive marketplace.[18] Pellegrino argues that health and medical care are not, and should not, be commodities. He does this in four steps.

First, Pellegrino claims that healthcare, in itself, is not a commodity. He defines a commodity as "a thing produced for sale valued for its usefulness to the consumer or its satisfaction of his preferences."[19] This is the way the word is also used in commerce. He means that this is the most relevant definition for the discussion, and that it portrays the good as something that can be interchangeable. Healthcare, however, is not like that, Pellegrino believes. Healthcare as a commodity would mean people have ownership over it. Stewardship over medical knowledge towards the poor who cannot afford healthcare would not be a duty. Because of that, Pellegrino means young people mainly support commodification, up until they notice family members being denied in the system because of it. Then they often change their mind.[20] He believes that healthcare should not be, like commodities, proprietary. The privilege of medical education means that physicians enter a covenant with society, where they have to use their privilege, their knowledge, for the benefit of the sick.[21]

Besides that, Pellegrino describes that healing from sickness has a special nature. An illness disturbs a patient's whole life-world and engages with the biological, psychosocial and

[17] Edmund Pellegrino, "The Commodification of Medical and Health Care: The Moral Consequences of a Paradigm Shift from a Professional to a Market Ethic," *Journal of Medicine and Philosophy* 24 no.3 (1999): 243-266.
[18] Idem, 243.
[19] Idem, 246-247.
[20] Idem, 248.
[21] Idem, 251.

spiritual aspects of the patient. It would therefore be a bad thing if only physicians have access to the knowledge that may heal this patient. Because a person flourishes better when healthy and given this special nature, healthcare cannot be a commodity according to Pellegrino. It is not produced and consumed like regular material, such as food or clothing.[22] Therefore, he claims, "commodities may be used in the process of providing care, but the totality of healthcare itself is not a commodity."[23]

Second, Pellegrino argues that commodification has consequences on professional ethics and care of the sick. These consequences would be ethically deleterious to patients, physicians, and society.[24] He does this by showing that the relationship between the physician and the patient becomes commercial, when commodified. This commercial relationship that exists on the market, does not impose a moral duty to help. It is a relationship based on the rules of commerce and the laws of torts and contracts,[25] where there is no room for the people who are not able to afford their care, or the uninsured.[26] The shift from a professional ethic to a business ethic of medicine that happens in commodification, according to Pellegrino, voids the professional ethics of the physician. Instead of beneficence, the primary principle would be non-maleficence. As a consequence, care is distributed among the persons with the ability to pay for their wants.

Third, Pellegrino argues that commodification does not work, since it does not fulfill its economic promises. Commodification should be cost saving, enhancing the freedom of the consumer regarding choices about her health, and the level of satisfaction the patient enjoys due to receiving more cost effective treatment.[27] Pellegrino then shows that these assumptions are incorrect in practice. By saying that the premiums in Pellegrino's time are actually rising, the argument from cost saving would be false. Also, he claims that the promise of freedom is misleading. The employers in fact pay for the insurance and, therefore, have the first choice of insurance plan. Above all that, people might not know how to best spend their money on healthcare. They can end up in a vulnerable position without having healthcare after all.

Fourth, and finally, Pellegrino argues that instead of a being a commodity, healthcare should be treated as a universal human need, and a common good. Since good health is a condition for human flourishing, society should provide it in some measure to its citizens. The

[22] Idem, 249.
[23] Idem, 247.
[24] Idem, 244.
[25] Idem, 252.
[26] Idem, 253.
[27] Idem, 255-256.

government should ensure that collective goods are justly distributed, Pellegrino writes.[28] However, in such a common good, people have social obligations towards it. Citizens have a reciprocal responsibility towards their own health. As Pellegrino writes, "In a common good conception, the self-abuser, the person who refuses to buy insurance he or she can afford, [...] imposes burdens on his fellow humans. Such persons weaken any claim they might have had to societal resources."[29]

3.2. Joseph Heath

In contrast to Pellegrino, Joseph Heath is positive about the use of healthcare as a commodity. Heath is a Canadian philosopher and has been the director of the Centre for Ethics at the University of Toronto. He wrote the article "Health care as a commodity",[30] in which he explains why healthcare is, and should, be a commodity.

In his article, Heath responds to the often made claim that healthcare should be publicly regulated, since it is not a commodity. Many believe that healthcare should be seen as a moral enterprise, not as a business venture. Therefore, only public provision of it is morally compatible. This claim, he thinks, is a bad argument and "obscures the rationale for the current public system".[31] Heath argues that healthcare itself is not a public good, although many believe it to be. The only justification for the involvement of the public sector in healthcare is because the insurance sector suffers from market failure.

Heath means that the private-public structure of the healthcare system in Canada does not pose a threat to the integrity of it and makes the system work well. He writes that "Failure to recognize this imposes an unnecessary rigidity upon the system, and leads defenders of the public sector to reject (as objectionable forms of "privatization") various private-public delivery structures ...".[32] He admits that commodification can indeed be unethical when it infringes someone's integrity, with for example selling women's labor. However, he believes the buying and selling of healthcare not to be unethical. What he does see as unethical is a refusal of care, when someone is not able to afford it.[33]

Since the integrity argument focuses mainly on distribution instead of commodification itself, in the sense that some people would not be able to receive healthcare

[28] Pellegrino, "Commodification of Care," 260.
[29] *Ibid*.
[30] Joseph Heath, "Health Care as a Commodity," in *Ideological Debates in Family Medicine*, eds. Stephen Buetow and Tim Kenealy (New York: Nova, 2007). 1-10.
[31] Idem, 1.
[32] Idem, 2.
[33] *Ibid*.

and, therefore, their integrity would be violated, Heath means the main argument against commodification to be that a healthcare system based on moral incentives would provide a superior level of particular goods than a system based on pecuniary incentives. Pecuniary incentives would supersede the moral ones, and thus provoke or even create collective action problems. Heath describes a situation in which a doctor on the plane will always perform his moral duty and help a sick person. When he would be offered money, however, the doctor might likely refuse to be 'on duty' on his holiday flight to Spain. Pecuniary incentives can thus crowd out moral incentives and reduce the efficiency of the system.[34]

Heath recognizes the above-mentioned issue, but, nevertheless, shows this argument cannot be extended to cover the healthcare system in general. Even though moral incentives are seen to be better, and some people would want it to be a basic right, three problems would arise. At first, the current (Canadian) healthcare system is commodified; healthcare is not a basic right, even though there is a universal entitlement in Canada. There is no reliance on the moral incentives of physicians and the current organization of the healthcare system would be "gravely wrong"[35] according to Heath, if commodification would be wrong. Second, Heath believes a system based on moral incentives not to be more effective for delivering healthcare than the current system. Doctors act upon their professional code of conduct and payment per procedure would encourage them to do more work resulting in heightened efficiency and improved care for their patients. Finally, as a third, Heath argues that something can be a right as well as a commodity and it need not to be a contradiction. When people wish to consume more than the community at large is willing to provide and pay for, they should be able to purchase it themselves. The commodification argument therefore does not justify a monopoly of the state for the health sector. Arguments against commodification, he believes, are mostly used as a way to express people's concern about distributive justice. The two-tiered system as used in Canada (which is similar to the Netherlands), is therefore not unjust.[36]

Even if distributive justice would be the concern, Heath argues, a market for healthcare would still not be unjustified. Needs, such as food, are also distributed according to the market. Though food supply needs can be easily predicted, medical expenses are unpredictable. Therefore, healthcare is not arranged according to a simple market, but through health insurances (or health management organizations in the US). When the entire population is pooled into one insurance scheme, Heath claims, efficiency gain is generated. Private

[34] Idem, 3.
[35] Idem, 5.
[36] *Ibid*.

insurers deal with information asymmetries which may lead to serious adverse selection problems and moral hazard. Some people will be healthier and make no use of the insurance, other will have chronical illness and will make greater use of it. Some insurers might attract those healthy groups. Others, who attract for instance mainly elderly with health issues, will then not be able to deal with the high costs of this insured group of people who all lay a claim on the health system. The role of the public sector is then justified by its efficiency gains. When it makes everyone purchase insurance and has a strong upper hand, it eliminates this adverse selection problem where information asymmetry would lead to the market failure. Instead of arguing for the role of the market, Heath shows that we should actually argue for the role of the state and not naturally assume its monopoly.[37] A mandatory universal health insurance plan eliminates adverse selection problems, moral hazard and collective action problem by enforcement.[38]

3.3. Analysis

By examining the accounts of both Pellegrino and Heath, we see that the main arguments for, and against, commodification are based around integrity and distribution. Both adhere to a similar concept of commodification. However, there is a difference in interpretation. Pellegrino writes from his country of residence, the United States, and Heath about Canada. The United States is known to be a country with very good healthcare for the people who can afford it. The ones who cannot, unfortunately, struggle with receiving good care. People who cannot afford care are eligible to apply for programs such as Partnership for Prescription Assistance, a program to receive benefits from patient-assistance.[39] Alongside this, the government of the United states helps some people, with limited resources and income, with their medical costs by providing Medicaid. This was created to help people pay for medical bills. Next to the mandatory eligibility group which includes among others pregnant women and low-income families, the eligibility for Medicaid differs per state.[40] However, basic Medicare does not cover needs related to hearing and vision impairments and most dental care.[41] Bearing this in mind, Pellegrino's arguments are understandable, but not totally

[37] Idem, 6-7.
[38] Idem, 7.
[39] Laura S. Lehman, "How Can I Help Patients Get Their Medications?," Medscape, last modified July 20, 2011, https://www.medscape.com/viewarticle/746188?src=mp&spon=25.
[40] "Eligibility," Centers for Medicare & Medicaid Services, accessed June 22, 2020, https://www.medicaid.gov/medicaid/eligibility/index.html.
[41] "Philip Moeller, "What's being left out of the Medicare for All debate," *PBS News Hour*, December 17, 2019, https://www.pbs.org/newshour/economy/making-sense/column-whats-being-left-out-of-the-medicare-for-all-debate.

applicable to the Canadian system Heath writes about, which is also similar to the Netherlands. In a universal system for basic health insurances these kinds of care should not be denied to anyone.

Pellegrino views commodified healthcare as property. Because of this, healthcare is patented, it becomes someone's possession. As a result, other people do not have ownership of the healthcare, and will not have access to it. Since Pellegrino argues people can only flourish in their best health, this is a bad thing. Besides that, it would harm the physician's professional ethics since there would not be a duty to help anymore. Both of these arguments are based on distribution. Both hold the negative consequence of not being able to provide or receive care. In the interpretation of Pellegrino, this would indeed be a negative consequence. Therefore, it is an important argument for the American health system. Nonetheless, both the Canadian and the Dutch healthcare system share a universal system of basic care in which every citizen is be able to receive healthcare through their basic insurance. We can therefore conclude that the duty to care does exist and people are able to flourish, even though their system is commodified.

Pellegrino's argument that commodification does not fulfill its economic promises however, is interesting. Though the arguments about freedom and the vulnerability position also do not apply to the either Canadian or Dutch system, since the mandatory insurance can be chosen by the citizen themself and, therefore, cannot be spent on anything other than healthcare, the premiums of the modern day are rising still. But how weighty is this argument?

Given the analysis of Heath, this argument alone should not be decisive for the Dutch healthcare insurance companies to not be private. The private-public structure, as in Canada and the Netherlands, does not pose a threat to the integrity of the healthcare system, since citizens cannot be denied the basic care they need. On the contrary, he argues that it would be more effective to have a market system for healthcare. In that case, more healthcare would be delivered to the people and we may even argue on Pellegrino's terms that this increases the flourishing of people. Since doctors have a professional ethical code, they should still treat their patients as needed.

This two-tiered system, as also used in the Netherlands, he believes, should not be justified on a market basis, but also on a state basis. Since the market increases efficiency and, therefore, human wellbeing, it is justified as long as the state counteracts the market failure.

The debate between Heath and Pellegrino then gets stuck into a what-works-better debate. Where Pellegrino argues a market system does not fulfill its economic promises and

generates a higher bill than promised, Heath claims it does a better job at efficiently providing healthcare for all. However, Heath's argumentation for this, that moral incentives would not be better at providing healthcare more efficiently than the current system, is questionable. It remains unclear whether it is true that market failures should be the main reason for state intervention in a market sphere of healthcare. Perhaps not the market failures, but the market itself may not be the best way for some healthcare deliverables.

An example for this can be the shift of Dutch dental care to the market in 2011. This government-led experiment planned to move dental care to the market for five years, without the government setting rates for this care. However, this experiment was reversed within a year as the results were undesirable. Where the idea was that the market would reduce the prices of dental care, increase choice for its costumers and promote innovation, only the idea of innovation was realized. The prices increased and the idea of expanding choices was neither realized. Patients were on paper able to choose for dentists that charges less money, but not always in practice. Since there was a shortage of Dutch dentists, only a quarter of them accepted new patients without conditions, they work with a waiting list and do not wish to treat people for just one time.[42]

The improved care, Heath claimed to be a result of commodification, is thus dependent on one's subjective preferences tied to the improvement. If one appreciates innovation over the increase in prices, Heath would be right. But if one values lower prices more, Heath would might be mistaken. Then again, the debate will result in the question whose values are deemed higher. Heath, however, does have a important argument by saying that something can be a right as well as a commodity, and it need not to be a contradiction. However, in this argumentation, the moral nature of the market is missing. In order to make a well-considered conclusion we will therefore look at the work of Elizabeth Anderson.

3.4. Elizabeth Anderson

Elizabeth Anderson is a distinguished Professor of Philosophy at the University of Michigan. She specializes in, among other things, political and feminist philosophy, and ethics. Anderson wrote extensively on the ethical limitations of the market in her book *Value in Ethics and Economics*.[43] Holding her views against those of Pellegrino and Heath leads to interesting considerations. Where both Pellegrino and Heath argue for or against

[42] Rutger Bregman, "'Vertrouwensband met tandarts is wel een paar extra euro's waard'," *Volkskrant*, June 26, 2012, https://www.volkskrant.nl/nieuws-achtergrond/vertrouwensband-met-tandarts-is-wel-een-paar-extra-euro-s-waard~b3e3a1d5/.
[43] Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge: Harvard University Press, 1993), 141-167.

commodification of healthcare, Anderson actually shows that it might not even be necessary to ask whether commodification is right or wrong.

Anderson is critical about the way markets affect personal relationships. A state should, according to her, restrict or prohibit commodification when it would increase the freedom or autonomy of people. Arguing from a theory of pluralism, she claims that since people value goods differently, they need a variety of social spheres to reach those different valuations.[44] Not everything should thus be for sale, Anderson argues. The sale of reproductive labor, for example, promotes neither freedom nor autonomy and, as such, should not be permitted.

Andersons argues that the market should be limited when the market norms *i)* undermine ideals such as autonomy, equality and freedom while governing the circulation of this good, and *ii)* do not do a better job than the norms of other spheres with "embodying the ways we properly value a particular good".[45] By providing five criteria, Anderson shows the difference between personal and market norms. Market norms are, as Anderson describes, impersonal, egoistic, exclusive, want-regarding and oriented to "exit", rather than "voice". This is characteristic of market transactions. Markets are *impersonal* since they see their relationships as a means which they can change any time. They are *egoistic* since other people's interest does not need to be considered while pursuing one's own interest. They are *exclusive* since the benefits can only be enjoyed by the purchaser of a particular good. If people cannot be excluded, the good cannot be sold for a market price. They are *want-regarding* since the market does not distinguish intense desires and urgent needs and therefore only respond to effective demand-desires. Finally, markets are *oriented to "exit" rather than "voice"*, because the costumers have the right to leave when they are dissatisfied. The markets response to this freedom is a "take it or leave it"-attitude of the owner of the good.[46]

The norms referenced above are ideals placed in an environment of ideal economic goods, according to Anderson. However, she mentions that when looking at the real practice, the actual norms these practices embody should be investigated. Therefore, we will now look at how the relation of the market and civil society is described, the sphere in which the basic health insurances would be categorized.

A civil society is recognized when a good is open to all its members without making a distinction in class, occupation and the like. It includes, next to the nonprofit institutions,

[44] Idem, 141.
[45] Idem, 143.
[46] Idem, 145-146.

markets and profit-making firms. In these spheres people are able to pursue their own goals and, therefore, market norms should not be fully controlling their activities. Selling a service as a professional is fine, Anderson shows. Entering into a market relation where the norms of the market may conflict with the norms of the professional role, should not directly be repudiated. It is acceptable since professionals too have to make a living, and receiving money for their work promotes their autonomy and equality of opportunity.[47]

A doctor asking money for his operations should thus not be morally rejected.[48] Most importantly are the norms governing this transaction. Anderson writes that when the state adopts market norms for the allocation of funds, professional practices are compromised in their autonomy. They are hindered in their non-economic goods pursuance. Vice versa, if profit-making firms regulate their activities according to non-market norms, they can promote non-economic goods which are internal to professions.[49] Thus not the type of the firm, a private, non-governmental, or state, is important when determining whether economic transactions are doing the right thing in terms of the professional practice, but the norms that are used during the transaction. If we extend this argument to the commodification of healthcare, Anderson would argue that it shouldn't matter whether health insurances are regulated according to market norms, but whether market norms are used in the regulation of these insurances. Not the market itself is morally wrong, but the norms governing it can be.

Furthermore, Anderson states that

> "*If market norms do pose a constant threat to the autonomy of professions and the integrity of goods internal to them, they may be to some degree indispensable, because the professions require external sources of funding. Since funds are limited, efficiency considerations should influence allocative decisions*."[50]

This is an important consideration in the context of this thesis. Where one might immediately reject market norms, Anderson shows that even though there are disadvantages to a the presence of a market, such drawbacks should be weighed against the efficiency considerations because of limited funds. A patient might for example prefer to have an intimate conversation with a doctor, but if there is limited funding and therefore limited time in the doctor's schedule, others should also have the opportunity to shortly speak with her. Incentive systems for physicians might have these physicians spending too much on their profession. Therefore,

[47] Idem, 147.
[48] Idem, 149.
[49] Idem, 150.
[50] *Ibid*.

as Anderson also argues, market norms might be useful to prevent waste. Moreover, Anderson argues that incentive systems which actually help save money, unfortunately, do not, by and large, follow the professional standard of good care which is internal in the medical practice. Therefore, goods of the professional practice have been partially commercialized. This is perhaps inevitable. The market with non-market norms can be combined to provide the best facility for civil society. A private, commodified system of health insurances is thus acceptable and sometimes even inevitable according to Anderson, as long as the norms governing the monetary transactions are not the standard market norms.

3.5. Second analysis and conclusion

As we can see, it might be more meaningful to talk about the norms used on the market instead of whether a market is morally permissible. If a specific market does not use market norms, then the market is acting like a non-market, even when encountering private companies. Are the market norms applicable to the Dutch market of health insurances? As described in chapter 2, I will here compare the norms of the Dutch health insurance market to the market norms Anderson describes.

The Dutch health insurance market is personal. Relations can be seen as means since the insurance company needs to attract customers. However, the company always has a duty to care, as written in the law. While this does not mean that relationships are not instrumentalized, such an instrumentalization is rather a matter between the caregiver and the patient. The relation a health insurance company has with its costumer is one in which the costumer receives reimbursement by the insurer. Their duty to care towards those costumers extends to accepting people as insurees and regulating their healthcare costs by imbursing and reimbursing their clients. This makes their clients an end in themselves. The market is not egoistic either, considering the insurance companies largely do not make profit, and, when they do, use it to enhance their business and therefore insurances. In this manner, their interest is predominantly oriented towards their clients, not themselves.

Moreover, the market is not exclusive. Even though the benefit of the specific insurance can be only enjoyed by the purchaser, everyone is obliged to purchase and, therefore, obliged to enjoy the benefit of the insurance. Exclusion is possible, but not desirable, and therefore the government has only allowed it in cases of conscientious objection. Besides that, the insurance market does distinguish between desires and needs and, as a result, is not want-regarding. The package of the basic insurance is determined in advance by the government. Even though it could shift, it will always cover the urgent care everyone

could need. Finally, however, the market is oriented to "exit" rather than "voice", because citizens are expected to 'vote with their feet' and to switch from health insurer each year they are not satisfied about either the service or the price. This orientation to "exit" rather than "voice" is supplemented, however, with the possibilities to still vote. Citizens are able to participate in body representatives, as mentioned in chapter 2.

But even though the health insurance market described above is not characteristic of market transactions, Zwarts could claim that it has immoral features which would not exist in a public structure. He for instance believes uninsured care to be more affordable than regulating care via insurances. This is never proven and therefore cannot be included in the argumentation. It could be noticed, however, that not the profit making is immoral, since the profit mainly goes back into the healthcare system, but the high salaries of top executives are. This is an interesting argument. For some of the chief executives of the main insurance companies made, in 2018, around the €345.000, which was €158.000 more than top executives in the (semi)public sector, which included, before its privatization, health insurance companies. For the *balkenendenorm*, a Dutch act that was established by prime minister Balkenende in 2006, determines how much money top executives in the (semi)public sector are allowed to make: a maximum of 130 percent of the salary of a ministerial salary.[51]

Although this should be taken into account, the subject of receiving exceedingly high salaries is another ethical issue an sich. There are many considerations made about such exceeding salaries, of which some object, but others view it as a justified compensation for a job with great responsibility. Besides, legally, their wages are allowed, and, as commonly argued, those executives are responsible for organizations that handle billions of euros within healthcare costs. Their wages are even way below the wages of famous professional Dutch soccer players. This might not way up against the public money going to their exceeding salary.

Although the argument above shows that there are some considerations that should be taken into account by the government which steers the insurance sector, these disadvantages of a market should be seen in perspective of its efficiency gains. As Anderson writes, when coping with limited funds, money cannot be used indefinitely. People need to be taken care of and care workers need to be paid. Forasmuch as the market norms are not governing the health insurance market, there is nothing objectionable to a private health insurer. A combined market with non-market norms could even be the best facility for civil society.

[51] Salarissen van politieke ambtsdragers," Parlement.com, accessed June 22, 2020, https://www.parlement.com/id/vjyqd6vz00ts/salarissen_van_politieke_ambtsdragers.

Not the transaction itself, as she argues, but the way this transaction is formalized by norms is important. A doctor should be able to receive money, but the private insurer also operates in a non-market way. Professional practices are thus not compromised in their autonomy and the private companies are promoting non-economic goods internal to professions. This way, the private nature of health insurance companies is not morally objectionable.

This chapter made clear that the existence of private health insurance companies is not morally objectionable. However, the question whether being coerced into this contract is morally justified needs to be explored further. This will be discussed in the next chapter.

4. Freedom as the freedom of choice

To answer such a question as the one mentioned in the previous chapter, whether it is morally justifiable to be coerced into a contract with a private insurer, it is necessary to return to Jordy Zwarts' lawsuit. In the lawsuit, Zwarts was held in his right and did not have to pay the prosecutor. Based on the fact that Zwarts never agreed to take out health insurance, nor agreed to the health insurance he was automatically assigned to, he did not need to pay the sum of money he owed them. However, even though he did win the case, it remained unsure whether the obligation of purchasing health insurance is objectionable. The question remains, then, whether Jordy Zwarts' argumentation has been fully agreed with by the judge's ruling, or that he was put in his right, retrieving the money from the health insurance company, based on the details of the contract that was never officially signed. Is it objectionable to be forced into this type of contract?

If Zwarts was just lucky to win this case on the ground of the rights of the debt collector, he would have to eventually take out a basic health insurance since this is a legal requirement for all citizens in the Netherlands. This legal requirement and Zwarts' objection against it will be examined in this section. Can a basic health insurance be forced on citizens? Does this harm their freedom? Since policies which infringe people's freedom are considered to be bad policies, it is important for the debate, from a public policy point of view, to ask how this kind of enforcement should be perceived.

Health insurance is designed to benefit the recipient by ensuring he or she is able to pay for the care he or she needs and receives. Starting from a principle of solidarity then, the Dutch healthcare is made to be accessible for everyone and insurance is therefore mandatory.[52] However, does the benefit of accessible healthcare justify its coercive character?

Before we can determine whether policymakers are allowed to force a Dutch citizen into having a health insurance policy, it is important to question what we understand as freedom and what, therefore, should be considered as harm. In this chapter I will look at the argument made by Zwarts in the context of literature about autonomy, freedom and paternalism. I will show that Zwarts relates to a libertarian concept of freedom, one in which coercion is seen as objectionable.

4.1. Zwarts' argument on freedom

The objection against the mandatory health insurance made by Zwarts was as follows: "I

[52] "Nederlandse zorgstelsel," 3.

would only enter into private agreements by choice. For coercion is punishable."[53] Zwarts adheres to the philosophy that citizens cannot be forced into a private law contract by the government.[54] In court, Zwarts clearly stated not to be 'willing' to take out a basic health insurance. He simply never agreed on a contract with a specific health insurer.[55]

The possibility Zwarts wanted to have, to not take out an insurance, was not offered to him. We can, therefore, state that Zwarts believed his autonomy to be violated. Autonomy broadly means to rule over oneself.[56] In this case, Zwarts understood his autonomy as to have the possibility to make his own choices. Since he was left without the choice to opt out, he believed his autonomy to be harmed. His freedom of choice was undermined.

4.2. Libertarianism

In the libertarian view, people should not be forced into active participation. Libertarians consider freedom as not being hindered by the government. They value their individual freedom heavily and insist that, in a just society, the level of coercion should be kept within stringent limits. On this account, permissible coercion deals with coercing people to refrain from certain things, such as violence or harming others, people cannot be coerced into things for their own benefit or the overall good.[57] Now, during the COVID-19 pandemic this gets a clear image. Many places in the US as well as Germany and the Netherlands have people protesting against the restriction measurements that are supposed to protect them against the spread of the virus.[58] It is an issue of forcing people for their own sake. Those protesters hold signs stating "this is supposed to be the land of the free". They believe to be unfree whenever they are forced into something. The way these protesters view the measures taken for them as coercive, and therefore restrictive of their freedom, is comparable to the way Zwarts views his mandatory health insurance. Both are to be 'for their own good'. If we consider freedom this way, as not being restricted in one's choices and actions, then they are right.

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[53] Eelke van Ark, "Verzekeringsweigeraar krijgt duizenden euro's terug," *Follow The Money*, February 11, 2019, https://www.ftm.nl/artikelen/verzekeringsweigeraar-jordy-zwarts. Translated by the author.
[54] *Ibid*.
[55] Court of The Hague April 18, 2020, ECLI:NL:RBDHA:2018:4819.
[56] Sarah Buss and Andrea Westlund, "Personal Autonomy," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2018), https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/.
[57] Bas van der Vossen, "Libertarianism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2019), https://plato.stanford.edu/archives/spr2019/entries/libertarianism/.
[58] "Coronavirus lockdown protests: What's behind the US demonstrations?," *BBC News*, April 21, 2020, https://www.bbc.com/news/world-us-canada-52359100. ; Kate Connolly, "Germany braced for more protests against coronavirus policies," *The Guardian*, May 21, 2020, https://www.theguardian.com/world/2020/may/21/germany-braced-for-more-protests-against-coronavirus-polices. ; Johan van Heerde, "Aanhoudingen bij anti-lockdowndemonstratie in Den Haag," *Trouw*, May 30, 2020, https://www.trouw.nl/binnenland/aanhoudingen-bij-anti-lockdowndemonstratie-in-den-haag~b3cc3df9/.

The libertarian standpoint has been widely embraced by both these protestors and Zwarts. The account of freedom Zwarts uses is seen mainly as a negative conception of freedom as described by Isaiah Berlin[59], for he argues that he should be able to remain unhindered by the governmental choices imposed upon him. Zwarts is coerced into more than merely refraining from violence or harming other people, and that should never be permissible, he believes. Zwarts therefore concludes to be hindered by the government since the coercion was too broadly applied. However, his libertarian view is not the only way to argue, which we will see in the next chapter. Because, although libertarianism, in which we can categorize Zwarts, focuses on negative freedom, this main focus should not immediately be seen as the norm in a Dutch society.

4.3. Paternalism

Restrictions on this libertarian freedom are badly received by the above mentioned libertarian followers. On the other side of the spectrum, however, people argue that certain restrictions on freedom are necessary to achieve better outcomes. These restrictions, governmental steering or control, are based on the idea of paternalism. Paternalistic policies move people in the direction policymakers want them to go. Paternalism, as the word says, is seen as a 'fatherly steering', and therefore has a benevolent basis.

One of these supporters is Sarah Conley. In her book *Against Autonomy: Justifying Coercive Paternalism*[60], she argues that since people are frail creatures, they cannot make the decisions that are in their best interests and hence hurt themselves. According to her, people are not aware of the external factors which influence the decisions they make. People for instance smoke purely out of addiction, when they actually want and need to stop. Because of these external factors, people cannot think efficiently about the achievement of their ends and need external help for this.[61] Conley claims that governmental paternalism should be coercive, since external factors make people choose self-destructing habits and means. Paternalistic policies will then, eventually, make people better off. Autonomy, she argues, is not an ultimate value, if it makes someone's life worse. She thus sees the freedom of choice to be so valuable, or at least as valuable as living a long, healthy and consequently happy life. Therefore, freedom of choice should be subordinate to people's actual best interests, such as

[59] Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1979), 118-172.
[60] Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge: Cambridge University Press, 2013.
[61] Idem, 20.

their health. For this is what they would have eventually chosen for, being more knowledgeable about their decisions.

Claire Hill, on the other hand, argues that this kind of paternalism can never be right. The reason for this is that no one can actually know what people want and what eventually is best for them. Where Conley argues that people subconsciously want the achievements of good health and a longer life, but act against this because of the externalities such as addiction, Hill claims that we cannot know what people really want and thus are unable to make policies in correspondence with it. According to her, the (sometimes) destructive behavior of people does not justify paternalism.[62] She thinks it is an untenable position, claiming to know what people really want, whatsoever they actually choose, since we do not actually know it. And since we do not know, we should not make such paternalistic laws.[63] Other authors hold those views as well, such as Mark White. White writes that even though people sometimes do make 'dumb choices', only the person who made this "dumb choice" knows whether it was actually dumb. The particular choice might have actually been in this persons best interest.[64]

4.4. Considerations

Where people are seen as inviolable and with inherent dignity as in a liberal democracy, they should not be interfered within their freedom, and should be able to act of their own free will. This brings Hill and White to the conclusion that when choices are made for people without their given consent, they are harmed in their dignity as their autonomy and freedom is not respected. This view, they show, stems from a Kantian account of dignity. When someone is being coerced in a certain direction, to purchase health insurance for instance, they are not treated as an end, but merely as a means for the policymaker.[65] As White argues, the autonomy and dignity of people would be respected when their choices are not disrupted and they are not coerced into something, since everyone merely assumes, but no one can know they have the actual knowledge of what is best for who without letting the people decide for themselves.

Conley, however, views dignity in a different way. Where the above mentioned accounts object to the imposition of certain choices, Conley shows that this imposition

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[62] Claire A. Hill "Anti-Anti-Anti-Paternalism," *New York University Journal of Law & Liberty* 2 no.3 (2007): 445.
[63] Idem, 448.
[64] Mark White, "Behavioral Law and Economics: The Assault on Consent, Will and Dignity," in *Essays on Philosophy, Politics and Economics: Integration and Common Research Projects*, eds. Christi Favor, Gerald Gaus, and Julian Lamont (Redwood City: Stanford University Press, 2010): 209-210.
[65] Idem, 214-215.

actually lets people achieves certain things in life they would not have achieved through their own choices. Not autonomy and freedom of choice, but fairness is important to Conley. And according to Conley, policymakers would not only be making policy in the best interest of the people, but also be elected by them.[66] Conley shows that the ends, a healthier, happier life, can justify the means. In her view, autonomy is thus not harmed, but actually promoted by coercive paternalism.

Thus, depending on the notion of freedom being used, the freedom is affected differently. The freedom can be empowered, but also infringed. Yet, where values such as dignity conflict, how could it be chosen what counts as a priority? What is just? Both accounts have a different concept of freedom and autonomy which they base on different accounts of dignity. Moreover, both accounts deal with some problematic aspects as well. At first, the accounts claim for universality. The claim by White and Hill that no one will ever know what is best for a person, except for him or herself, is a very strong one. Consider, for example, studies about cognitive function and poverty.[67] They show that living in poverty impedes people's cognitive resources which could make their choices even more 'dumb'. Would it then still be fair to not provide people with their best interest, even though they would not choose it themselves? Second, Conley idealizes paternalism for its long-term achievements. But do short-term enjoyments not matter? Personally, I enjoy eating potato chips greatly and could eat them every day. I know they are heavily salted, addictive, fat and not good for my health. I also know I should not eat them, but I do value the enjoyment, even though short-term, more than I value the long-term health benefit if you would ask me now.

With the claim for universality this will result in a yes-or-no discussion where the moral high ground will be claimed by several positions without there being a middle ground or discussion to further. Besides, do these arguments actually respect the citizens? The paternalistic view is clear about that in the sense that it does not, although its supporters claim a justification through the outcomes it provides. The libertarians, on the other hand, do not care about those who lose out, as long as it is the result of their personal choices, such as a smoking addiction, which libertarians would eventually categorize as a choice made by the addicts themselves.

An unanswered question then is whether the range of choices the ones who lose out

[66] Conley, *Against Autonomy*, 2-3.
[67] Anandi Mani, Sendhil Mullainathan, Eldar Shafir and Jiaying Zhao, "Poverty Impedes Cognitive Function," *Science* 341 no.6149 (2013): 980.

had, was actually legitimate. In the next chapter we will see, by delving into democratic equality, and republican freedom, that the answer to this can be negative.

5. Another conception of freedom

As we have seen in the last chapter, the libertarian argument for freedom comes with difficulties. Does the availability of choice really legitimize the current position of people, when we talk about wealth? This chapter will define an alternative conception of freedom. Where the libertarian conception stressed the negative conception of freedom heavily, the conception in this chapter asks rather what is needed to do to be free. In such a society, people owe each other certain things in order to be actually free. Since this account emphasizes the conditions people owe to society in order to be free, the chapter is called after this 'other conception of freedom' I will develop in this chapter. This other conception stands in contrast to the conception of freedom libertarians have.

Where the libertarian concept of freedom is mostly seen as emphasizing a negative freedom, it would be unjust to call this other account on freedom a positive one. Indeed, some argue, of which Pettit might be one, that republican freedom is another form of negative freedom. As Quentin Skinner already demonstrated, a third concept of freedom, next to the positive and negative freedom as described by Isaiah Berlin[68], a split-off from the negative one, should be recognized too. Where Berlin claimed all accounts on freedom should embody absence of interference, the one that will be demonstrated in this and the next chapter will show, as Skinner addressed[69], the difference between a mere idea of non-interference and the more broad concept of non-domination; one in which people are (implicitly) dependent on other people's goodwill, preferences or domination. For this account, I will delve into the ideas of Philip Pettit and Elizabeth Anderson: the idea of republican freedom and democratic equality.

It would be good to place the conception of freedom provided by libertarians more comprehensively in the Dutch context. While libertarians argue that they should not be disturbed in their actions and people should not interfere with their choices, the Netherlands is not libertarian, but a liberal democracy. In a liberal democracy, people are being protected from their government, their lawmakers and other governmental bodies on the grounds of their human rights, "such as the right to freedom of religion".[70] For every person is seen as inviolable and with inherent dignity.[71] People's rights and liberties are then both negative and positive: people are not supposed to interfere with each other's freedom (negative) and people

[68] Berlin, "Two Concepts of Liberty".
[69] Quentin Skinner, "A Third Concept of Liberty," *The London Review of Books* 24 no.7 (200): 16.
[70] Michael J. Perry, *The Political Morality of Liberal Democracy* (Cambridge, New York: Cambridge University Press, 2010) 10.
[71] *Ibid*.

are supposed to be able to act to their free will (positive).[72] Libertarians, as we have seen, understand this conception mainly as the right to make one's own choices, not be interfered in them and therefore be free. However, as we will see in this chapter, in order for someone to act on his or her free will, he or she needs to have basic liberties in order to make a legitimate choice. Otherwise, the idea of freedom is flawed.

5.1. Criticism of libertarianism

When freedom is viewed as being able to do what one wants, the importance of the resources needed to do what one likes is neglected, Anderson shows[73]. Although people might be free to choose, they might be restrained by the fact that their resources on other levels are scarce. A choice to not go to the dentist might, for instance, be a result of the priority given to the school trip of one's child, if they have the same financial impact, but cannot be both selected since someone's budget is limited. Even if someone might prefer to be able to choose both, one might not have the financial resources to do so.

Moreover, the libertarian definition does not recognize that people's wishes mostly require social activities when it mainly stresses the absence of others, not the need for their participation. And, as Anderson writes, "since the democratic state is nothing more than citizens acting collectively, it follows that the fundamental obligation of citizens to one another is to secure the social conditions of everyone's freedom."[74] In this way, it is not that people should avoid interfering with each other's abilities to enact their choices, but, instead, it is necessary for them to actively support each other in order to promote a fully free society. Otherwise, Anderson argues, the freedom of one could be the subjugation of another.

This point becomes even clearer in Pettit's writing. Pettit argues for a republican account on freedom which is, as he writes, understood as non-domination.[75] A person is truly free when she is not dependent on other people and, therefore, is not dominated. Pettit shows that even though dependency does not necessarily have bad conclusions, since the person someone depends upon can be very benevolent, and with the best goodwill, it is by default a bad thing to have to rely upon others since people's intentions, goodwill or benevolence can always change. Thus the free choice we nowadays mistakenly see as freedom, can still be a choice range for someone who is dominated. A dominated horse, for instance, can freely

[72] Ian Carter, "Positive and Negative Liberty," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2019), https://plato.stanford.edu/archives/win2019/entries/liberty-positive-negative/.
[73] Elizabeth Anderson, "What is the Point of Equality?," *Ethics* 109 no.2 (1999): 315.
[74] Idem, 314.
[75] Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W.W. Norton & Company, 2014).

choose between going left or right, but only if his master decides to release the reins.

Viewing the possibility to choose as one's freedom, Pettit argues, stems from Mill.[76] Although people might argue for happiness or welfare for everyone, the core of this welfare is not to put people up as equals, but to satisfy their utilitarian happiness. Then we would still be left with a society full of dominated people. In this view, thus, the egalitarian equality of Anderson and the republican freedom of Pettit, freedom is seen as more expansive and with social conditions. Domination within private relations, although consented to, is seen as a violation of someone's freedom.[77] One of the founders of this idea of the social conditions bounded to freedom is Jean-Jacques Rousseau.[78]

5.2. Social contract theory: Rousseau

As we have seen, in the democratic state, citizens have the obligation to secure everyone's freedom and therefore also the freedom of someone else. These thoughts have been shaped within the philosophical line of the social contract theory. Rousseau already wrote about being forced by the government in order to be free, so that the person is protected from personal dependency. Otherwise, people might be subjected to tyranny.[79]

It sounds paradoxical, forcing people to be free. And actually, the apparentness of the contradiction is probably what White and Hill did not see. Rousseau's conception of freedom is one in which people gain positive, civil liberty, by giving up their natural liberty, their physical freedom to do what they like, such as threatening others by using one's power, in order to become a society a whole. People give up their physical freedom to do what they want in order to gain civil/positive freedom, to become a part of a moral-political community. Their gain is then the realization of certain things that would not be possible when people would live side by side in the world, as the 'sum of its parts'.

In such a society, where people live with civil freedom, they can realize things that would not be possible to realize without this cooperation. People can develop themselves culturally, artistically and be a part of the political life. Nevertheless, it does require their submission to a society which carries out its will, which may contrast to someone's private interest. The General Will, the outcome of people's voting and coming together that results in a sovereign, represents the better option for the people, that should be, whatever their private

[76] Idem, 22.
[77] Anderson, "Equality," 314-315.
[78] Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses*, edited by Susan Dunn (New Haven: Yale University Press, 2002).
[79] Idem, 166.

interest is, in the best interest of the society as a whole.[80] Perfectly fitted within our context, Rousseau writes that the contract only works if people realize that the state is established upon men. Enjoying the right to be a citizen thus comes with duties. One owes the common cause that what "the loss of which would be less harmful to others than the payment of it would be onerous to him".[81] What he owes in duties, Rousseau writes, will never be as much as what he gains in such collaboration. His gains outweigh his duties.

5.3. What does make you free?

The way Pettit then sees freedom is as a life lived without any form of domination. He writes that

> "*... to be free in a choice is not enough to get what you want. You must be able to get what you want regardless of what it is that you want. And you must be able to get what you want regardless of what others want you to get*." [82]

Just like citizens[83] of the Roman republic, being a free citizen means being provided with security and, therefore, having the ability to develop oneself in society. Real freedom, he writes, has depth and breadth. Depth in freedom means that freedom is more than being free in a choice. Breadth in freedom determines the range of choices which will be analyzed in the next chapter.

In a free world without domination, a person is able to choose an option, no matter her preferences over it and whatever someone prefers her to choose. Above all this, she needs the room and resources to carry out the option she prefers.

Pettit writes that republican freedom advocates for independency of the will of others. Citizens should never be subjected to other people's grace or goodwill for living how they want. When this happens, someone is not free according to the republican version of freedom. When people need care, assistance or something else to properly function as a human being in society, they should be able to receive this as if it was theirs to own, instead of out of pity, spite, or goodwill. And although Pettit means that it is "worse to be controlled by the free will of another than to be constrained by a contingent absence of resources"[84], people do need the resources to count as equals. Pettit writes that every person should count as equal with the

[80] *Ibid*.
[81] *Ibid*.
[82] Pettit, *Just Freedom*, 29.
[83] Though Roman citizenship was only provided for a selection of the inhabitants, Pettit uses the reference to clarify his concept of freedom and aims to provide such freedom to all people, in contrast to the Roman citizenship.
[84] Idem, 48

best, when provided security in the forms of public laws and norms. If this is taken seriously, then, citizens have both the right to be provided with these basic liberties to enjoy,[85] and, the obligation to secure these basic liberties for the other citizens in society. Only when this happens, a society is just.

Pettit's view of freedom is very similar to Anderson's. She also views any sort of personal domination as objectionable and criticizes luck egalitarians in focusing too much on distribution. In order to generate justice, she argues, "the primary subject of justice is the institutional arrangements that generate people's opportunities over time."[86] Anderson argues for an understanding of freedom where the social conditions reach much further than in the libertarian one, just like Pettit. And like Pettit she views domination in private relations as violation of the freedom for individuals.

Because citizens act collectively in a liberal state, they need to also act collectively to secure each other's freedom. Anderson writes that "the fundamental obligation of citizens to one another is to secure the social conditions of everyone's freedom".[87] Where the libertarian view merely argues for freedom in the sense of the absence of governmental intervention, this account of freedom shows that there is actually a need for people to interfere with others so that they will at least be provided with their basic liberties, in order to be a real free citizen. In line with Rousseau then, it should not merely be asked what someone else's limits of interference are, but what citizens in a society owe each other in order to be free, standing in relations with others as equal.

Where Anderson and Pettit want to shift to, is to the same account on freedom. Even though Pettit identifies it as republican freedom, as Sven Nyholm also clearly shows, he argues for a more inclusive and egalitarian form of republican freedom than formerly often argued for by other authors.[88] For this reason, both accounts can be seen as having the same claim. So all citizens need to be able to exercise their basic liberties, for which they need certain resources, without being dominated.

[85] Idem, 46-52.
[86] Anderson, "Equality," 309.
[87] Idem, 314.
[88] Sven Nyholm, "Just Freedom?," review of *Just Freedom: A Moral Compass for a Complex World*, by Philip Pettit, *Res Publica : A Journal of Moral, Legal and Social Philosophy* 20 no.4 (2014): 443.

6. The basic health insurance as a basic liberty

The concept of freedom proposed in the previous chapter requires a further and deeper look into the social conditions of freedom. It argues that those social conditions need to be secured in order for people to be free. But what social conditions are we exactly talking about, and what does this imply for the argument on a compulsory basic health insurance? In this chapter, I will go back to the argumentation of Zwarts, and his so-called unjust obligation of the basic health insurance premium. I will show that, in line with our developed conception of freedom, it is perfectly justified and even necessary to require citizens to pay a mandatory amount for a basic health insurance system, even if they do not wish to receive it. I will also delve into Ronald Dworkin's criticism and argue why this criticism does not hold.

6.1. Functioning as equals requires functioning in health

In order to live in a society as a citizen without being dominated, one needs the room and resources to be capable of making choices which are needed so the choice is fully theirs to own. A basic health insurance is required for this. As we have seen, social justice means to have a personal form of independence. Since one should be able to function in society without needing to rely on the goodwill or benevolence of others, he or she should have access to the basic healthcare. This way, people are ensured to have the capability to function in society as far as their health lets them. Without such availability to healthcare, people in fact are dependent to other people's benevolence to help them functioning, either in monetary terms or in actual (voluntary) care. Having social justice in relationships thus means that insurances should be covered in public policy.

People should be insured for their healthcare, as Pettit also writes, because "the ills to be insured against will involve the under-resourcing of people's basic liberties and their consequent exposure to new possibilities of domination."[89] Besides, whether this is done by a private or public institution should not matter, if we look closely at the argumentation, whereby the institution treats every citizen as equal. In this way, there can be no domination of the institution towards particular groups or people.

Both Anderson and Pettit defend the approach based on capabilities as the measurement of seeking equality for all.[90] It might be a question for further research to argue which specific capabilities are needed, because this part will focus solely on health insurances

[89] Pettit, *Just Freedom*, 86.
[90] Anderson and Pettit defend the capabilities approach by Amartya Sen and Martha Nussbaum: Anderson, "Equality,", 316. ; Pettit, *Just Freedom*, 87.

as needed to function in society. In this theory, people are entitled to both what is needed to escape oppression in social relationships, and to function in a democratic state as a citizen. However, to function as a citizen, means not just to do the things citizens do, such as voting, but also to participate as an equal in civil society. And civil society includes also hospitals, just like schools and shops.[91] The availability of hospital care is therefore important to function as an equal in civil society. But to be able to function as a human being at all, one needs to have access to medical care, in order to acquire and preserve human agency in its basic conditions.

Although, as Pettit writes, the cultural context is of great importance when deciding what, exactly, each citizens requires, access to basic health in the form of insurance is, for the above mentioned reasons, with certainty, included into the just Dutch society seen from this conception of freedom. Imagine a situation where people do not have the standard access to their healthcare. Then Pellegrino's before mentioned arguments about distribution again play a role. In such a situation, people might eventually end up with limited financial resources and have to choose from the situation where one can either pay for his own college tuition, or for his cancer treatment. In such a case, the person cannot be held responsible for his choice to not go to college. Although it might be framed as choice, who would actually agree this is not the only option he could have chosen?

For freedom to persist in a just society, people thus need to have access to their social conditions of freedom, which includes their health insurance. It thus needs to be obliged for everyone to work together and ensure access to it. It therefore is permissible for the government to require its citizens to pay for an insurance which benefits the whole society, so that it can guarantee basic liberties to its citizens. In this way, the people are not left to the domination of the more lucky ones who do not face the financials hurdles that cancer can bring. Such a society, where people are deprived of their basic liberties and freedom because of their unfortunate health, will never be equal or just.

6.2. Ronald Dworkin

This logic of requiring everyone to take out basic insurance for these reasons does not hold for others. One of these critics is Ronald Dworkin. He argues that people should be compensated for their bad luck, when for example their health is unfortunate, but only to the extent that it is bad, brute luck. People who take risks and, for example, break their legs while skiing, or those who get lung cancer from smoking, are responsible themselves to the extent

[91] Anderson, "Equality," 316-317.

that they were able to choose an insurance, however, deal with so-called bad option luck.[92] The ones suffering from bad option luck face difficulties which could have been calculated on forehand. Because the risk this person took, by going, for example, on a ski trip, or by smoking a cigarette, might have been declined if the person anticipated on this risk on forehand. Since the person accepted this risk, she also carries the responsibility for it.

According to Dworkins view, based on luck egalitarianism, a difference in purchasing health insurance reflects the difference in assigning value to particular forms of compensation of their lives in the future. He writes that this choice may reflect that "one minds or values risk differently from the other, and would, for example, rather try for a brilliant life that would collapse under catastrophe than a life guarded at the cost of resources necessary to make it brilliant."[93] Insurance is, according to him, based on the choices people make on the market. A distribution from someone who did purchase insurance, to someone who did not, would not be just, Dworkin argues. For even though the non-buyer had bad brute luck, the option luck should not be distributed since people personally decide to insure themselves or not. Dworkin writes that one who suffers both bad brute luck, as bad option luck, has no claim to others who did insure themselves and did not suffer from this bad brute luck.[94] She would have no claim to receiving financial support from other people who also went on a skiing trip, but did not break their legs, as she did, if she had not insured herself.

6.3. Respect

With these counterarguments Dworkin has two flaws. It contains both a lack of respect for its citizens and an argumentation problem based on the market choices.

At first, where Dworkin argues that bad option luck justifies someone not being able to receive care, this argumentation contains a lack of respect for its citizens. As Anderson writes, treating people with respect would never include leaving people to such bad faiths that they would not be treated for their lung cancer or the like. Although Dworkin does not claim that we are completely, one hundred percent responsible for bad outcomes based on option luck, he does argue that option luck gives people quite a bigger responsibility for harms we suffer. And although he therefore not argues for a complete neglection for those on the basis of their responsibility, the victims of bad option luck do have a worse outcome which might not at all be their deserved faith. Even though Dworkin would argue for a mandatory health

[92] Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy & Public Affairs* 10 no.4 (1981): 293.
[93] Idem, 296.
[94] Idem, 296-297.

insurance, as he sort of did,[95] this justification is based on paternalistic principles just like Sarah Conley's. How can they then be expected to retain their self-worth? Goods must be distributed in a way that express respect for all people. Otherwise, we would sink into such a society that Pettit wrote about, where citizens claim resources on the basis of their inferiority and should pity themselves.

Neither the paternalistic enforcement, nor the abandonment of luck egalitarianism, respects the citizen with either denial of healthcare or enforcement of an insurance based on paternalistic grounds. The egalitarian conception of freedom, on the other hand, sets citizens free to not use their health insurance, but respects its citizens in such a way that it obligates each citizen to respect other's freedom and therefore carries along the obligation to contribute to the aid others need. Since it is not just out of goodwill but out of obligation that everyone owes to their fellow citizens, people need to contribute to the system of either taxes, or, as in the Netherlands, health insurances. Not merely for themselves, but out of obligation to others, since they have a moral worth.[96]

The second error concerns Dworkin's argument on market choices. As Anderson also shows, the market choices people make around their insurances does not determine what citizens owe each other: "since these choices were not, in fact, made, the failure to reflect them in state allocations violates no one's actual autonomous choices."[97] Furthermore, what people do owe each other is not determined by their personal preferences. If this were the case, people who prefer taking risks would be seen as inferior in society. It is determined, however, by the principles that society collectively decides upon to provide together for themselves, for society, instead of for oneself individually.[98] Risk-loving people would also then be able to reject the claim to healthcare, but should never be able to relinquish the claim others have on them.

6.4. What is Zwarts owed?

Where Zwarts would thus reject his insurance on the basis of the claim to care, he cannot reject his insurance on the basis of the obligation to care. He might find it paternalistic to not be able to trade his freedoms for the other things or goods he prefers. However, looking from the perspective of the obligation holder, Zwarts has an unconditional obligation to respect

[95] Julian Sanchez, "Ronald Dworkin: Heartless Libertarian?," Cato Institute, last modified September 21, 2011, https://www.cato.org/blog/ronald-dworkin-heartless-libertarian.
[96] Anderson, "Equality," 330.
[97] Idem, 309.
[98] Idem, 310.

other people's moral equality and, therefore, the social conditions of their freedom. As Anderson writes, relational equality does not base someone's rights on one's individual interest, but on the obligation of others, people are justified lifetime guarantees to health insurances.[99] Then they can be truly free. However, this freedom only exists where all citizens are able to access their social conditions of freedom and therefore obliged to purchase a basic health insurance.

[99] Idem, 319.

7. Conclusion

In this thesis, I have delved into the Jordy Zwarts case and examined whether the arguments made in this case, against a compulsory private health insurance, were morally justified. The Jordy Zwarts case served as a stepping stone to a bigger moral issue, about the moral acceptability of private companies, and whether citizens can be forced by their governments to enter into contracts with such companies. Although both of these questions deal with the morality of a Dutch basic health insurance, they can be seen as two separate issues and were therefore treated as such is this thesis.

In the first part, I tried to evaluate the morality of the private character of a health insurance company by analyzing arguments made by Edmund Pellegrino, Joseph Heath and Elizabeth Anderson for and against the commodification of care, since privatization is a consequence of commodification. Where we could see that the main arguments against commodification, as made by Pellegrino, were based on distribution, it became clear that the debate about the commodification of care is dominated with arguments on distribution. Although these contribute to the understanding that a fully commodified health insurance system might be very undesirable, those arguments do not apply to the universal system the Netherlands currently has. The partially commodified system in the Netherlands does therefore not deal with the integrity issues Pellegrino raises. Besides, where Heath argues the market provides a higher effectivity of delivering healthcare, this can be disputed as well. Therefore, not the arguments for or against commodification, but a moral analysis of the health insurance market itself, with the norms it uses, provides a defense of its moral status. And since the Dutch health insurance market is does not carry the market characteristics, as Anderson described, such as excluding people, treating them as means, being want-regarding, among others, and although these norms might have drawbacks, the market still provides higher efficiency gains with the limited funding available. So, forasmuch as the market norms are not governing the health insurance market, there is nothing objectionable to a private health insurer.

In the second part, I asked whether it is moral to be forced into the private contract and how this relates to being free in a society. Where I initially wondered whether the benefit of having a health insurance was a justification for the enforcement of it, the republican theory of freedom offered by Philip Pettit, as seen in line with relational egalitarianism offered by Anderson, showed how I myself was wrong by thinking in this way. They showed that the argumentation of paternalism might give you the desired ends, but does not respect its citizens

equally. At the other end, a libertarian view on freedom argues to not be interfered in choices. However, this view lacks awareness that the options provided might not have been just.

What Anderson and Pettit show, is that being free in a society means being able to stand as equals in such a society and therefore have access to basic liberties. To not be dominated, one should not have to rely on goodwill of others. Being really free, means being free for not just a moment, but over a life time without being dominated. And because citizens in a state act collectively, they need to secure each other's freedom too. For freedom to persist in a just society, people need to have access to their social conditions of freedom, which includes their health insurance. Thus not merely one's own healthcare is a reason to be buying a healthcare insurance, but the duty to care for others is too. For a society in which people are deprived of their basic liberties and freedom because of their unfortunate health, will never be equal or just.

Therefore, when looking at the Zwarts case, it can be concluded that the coercion into a health insurance contract with a private insurance company can be perfectly legitimate. However, I do recognize that the analysis on whether the market characteristics, described by Anderson, apply to the Dutch system lacks a reflection of current care practices in the Netherlands. Where the theory sounds convincing, the practice, also the practice could disappoint. Nevertheless, such a realization would not directly discard the argument. It does show that more research is needed in this area, especially focused on the Dutch insurance market and to what extent those five market characteristics actually apply.

8. Literature

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