

Essential Services, Workers' Freedom and Distributive Justice

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1 Introduction

This paper examines the normative implications of the essential service argument commonly used to justify restrictions on workers' freedom to withhold their labor. The essential service argument says that essential services workers should not be allowed to strike since that form of collective bargaining can likely inflict imminent and substantial harm on the society. Both detractors and advocates of the freedom to strike have widely debated the essential service argument. Yet, surprisingly, the debate has rarely examined its implications in terms of occupational freedom and distributive justice.

Here I argue that once we accept the essential service argument to restrict essential workers' freedom to strike, we should also be prepared to accept limitations on occupational freedom. If we accept that the state should guarantee the provision of some services, then we should also accept that the state can permissibly restrict not only the freedom to strike, but also occupational freedom in the eventuality that not enough people voluntarily agree to work in the provision of essential services. That is, if necessary, the state should be prepared

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to address the problem of worker shortage in essential services through different motivational strategies, including coercive motivational instruments.

The essay is organized as follow. The next section evaluates the notion of essential services. It argues that although the distinction between essential and non-essential services may be theoretically elusive, it has important policy implications. Section 5.3 describes the essential service argument. It explains why that argument – which is commonly used to justify restrictions on the freedom to strike – can be analogously employed against occupational freedom in a context of essential services workers shortage. Section 5.4 focuses on the problem of staff shortages and maldistribution of health personnel. It argues that there is nothing intrinsically wrong with compulsory service programs for recruiting health workers to serve in underserved areas.

2 Essential Services

In December 2013, police officers in Argentina staged strikes for higher salaries. Several cities experienced police work stoppages for one or two days. This was enough time to allow outbreaks of looting, violence, vandalism and general chaos. Looters attacked supermarkets, shops, electronics stores and factories en masse. In the absence of police protection, many civilians attempted to stop looters and disperse mobs. As a result, 13 people died and many others were injured.¹

In the same year, a school teacher strike that lasted for almost two months affected a million elementary school students of the Mexican state of Oaxaca. Some 10,000 striking teachers protested in the congested streets of Mexico City against a recent education reform enacted by the national government. The protesters not only managed to march, block and paralyze one of the world's most populous cities, but they also left a million students

¹See for example: <http://www.lanacion.com.ar/1647946-fueron-13-los-muertos-en-todo-el-pais-en-las-jornadas-de-violencia>; <http://www.theguardian.com/world/2013/dec/10/argentinian-looting-spreads-police-strikes>; <http://blogs.aljazeera.com/blog/americas/reflection-argentina-after-deadly-looting>, [All accessed on 12 February 2014]

without access to educational classes.² The list of strikes that discontinued services in 2013 includes trash collectors' strikes in Spain, Chile and the U.S; firefighters' strikes in England and Wales; and physicians' strikes in Panama, Nigeria, Kenya and Greece.

One of the main functions associated with a modern state is the provision of security, public safety and education for its citizens. But at the same time, many democratic states also ensure workers' collective bargaining rights and freedom of association. Up to date, more than 160 countries have recognized the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in 1966. Among other things, the ICESCR commands its parties to grant a right to strike. In its Article 8, section d, the ICESCR encourages the States Parties to ensure "the right to strike, provided that it is exercised in conformity with the laws of the particular country." Similarly, the International Labor Office (ILO) – the United Nations agency devoted to promote and recognized labour rights – has persistently defended the right to strike as a "fundamental right of workers and of their organizations" (ILO, 2006, p.112). The ILO, however, also recognizes that governments should be allowed to prohibit the strikes of workers in "essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population" (ILO 2006, p. 112).

Legal systems around the world formally recognize the existence of essential services (Morris, 1983, 1986; Pankert, 1980). Although it is difficult to draw the line, the distinction between essential and non-essential services is significant in terms of public policy.³ Employers, workers and governments usually agree that some services are more important than others and that this fact justifies the adoption of special rules to settle labour disputes (Pankert 1980, p. 723). This distinction helps us to determine which services should be

²See for example: http://www.huffingtonpost.com/2013/08/29/mexico-city-teacher-protests_n_3837576.html; <http://www.theguardian.com/world/2013/sep/14/mexico-riot-police-retake-zocalo-plaza>[All accessed on 12 February 2014]

³By analyzing public opinion data from the Eurobarometer, Van der Walle explores what factors determine which services are considered as essential in 15 EU countries. The author shows that citizens have different opinions about the provision of those services. See: Steven Van de Walle (2009)

given priority both in terms of production and distribution. People working in the production and delivery of essential services may have special obligations. It might be argued that the right to strike – which is internationally regarded as a fundamental right of workers and of their organizations – can be limited or even prohibited in essential services (ILO 2006,n.3, para.576). Indeed, as Morris argues, the uninterrupted operation of the service can “outweigh the consideration that workers in it should be free to withdraw their labour” (Morris 1983, p. 83).

Although the list is not exhaustive, the Committee on Freedom of Association enumerated eight essential services including the hospital sector, electricity service, water supply services, the telephone service, the police and the armed forces, the firefighting services, prison services and air traffic control services (ILO 2006, n.3, para.585). We can say, therefore, that essential services are fundamental insofar as their disruption would have harmful consequences for the whole or part of the population (Morris 1983, p. 69; Van de Walle 2009, p. 522). The list of non-essential services is more extensive. Among other things, it includes radio and television services, the education sector, banking, ports and garbage collection services. It is worth noting that non-essential services may become essential ones when, say, the delivery of a non-essential service is interrupted for the time it takes to endanger “the life, personal safety or health of the whole or part of the population” (ILO 2006, n.3, para.585). To take an example: although garbage collection is listed as a non-essential service, it becomes essential when it is discontinued for an extended period of time and the accumulation of garbage becomes hazardous. As a consequence, we can say that the essentiality of a given service is determined by the relationship between the level of harm that can likely be produced when

the provision of that service is interrupted and the time of stoppage.⁴

Since particular values need to be safeguarded (e.g. universality, affordability, quality, fair treatment), the market should not entirely control the provision of essential services (Bruijn and Dicke, 2006; Van de Walle, 2009, p.522). This does not imply that this type of service is always publically provided, but rather that the state sometimes regulates – and at other times even intervenes – in its production and delivery. In fact, third parties or non-governmental agencies can provide some essential services more efficiently under certain circumstances. Health care, for example, is an essential service that can be delivered both by public and private agents. Even in those situations where service provision may be better handled by private enterprise, this does not necessarily mean that the state needs to fully acquiesce its role in the provision of health care. Through the use of regulation, states can make sure that private health care providers meet certain standards of quality (e.g. private health clinic have enough surgeons to cover the needs of their patients and so on).

Additionally, it is worth noting that not all public services are essential (Pankert 1980, p. 726). Although all public employees often perform important services, some of their work is not “essential” in the way we have defined the concept. As Meltzer and Sunstein (1983) argue, “no catastrophe would result if employees of the American Battle Monuments Commission were permitted to go on strike”. As argued above, the essential nature of a service is determined by the probability that its interruption will result in immediate danger

⁴Time is an important dimension to identify essential services. By following this reasoning, we can conclude that discontinuity in the delivery of a non-essential service that may have possible long-term consequences should be a sufficient reason to declare that service as an essential one. However, ILO does not necessarily recognize that possibility. For instance, its Committee on Freedom of Association makes it clear that “the possible long-term consequences of strikes in the teaching sector do not justify their prohibition” (ILO 2006, n.3, para.590). Short-term effects seem to matter more than long-term effects at the time of deciding when a non-essential service should be treated as an essential one. But, on further consideration, this does not seem right. The interrupted delivery of a non-essential service that has a long-term effect on the population should also be a matter of concern. After all, discontinuity may also affect the quality of a service. The problem is that these two dimensions of continuity and quality are not fully independent. Teachers who never stop working may provide a worse service than those who strike in a frequent basis. However, it seems unlikely to expect quality from an educational system in which a non-trivial number of educational hours are missed. Therefore, it is not possible to evaluate different services according to similar measures and standards of quality.

to the community and not by the status of those who perform it.

3 Essential services and Workers' freedom

Let us assume that states have an obligation to ensure the provision of essential services.⁵ In order to guarantee that provision, states might need to intervene in the process of production and delivery of those services. This need for intervention arises from the fact that, in many cases, states cannot rely on the private market as a vehicle for providing essential services since the desired outcomes may not result from transactions among free economic agents. Private companies may not have incentives to invest in the production and delivery of essential services.

States regulate the provision of essential services through different instruments.⁶ Here I focus on two regulations specifically directed toward workers. First, states can minimize the likelihood of reduction or stoppage of services by limiting workers' bargaining instruments. For instance, several countries severely limit or prohibit strikes in essential services in order to prevent work stoppage. Second, states may compel people to work in the production and delivery of essential services. That includes, for instance, compelling workers to serve needy populations in underserved areas or implementing compulsory community service programs. These two forms of regulation can interfere with two important workers' freedoms: the freedom to strike and the freedom of occupational choice. On the one hand, although workers in liberal democratic societies are free to quit a job whenever it suits their interests, the freedom to strike may not be fully granted for essential services workers. This happens even in cases where the freedom to strike is widely considered to be both a necessary instrument to compel an employer to bargain collectively and also a means to make freedom of association effective. Without this type of freedom, workers and their organizations may not be able to

⁵Note that this assumption is not universally accepted. For a classical rejection of this assumption, see: Nozick (1974)

⁶For a discussion of alternative regulatory mechanisms see: Baldwin, Cave and Lodge (2012).

further and defend their social and economic interests. Freedom to strike gives credibility to workers' bargaining power.

On the other hand, contemporary democratic and market-based societies typically guarantee the free choice of careers and occupations. People living in those societies can decide what occupation or profession they would prefer to enter. Occupational freedom is commonly understood as the absence of coercion from the state or any other agent to perform a particular job.⁷ This broad definition can be interpreted in three different ways.⁸ A first interpretation is that violations to occupational freedom occur whenever the state coerces people to choose and perform a specific job. This happens when, for example, talented individuals who prefer to work as gardeners are forced to become doctors in a centralized effort to address unmet (but essential) needs of the society at large. Freedom of occupation is violated because some people (e.g. the talented) are not free to choose the occupation that they would like to enter. A second interpretation is that occupational freedom is violated whenever a person is forced to perform her favored job in unwanted conditions. As examples, we might think here of teachers and physicians who are forced to work with an underserved population before they can obtain a license to practice their profession at any location they might prefer. In this case, those doctors and teachers who do not want to work with the underserved are free to work in other professions. The state is not forcing people to become teachers or doctors, but does compel graduates of those professions to put the needs of the community before their own preferences.

Finally, the most expansive interpretation: occupational freedom is preserved when the first two criteria are fulfilled (e.g. nobody is forced to choose and perform a particular job) and, furthermore, when workers also have the real opportunity to avoid jobs they would

⁷See for instance: Cohen (2008), Fabre (2010), Otsuka (2008) and Casal (2013).

⁸ For the sake of the argument I am assuming here that there is no discriminatory treatment in liberal democratic societies. For example, occupational freedom is also violated when women are not allowed to practice a particular profession. For an evaluation of different notions of occupational freedom, see Lucas Stanczyk, *The Right to Free Choice of Occupation* (unpublished ms., Department of Political Science, Massachusetts Institute of Technology, 2014).

rather not work. Thus, if a worker's deliberation comes down to choosing between working an undesirable job or not working at all, then the society at large has not met the requisite criteria for freedom of occupation (Otsuka 2008, p. 442). It is worth noting that the first two interpretations of freedom of occupation require that nobody interferes with another person's choice of work. These are negative concepts of freedom: an agent violates the liberty of free choice of occupation when it performs a deliberate action that prevents a person to pursue a particular career or forces her to do a particular task. According to the first two views, freedom of occupation does not require that I must have assistance in obtaining the job I prefer – but merely that nobody should hamper my efforts to choose the career which I find the most fulfilling.

By contrast, the third interpretation of occupational freedom is a positive one: occupational freedom not only depends on the absence of interference by third agents in our occupational choices, but also depends on having real options to opt out of undesirable jobs. It is beyond the scope of this paper to evaluate the separate merits of these three interpretations. The only point I wish to make here is that the essential service argument directly affects the first two notions of occupational freedom. Once we accept the essential service argument to justify limitations on the freedom to strike, we should also be prepared to accept some limitations on occupational freedom, provided there exist alternative formal mechanisms to allow workers to defend their interests when their occupational freedom is somehow restricted.

It is not hard to see why the idea of essential services can conflict with both the freedom of strike and the protection of occupational freedom. The defense of essential services tells us that there are some services that need to be delivered and guaranteed. In a society where people are free to choose their occupation, the potentially undesirable characteristics of some essential services might discourage people from working in such areas. If I do not want to take part in a mandatory community service program or if I want to be a doctor or a teacher but I do not want to work in an underserved area of the country, then my freedom

of choosing among those professions will be limited.⁹ Similarly, essential services workers may enjoy fewer liberties at the time of negotiating their labor conditions (salary, vacations, etc) than workers of non-essential services. We can say, therefore, that essential services affect workers' freedom in two ways. First, people working in the production and delivery of essential services will be subjected to special labour regulations. For instance, police officers, firefighters, and doctors might not be allowed to strike as a way to pursue collective bargaining. Second, essential services workers can be compelled to serve in underserved areas and to work longer shifts than in other professions. It is worth noting that these two freedoms are independent of each other: workers can enjoy freedom of occupation without a right to strike and vice versa.

There seems to be an important normative difference between limiting workers' collective bargaining rights and restricting their career choices. Where does that difference lie? A first possible answer is that the surrender of workers' rights is a matter of degree. Workers' collective bargaining rights are not as basic and essential as occupational freedom. The thought is that freedom to practice my profession in the location that I prefer is more valuable than the freedom to strike. To serve, for instance, as a teacher or a physician in underserved areas might be considered an act of supererogation, but not an obligation of justice. We may think that it is beyond duty to serve in areas that are difficult to staff.

A second argument is that those workers who are mandated to perform tasks in underserved areas or those who are obligated to participate in community service programs may not have access to the same mechanisms to negotiate and regulate the terms of their appointments as workers laboring in other sectors. In contrast, workers who do not have

⁹It could be argued that this is not a problem of freedom of occupation, since people are free to become doctors if they want to. They simply cannot work in those areas they prefer. But that is true for many activities. For instance, I would prefer to be a professional football player rather than a political scientist. I am free to pursue both careers. But I cannot have the real opportunity to make my living in the way I most prefer since my talents as a football player are not sufficient to compete in that market. However, these situations differ in a significant way: the freedom of choice in the case of the doctors is affected by a third agent, the state; in the other case there is no agent interfering with my opportunities to be a professional football player. My freedom of choice in the latter case is limited because of my personal talents, not because the state says that I cannot play football.

a right to strike can typically appeal to other collective bargaining mechanisms to defend their interests. As ILO recommends, “where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services” (ILO 2006, para.595). That “adequate protection” refers to the possibility of having collective bargaining machinery – just without also having a right to strike. Although disputed, some believe that employees deprived of the right to strike can be provided with appropriate guarantees to safeguard their interest such as “a corresponding denial of the right of lockout, provision of joint conciliation procedures and where, and only where, conciliation fails, the provision of joint arbitration machinery” (ILO 2006, para.600).

The main argument that I make here, however, is that the essential service argument used to justify limitations on workers’ freedom to strike can also be seriously scrutinized as the basis of justification for some limitations on occupational freedom. In other words, those who – based on the essential service argument – deny workers’ freedom to strike should also be prepared to accept the following notion: that if there were not enough volunteers to work in the provision of essential services in underserved areas or to tackle unmet (but essential) social needs, then the state should be able to limit people’s occupational freedom as well. That is, if financial and status rewards are not strong enough to motivate people to voluntary work in the provision of essential services to needy populations, the state should use other motivational instruments to secure their provision. This argument goes against the view that occupational problems associated with the provision of essential services should be solved through market-based instruments alone. According to this market-based view, monetary incentives should be used to ensure that a sufficient number of people voluntarily accept to work in the provision of essential services (Rawls 1999).

Note, however, that the essential service argument does not tell us that essential services must be provided regardless of circumstances. Rather, it tells us that the state can restrict

some workers' freedoms when the provision of essential services is at risk. It specifically postulates that the freedom to strike should be limited to essential services' workers, provided those workers have access to alternative mechanisms to defend their interests. Analogously, we can apply the same argument for the case of occupational freedom: provided essential workers have mechanisms to defend their interests, the state should be allowed to restrict workers' occupational freedom when the provision of such a service is endangered.

3.1 The essential service argument

Consider the “essential service argument” for restricting workers' freedom to strike. As Gerald Dworkin points out, the case against freedom to strike in essential services is primarily ethical (Dworkin, 1977, p.76). There are two main normative reasons for this. First, there is a presumption that essential services workers have a special moral obligation to abstain from the strike as a form of bargaining.¹⁰

Strikes by workers who perform essential services should be prohibited because the withholding of services can inflict substantial harm to the community. For instance, a nontrivial component of the duties of hospital ancillary workers, ambulance drivers, nurses, and doctors is to be responsible for the welfare of people in their care. Since those jobs are incompatible with interruptions in the service, the right to strike should be prohibited (Cannell, 1985). Second, strikes in essential services typically use the pain brought to the recipient population of these services as a source of bargaining power (Reitemeier, 2000; Loewy, 2000). This kind of collective action is predicated on the hope that the affected recipients of the services (usually poorer or resource-strapped populations which are uninvolved with the decision-making process) will apply outside pressure on the offending management (Glick, 1985). Strikes must cause – or threaten to cause – harm to these recipient populations in order to force the

¹⁰One important formulation of this argument has been used to argue that public-sector employees – in contrast with their private-sector counterparts – should not be granted the right to strike. For the original formulation of that argument see: Wellington and Winter (1969). For a discussion of Wellington and Winter's proposal see: Burton Jr and Krider (1970), Meltzer and Sunstein (1983), and Younger (2007).

employer to yield (Dworkin 1977, p. 79; MacDougall 2013). It is unjustified, some argue, to deliberately punish the recipient populations in order to apply pressure on a disputant (Glick 1985, p.196).

Naturally, these arguments to prohibit freedom to strike lose some of their force if we can show that work stoppages do not involve harm or the risk of harm to the recipient population. There is evidence, for example, that strikes among law enforcement officers do not necessarily have a significant and systematic impact on the rates of reported crime (Pfuhl, 1983). Likewise, there is preliminary evidence to suggest that mortality rates remain unchanged when physicians going on strike (Cunningham et al., 2008). This evidence, however, is far from being conclusive. To begin with, these studies only show that strikes taking place under specific conditions (e.g. hospitals that maintain an efficient emergency service during the strike) may not have harmful effects on the population. We should assume, however, that law enforcement strikes can inflict substantial harm on the population. Consider, for instance, the negative outcomes of the recent case of striking among law enforcement officers in Argentina or the negative effects of myriad other well-documented police strikes (e.g. Boston in 1919, Montreal in 1969).

These studies do not evaluate different levels of harm generated by strikes. The non-provision of essential services can harm people at different levels. The most obvious level is when work stoppage leads to social chaos with several people wounded or, even worse, dead. But strikes might also produce undesirable outcomes at less visible levels. Take, for example, the case of doctors. In contrast to other workers, doctors' primary goal is not to make money or attain social status, but rather to help patients (Loewy, 2000; Goold, 2000; Pellegrino, 2001). In other words, the professional ethic is to elevate the good of the patient above the physician's own self-interest.¹¹ The doctor-patient relationship is based on trust. Trust, Rodger Jackson says, is "critical to the therapeutic encounter because unless patients

¹¹According to the fundamental medical ethics expressed in the Hippocratic oath, physicians must act for the benefit of their patients. This ethical code, Dworkin (1977) says, is contrary to the rationale behind strikes.

can trust their physicians, they will be less inclined to disclose personal information, seek out necessary help, appropriately extend physician discretionary power, follow recommended treatment procedures, or engage in future encounters with physicians” (Jackson 2000, p.508). These complex trust relationships make physician strikes more normatively problematic than similar strikes by, say, public transportation workers (Jackson, 2000, p.505).

But are these arguments sufficient grounds for stripping essential services workers of the freedom to strike? I would argue that there are at least three alternative ways to reject the essential service case for limiting the freedom to strike. First, we can point out that the arguments above hinge too critically on the definition of “essential services workers” as an easily delineated category of worker. Without having a generally accepted standard to distinguish essential from non-essential services, those categories might be too ill-defined (Meltzer and Sunstein 1983, p.737; MacDougall 2013, p.252). As mentioned above, time and circumstances can turn unessential services into essential ones as a strike continues. To grant the right to strike to non-essential workers might make it more difficult to enforce a ban on strikes against essential ones. The latter may think that it is unfair to deny the strike weapon to some workers while it is granted to others (Meltzer and Sunstein 1983, p. 737). Moreover, before institutionalizing a ban on strikes for, say, physicians, it is necessary to show that “there is something about medicine in general that is essential, not just that some medical services are sometimes essential” (MacDougall, 2013, p.252). Not all police officers, firefighters and health care workers produce and deliver essential services. Thus, to deny the freedom to strike to all doctors or all police officers by appealing to the essential services argument can be more difficult to justify. Second, we can argue that the freedom to strike embodies fundamental values which should be protected even if some harm is likely to occur in the process. By adopting this position, the whole notion of essential services becomes irrelevant. According to this view, the existence of potential harm is not a strong motive to limit workers’ freedom to express, represent and bargain their interests collectively. A free society should strive to guarantee its workers the freedom to withhold their work whenever

they believe it is in their best interest to do so.

Finally, it is possible to argue that essential services workers do not possess any special obligation to refrain from going on strike due to the fact that their circumstances are not relevantly special (Brecher, 1985, p.66). At the end of the day, all of us, in some way or another, are responsible for the success or failure of the provision of essential services. All of us are guilty for not doing enough to achieve the goal. Civil servants, politicians, etc, should be in the same position as the doctor or the ambulance driver (Brecher 1985, p. 67). Deaths arising from others' omissions should fall under the same judgment. We can find examples where the allocation of resources could have been decided in such a way that harm was avoided. The responsibilities of government officials to patients – or to others who are prevented from becoming patients because of decisions made about the allocation of resources – are not different from the responsibilities of emergency health care workers. Thus, either those obligations apply to us all, especially to those whose power over the welfare of people is greater, or they do not apply to any of us.

These are important challenges to the essential service argument. However they are not insurmountable. Consider the first criticism. It hinges on the fact that distinguishing essential from non-essential service is a troublesome task. It is true that some services are hard to categorize. Education is a good example of how a service primarily categorized as non-essential could be eventually declared essential. As Wellington and Winter suggest, a teachers strike is unlikely to create an immediate danger to public health and welfare (Wellington and Winter 1969, p.442). Although children do not suffer physical damage when teachers go on strike for a significant period of time, they cease to receive education. The harm is not immediate, but it may eventually arise in the future. Some believe that it is unreasonable to prohibit the freedom to strike in the education sector based on the (potential, but highly vague) long-term consequences (ILO 2006, para. 590). Others, instead, believe that possible long-term consequences are a sufficient reason to restrict somehow the freedom to strike in education.

It should not be assumed, however, that all services are equally complicated to categorize. We could, for instance, conceive of essentiality as a continuum from less to more essential or to separate services into different categories such as essential, intermediate and non-essential according to some particular criteria (Melzer and Sunstein 1983, p. 737; Burton and Krider 1970, p.427). By adopting the latter approach, we might rank order different services after evaluating the probability that a strike will result in immediate danger to public health and safety. Thus, police, emergency physicians and firefighters are an example of essential services since strikes may immediately endanger public health and safety. In this logic, we can categorize as intermediate services all those services whose interruption may be tolerated for a few days. Intermediate services would include sanitation, non-emergency health care, transit, water, and sewage. Finally, non-essential services are those services where strikes of indefinite duration can be tolerated, such as streets, parks, education, housing, welfare and general administration (Burton and Krider 1970, p.428). Since the essentiality of different services is context dependent, it is impossible to provide a fixed list of essential services. There are multiple factors (e.g. climate, demographic situation, the size of the city) that can change the importance of a particular service from one place to another. All we can reasonably do is categorize services according to the probability that their interruption will result in immediate danger to public health and safety.

The second objection suggests that the freedom to strike is a fundamental value for a liberal society. Restrictions or prohibitions on this particular freedom are equivalent to interfering with basic freedoms such as the freedom of speech and association. This objection presupposes, of course, that preserving individual freedom possesses a value of high priority. But it is difficult to defend this idea when the respect for this freedom potentially causes harm to the recipient populations of essential services. The only way to defend this position is to show that the benefits of protecting the freedom to strike (for the specific workers under question) are comparatively larger than the harm (for the recipient populations) it might potentially cause. For example, it should be shown that the objectives of a strike

among physicians are in the best interest of the patients they service. The idea is that this bargaining instrument might aid physicians in obtaining the resources they require to improve the services they provide to their patients. However, that is not always the case. The motivation behind strikes may not be directly associated with the objective of improving the quality of the service that physicians provide.

The final objection to the essential service argument is that essential services workers do not have special obligations that distinguish them from non-essential services' workers (Brecher 1985). The idea is that it is unfair to exclusively limit the freedom to strike to essential services workers because the actions or omissions of others workers such as politicians and administrative bureaucrats can also substantially harm people. The essential service argument is based on the proposition that only essential services workers are responsible for the damage caused by service interruption. Health workers' strikes should be prohibited because of the consequences it may have for patients. But politicians' actions also have consequences for patients (e.g. the poor allocation of resources). Therefore, prohibiting the freedom strike to the former and not to the latter is unfair. Either those obligations should apply to all or they should not apply to anybody.

As Brecher puts it: "if a person's death as a result of strike action is an evil which outweighs the good arising from such action, then other deaths arising from others' omissions – or commissions – fall under the same judgment by just the same token" (Brecher 1985, p.67). This argument assumes that the responsibility for actions and omissions that can harm people should be equally evaluated. But that is a difficult needle to thread. First, the essential service argument assigns responsibility by competency. Firefighters are trained to extinguish fires and rescue people. If my house is aflame, I would prefer to have the assistance of firefighters than the assistance of any of my neighbors. Second, people may get sick because of the actions or omissions of politicians and administrative bureaucrats. Politicians who, for instance, made bad decisions about the allocations of vaccines may harm many people. But the best way to hold politicians accountable for their actions and omissions

is not by denying them freedom to strike, but by holding them electorally accountable. This argument does not recognize that those who also cause harm are evaluated through other mechanisms.

The point is not to determine who should be blamed for a sanitary crisis, higher levels of criminality in the street or the occurrence of a large fire. There are different mechanisms to evaluate and determine the responsibility of politicians and bureaucrats in those acts. It is akin to the situation of a physician refusing to treat my high cholesterol because I did not follow her dietary advice. Even though I am fully responsible for my cholesterol and for the harm that it causes to me, a physician's job is not to assign responsibility and act according to that judgment, but simply rather to treat her patients.

From this, of course, we should not conclude that all strikes should be prohibited. Far from that conclusion, this paper argues that there exist good reasons to limit the freedom to strike for workers producing and delivering essential services. While the essential service argument is not flawless, (i.e. it does not provide a precise and universally practical ethical guide to distinguish all essential from non-essential services), it serves to ground an obligation against striking for at least those workers whose service is generally agreed to be essential (law enforcement, firefighters, paramedics and emergency medical personnel). As long as we agree that there are some services whose continuity must be secured, then we should be prepared to accept the proposition that the state should use different strategies to motivate people to safeguard those essential services. For example, we should be prepared to accept that states can make use of alternative motivational instruments to motivate police officers, doctors, firefighters and so on, to work in underserved areas and needy populations. That includes not only the use of public awareness campaigns and economic inducements, but also of coercive motivational instruments. It is inconsistent, I argue, to advocate for the state's right to prohibit work stoppages in some crucial services and at the same time to deny that the state should (if needed) coerce people to provide those services. Once we accept that the provision of some services should not be interrupted, we should also accept that, wherever

those services do not exist, the state should promote them.

4 Essential Services and occupational freedom

Severe staff shortages and maldistribution of health personnel affect people in both developed and developing countries. Consider, for instance, the fact that about 50 million North Americans live in medically underserved areas – that is, in areas where basic population health outcomes are unmet because of the insufficient number of relevant health workers (Eyal and Bärnighausen, 2012, p.23). Those numbers become even worse in some developing countries where poor working conditions and low wages facilitate a global emigration flow of their health personnel to high-income countries (Lehmann, Dieleman and Martineau, 2008).

The essential service argument recommends limiting essential services workers' freedom to strike because of the harm that the interruption of services may produce on the population. If we took this argument seriously, we should conclude that the state has obligations of justice to provide essential services to the whole population. The difficulty appears when the required human resources are scarce; particularly when there are not enough volunteers to work in the provision of those services. Curiously, this problem has been scarcely discussed in the recent distributive justice literature. With a noticeable focus on the distribution of non-human resources, the contemporary literature on distributive justice barely addresses the problem of allocating people to needed occupations. We can identify, however, three main answers to that problem. The first answer suggests that the only thing the state can do in those cases is to either provide material incentives or to persuade people to perform needed services (Rawls, 2001, p.64). Consider again the case of physicians. Most physicians do not want to work in the provision of health care in deprived or isolated areas. As Eyal and Bärnighausen point out, in isolated areas physicians not only may find themselves separated from their friends and relatives, but they may also fail to locate the sort of education and cultural opportunities they want for their children (Eyal and Bärnighausen 2012, p. 24).

There is a cost associated with living in places where the access to running water, electricity, or communication facilities can be limited.

According to this first view, the state should not motivate physicians to provide essential services by resorting to coercive mechanisms such as a threat to revoke their medical license or to pay a fine. It should not use negative inducements that will increase the cost of not working in a particular location. Rather, the argument is that the state should either use persuasion to convince health workers about the importance of serving in underserved areas or use material compensation and pay them money above and beyond their average salary. For example, states could provide scholarships, housing, higher salaries and many other benefits to motivate physicians to serve in specific areas (Lehmann, Dieleman and Martineau, 2008; Wilson et al., 2009). Similarly, it could launch different public communication campaigns encouraging physicians to work in underserved areas because that is the normatively justifiable thing to do. Although this first alternative preserves occupational freedom, it does not tell us what the state should do when persuasion and positive inducements are insufficient to motivate physicians to provide essential services.

Inspired by the work of Gerald Cohen and Joseph Carens, a second view says that people have non-enforceable obligations of justice to work in the provision of essential services (Cohen, 2008; Carens, 1981). That kind of work can be conceived of as just one of the many things that people – as a matter of justice – are obligated to undertake of their own volition, but that we would not seek to force them to do (Gerald Cohen 2008, p.218). Justice – Cohen says – “cannot be a matter only of the state-legislated structure in which people act, but rather is also a matter of the acts they choose within that structure” (Cohen 2000, p.122). It is not possible to achieve justice only by formal rules; rather distributive justice also requires a just ethos that goes beyond conformity with the rules. That is, “the set of sentiments and attitudes in virtue of which its normal practices, and informal pressures, are what they are” needs to be oriented towards equality (Cohen, 2000, p.145). Inequality, in Cohen’s view, can only be overcome after a revolution in motivation, as opposed to simply changing the

formal rules that regulate the society (Cohen 2000, p.120). In this case, an ethos of solidarity should guide physicians toward working in underserved areas in order to benefit the least advantaged in society. This does not endorse, however, the idea that physicians should be coerced to serve needy populations. An ethos of solidarity does not threaten occupational freedom because it is not legally enforced (Cohen 2008, p.181–229). But this solution shares the same problem as the first alternative: it does not tell us what to do when an insufficient mass of people follows the guidance of the ethos of justice.¹²

These two arguments are in tension with the justification behind the essential service argument. Acceptance of that argument requires securing an uninterrupted provision of essential services with a universal scope. Put differently, the goal is that the allocation of those services is not segmented or stratified. Those who live in isolated or deprived locations should also have opportunities to access essential services. The challenge is to allocate human and non-human resources to address the essential needs of the population in a context in which not enough people choose to work in the provision of those services. We can either accept the scarcity of volunteers and justify the non-provision of essential services based on that fact, or we can accept that the state may compel people to work in the provision of those services. As we already saw, the first possibility is incompatible with the essential service argument. The second one is not. Does that mean that whenever there are not enough volunteers to provide essential services the state should coerce people to do the job?

A third view argues that, in an effort to improve human welfare, it may be permissible to restrict occupational freedom (Stanczyk 2012). Liberal theorists believe that basic freedoms (e.g. freedom of movement, occupational freedom) should only be restricted when the provision of the basic liberties themselves is affected. A conscript army, Rawls says, may be justified “on this basis alone despite the fact that conscription infringes upon the equal

¹²It is fair to notice that Cohen’s argument is meant to address the problem of inequality that can appear when talented members of society (e.g. physicians) refuse to provide services unless they receive substantial material incentives. Cohen’s main concern is that the use of economic incentives as a motivational strategy goes against egalitarians ideals of distributive justice since it only increases inequality in society. Talented people, Cohen argues, should be motivated by an ethos of justice and by material incentives.

liberties of citizens” (Rawls 1999, p.334). But if we believe that, as a matter of justice, states are obligated to supply essential services (provided that the burdens of compulsory service are distributed fairly), then it can be permissible to compel people to work for welfare-improving purposes (Stanczyk 2012, p.164). The argument that I defend in this paper can be understood as an extension of this third view. In particular, my point is simply that state coercion should take the place of market incentives when the overall costs associated with the positive inducement solution are much higher than the negative inducement option.

We can ask at what point state coercion should take the place of market incentives and persuasion. Although communication campaigns and other forms of persuasion can be dismissed because of their difficulties in engaging people in the provision of essential services, the use of market incentives is commonly considered the most adequate solution. But even this solution is not completely satisfactory.¹³ Even when governments can make an irresistible offer and pay extraordinarily large incentives to guarantee the provision of essential services, the positive inducements required in that case may be high enough to increase the cost of services to levels that are unaffordable in practice for many societies.

For example, in the global context, lower-income countries would be required to provide unaffordable positive inducements in order to reduce the emigration of their physicians to developed countries. We could argue that if there is not enough money to raise the salaries of doctors in underserved areas, then this as a problem of global inequality that should be solved through the redistribution of wealth across international boundaries. However, in this case we have to weigh the costs of restricting occupational freedom against the costs of waiting for global redistributive policies that would allow us to pay physicians high enough

¹³The market incentives solution also raises an important normative challenge, namely, the debate about the levels of inequality we are willing to accept and tolerate. Consider, for example, the case of physicians with astronomical salaries who work in highly deprived areas. It may be argued that the use of exceedingly large positive inducements to motivate people to provide important services can create morally troubling levels of inequality. I do not disagree with the idea that by raising salaries to astronomical levels we are allowing unacceptable inequality and compensation. But a discussion of that argument is beyond the scope of this work. The inequality case against the use of market incentives is independent of the essential service argument that I discuss here. I want to thank Lucas Stanczyk and an anonymous referee for pressing me on this point.

to retain them in underserved areas.

To return to the question of freedom to strike, we could argue that this freedom should always be allowed since it would be possible to find the appropriate positive inducements to motivate essential services' workers to continue their work and avoid strikes. But that, of course, is a problematic solution. On the one hand, the cost of retaining essential services' workers might in many cases become unaffordable. On the other hand, essential services' workers could become incentive seekers who exploit the essential character of the service they provide. Restrictions to the freedom to strike are precisely justified to avoid this very problem.

To say that the state, in order to be consequent with the essential service argument, may need to coerce people to work seems – at first blush – unacceptable by liberal standards. There are three arguments against the case of compulsory service. First, there is a basic liberty objection: some basic individual liberties (e.g. freedom of speech, liberty of conscience, freedom of movement and occupational freedom) can be “limited and compromised only when they conflict with other basic liberties” (Rawls 1999, p.54). Mandatory contribution to the provision of essential services can be perceived as a violation to basic freedoms. Second, compulsory programs to recruit essential services workers can be counterproductive deterrence policies (Gerald Cohen 2008, p.218). The thought is that the prospect of penalties might deter people not only from entering to work in the provision of essential services but also from acquiring the knowledge and skills to become doctors. Thus, the implementation of coercive motivational schemes can have adverse consequences for the supply of essential services workers. A third criticism says that the quality and quantity of essential services can be affected when people are not rightly motivated to work in the provision of those services. The slogan behind this criticism is that “the right thing needs to be done for the right reason” (Gerald Cohen 2008, p.219) Workers truly motivated to voluntarily provide essential services will do a better job than those who are compelled to serve.

Let me begin to address the second and third objections first. It is an empirical question

whether people who voluntarily choose to provide essential services are better workers than those who are compelled to do so. Similarly it is an empirical question whether compulsory programs to recruit essential services workers can deter them from acquiring the relevant skills. Unfortunately we do not have enough data yet to support or reject these objections. All we know is that people live in underserved areas and that compulsory programs that compel health workers to spend a minimum number of years in those areas effectively address the maldistribution of human resources in the short run (Lehmann, Dieleman and Martineau 2008; Wilson et al 2009). However, there is no strong evidence showing that compulsory programs increase the retention of staff in underserved areas or that they improve the quality of health services for underserved populations. As Cavender and Albán (1998, p.1937) suggest, the underlying assumption for the implementation of compulsory recruitment programs is that the increased presence of physicians will improve the health condition of underserved populations. But that assumption does not necessarily hold true. Different studies have shown that compulsory recruitment programs can fail to achieve their goals when the recruited physicians do not have access to a comprehensive educational pre-service program, basic medical equipment, material and an adequate infrastructure. These problems, however, are not necessarily related to the use of coercive motivational instruments per se, but to the background conditions that are needed to implement a successful intervention health program. Because none of these implementation problems are unsolvable, we should ask whether or not there is a normative case against the use of compulsory recruitment programs to address unmet health needs.

The first objection is a normative challenge to the essential service argument. There are two main answers to the basic liberty objection. One approach is to argue that people should be forced to become essential services workers if there is demand for such workers. That is, that if needed, people should be forced to become doctors even though they prefer to pursue any other career choice. Another is to argue that those who voluntarily want to become doctors, teachers or police officers should be required to help the state to address unmet

essential social needs. While in this case essential service workers are under a contractual obligation, that obligation is nonetheless voluntarily assumed. Those who agree to provide essential services are morally bound to accept special contractual obligations that are part of their job. As I discussed before, these two possibilities clearly affect occupational freedom in a different level. They relate to different conceptions of occupational freedom. While the first option can fully restrict occupational freedom, the second limits the ways in which a particular profession can be exercised. Many countries, for instance, incorporate formal training with service. Doctors and other health workers are required to serve and practice their professions in underserved areas for one or two years before they can obtain a license to work in any place they may want to work. The obligations to serve are conceived as being part of the necessary training to become a competent professional. As it has been reported, however, some Ecuadorian medical doctors would rather prefer to have the license to practice medicine without having to fulfill the one year service requirement (Cavender and Albán 1998). Since all medical graduates are required to work in underserved areas of the country before they can be certified, doctors can claim that their occupational freedom is affected because they are not allowed to work in their preferred location after they graduated. Although this is a reasonable position, it is difficult to claim that compulsory recruitment programs – which have both a fixed and short duration and a voluntarily participation aspect – strongly violate occupational freedom. On the other hand, like in the freedom to strike case, limitations to occupational choice should not be accepted at any cost. Liberal societies where the freedom to strike is restricted for essential services workers typically provide these workers with alternative mechanisms to defend their interests (i.e. special legislative or judicial committees, compulsory arbitration and so on).

As in the strike case, we need institutional mechanisms that make limitations on occupational freedom more normatively acceptable. Once some form of coercive motivational instrument is used to motivate people to pursue a legitimate purpose, we need mechanisms to monitor and control the use and misuse of that form of power. There are different rel-

evant criteria for this task. The first concerns fairness. Any procedure that assigns people to mandatory work should treat people in an equitable way. For instance, when the scope of compulsory service programs to recruit health workers is only limited to medical students trained in public schools and not in private ones, the state is giving the latter group the opportunity to free ride on the essential service provided by the former. A second criterion is efficiency: a mandatory program to recruit workers to perform essential services whose costs outweigh its benefits – or one that is more expensive than an equally beneficial alternative – should not be implemented. A third criterion is somehow summarized in the concepts of accountability, publicity and participation. Those whose occupational freedom is limited should have institutional mechanisms to monitor, check and indicate where adjustment of the compulsory recruitment programs is needed.

The specifics of those programs should not only be publicly disclosed, but their participants should also have access to formal accountability and participatory mechanisms. To avoid abuses and misuses of power, compulsory recruitment programs need adequate supervision. This is not meant to be an exhaustive list of all the criteria that might be used to evaluate compulsory programs. Rather they are a sample of the criteria that could be employed in the course of assessing the appropriateness of programs that restrict occupational freedom.

5 Concluding remarks

This paper argues that if the provision of essential services justifies limitations on freedom to strike then restrictions on occupational freedom can be justified for the same purpose. Both freedom to strike and occupational freedom are recognized as important individual workers' liberties. While the former is important for ensuring the effectiveness of collective bargaining and freedom of association, the latter safeguards workers from being prevented from choosing and practicing their preferred work. Several arguments, however, have been made to restrict

the freedom to strike for essential services workers. The main reason behind those arguments is that interruptions in the provision of essential services can produce substantial harm on the community. Freedom to strike in essential services should be prohibited or restricted provided that essential services workers will have access to other formal mechanisms to defend their interests.

I proposed an analogous argument to defend restrictions on occupational freedom in cases where there are not enough takers to provide essential services. I illustrated this point by considering the case of compulsory service programs for recruiting health workers. Note, however, that the essential service argument for recruiting health care workers possesses a broader scope. It can be applied, for instance, to justify restrictions on occupational freedom aimed at lessening the shortage of essential services' workers in other areas caused by immigration, brain drain and the maldistribution of human resources. To compel essential services' workers to serve in underserved areas or to work longer shifts than in other professions are only two of many possibilities that can be justified by the essential service argument.

As Fabre suggests, even though governments may be willing to pay for the provision of essential services in underserved areas, there still may be few people willing to do that work (Fabre, 2006, p.58). For example, coercive motivational strategies that limit physicians' occupational freedom can be permissible when the provision of essential services is affected. This, of course, goes against the ideal of maximizing the occupational freedom of those who do not want to practice in underserved areas. But as in the case against freedom to strike for essential services workers, the health interests of underserved populations should be weighed against restrictions on health workers' occupational choice. Those restrictions, however, cannot be traded at any price. Analogously to the argument to limit the freedom to strike, restrictions on occupational freedom should be allowed not only in order to guarantee the provision of some essential services, but also when essential services' workers are provided with adequate protections that compensate them for the limitations placed on their freedom

of action.¹⁴ These adequate protections refer to the different mechanisms that essential services' workers may have to monitor and control the limitations placed on their occupational freedom. The challenge is to provide the affected parties with formal mechanisms to monitor and oversee the execution of mandatory recruitment programs. If my argument is correct, the debate should move beyond the dichotomy of compulsory versus non-compulsory recruitment programs. Instead, more attention should be paid to formal arrangements that can make mandatory schemes more consistent with the ideals of occupational freedom.

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¹⁴Here I am adapting ILO's recommendations for limitations on the freedom to strike to the case of occupational freedom. See ILO (2006, para.595).

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