

Anthony Comegna ([00:19](#)):

Part of what we're starting this year at IHS is what we've been calling the Discourse Initiative. This is an effort to create and sustain a series of academic conversations between scholarly peers from across the ideological spectrum around our shared set of values, including equal dignity and individual autonomy. And these two themes happen to be the cornerstone principles in the thought and work of our guests this week, Professor Jessica Flanigan. If your research sounds like a great match with our Discourse Initiative, visit the [ihs.org/discourseinitiative](https://ihs.org/discourseinitiative).

Anthony Comegna ([00:58](#)):

Right now, you said something at your recent Speak for a Sandwich here at the office that really stuck out to me, and I imagine you fully intended this sort of a thing to really leap out at the audience. You said, "The FDA kills people." So can you break that down for us and explain exactly what you mean?

Jessica Flanigan ([01:22](#)):

Right. So when a person acts in a way that causes someone to die, either we would classify it as a killing or letting die. So, for example, if a person failed to rescue a person, you'd say, "Well, that person let the other person die." So if you saw someone drowning and you didn't wade in to save them, then you let them die. You didn't kill them. The water killed them. But you were in some ways a person who was in the causal chains of events involved in a way that contributed to their death by failing to act. But if you acted in a way that violated a person's rights, then you killed them. And so what do people have right to? They have rights to their body. So for example, if you push somebody off of a boat and then they go into the water and then they drown, then you killed them because their death was caused by you violating their bodily rights.

Jessica Flanigan ([02:15](#)):

When the FDA prohibits people from accessing potentially therapeutic drugs, some of those drugs, which could save someone's life, they violate people's rights because people have rights to decide what drugs to put in their bodies. And when the FDA prohibits them from making that kind of a decision by, for example, holding up access to the drug until it's approved, that prohibition is a violation of people's authority to exercise rights of what I call self-medication. And rights of self-medication are just a subspecies of the more general bodily rights people have that include medical rights, like informed consent. And so that's how the FDA kills people, is that the FDA holds up access to potentially lifesaving pharmaceuticals in a way that violates people's rights and causes their death. And so it's culpable killing.

Jessica Flanigan ([03:07](#)):

It doesn't look like the FDA kills people because it looks like people just die of their diseases. So if a person could've had their life extended or their disease cured by a new drug but they don't get access to the drug, it looks like they died of cancer or ALS or some infectious disease or something, but they didn't. They actually died a regulatory delay. But we don't count those types of deaths as regulatory delay, I think, because we're blind to the kinds of killings that are caused by these types of administrative policies.

Anthony Comegna ([03:44](#)):

It's kind of interesting. It strikes me that this is sort of an inverse of the old idea of the sacred touch of the monarch, that if the King touched you and you were sick you would be cured of your disease. One of

these mystical powers imbued on the King because of suppose supposed connection to God and all of this. And you know-

Jessica Flanigan ([04:07](#)):

That's interesting. It is seemed like we have this... We do seem to think that there are mystical powers imbued to public officials where we think that they should be entrusted to save our lives and prevent us from harm because we couldn't be interested to save our own lives or make medical decisions for ourselves or protect ourselves from harm. It's as if somebody gets behind you desk in the bureaucracy and then they get a bunch of magical powers to know best what's great for your medical decisions, which we would never think that about anybody else. Even our doctors, we don't think that about.

Anthony Comegna ([04:42](#)):

But it does strike me though that one of the objections to your statement might be from, "The people themselves," that they, most people don't trust themselves to be able to make very, very important and complicated decisions about stuff like this. They wouldn't want to be in charge of running their own personal healthcare policy, for example. And it's a lot easier, like it was always a lot easier to just offload the problems of maintaining grain surplus or something, to the local lord. It's a lot easier to just offload the management of these things to the government. I think people want that kind of paternalism.

Jessica Flanigan ([05:26](#)):

Yeah, I mean in some ways I'm sympathetic because I know that if my ideal system of pharmaceutical regulation were to be implemented, my own life probably wouldn't change that much because I'm totally fine with agencies like FDA acting as [inaudible 00:05:42] agencies. And so people who are like, "Oh, I don't know what I'm going to do about health," or whatever, they could just defer to regulatory agencies and trust those experts.

Jessica Flanigan ([05:53](#)):

But the difference is, currently people whose judgment about whether or not they should use a drug or not, when their judgment departs from the judgment of their doctor or when it departs from the judgment of the FDA, they don't have that option. So imagine for example, a person who judges that even though their doctor and the FDA thinks it's probably not a good idea for them to use Adderall, they have other things besides their health that they're concerned about, which their doctor and FDA aren't concerned about. And they want to use Adderall so that they can get ahead at school or something like that.

Jessica Flanigan ([06:24](#)):

On my view, that kind of a person, who doesn't really value their health over and above all of that other values, but thinks that they could make a decision that might be more dangerous to their health, be better for their life as a whole, they should be allowed to make a judgment that departs from the FDA or their doctor. But the current system of pharmaceutical regulation and prescription requirements prevents those people from making those types of decisions.

Jessica Flanigan ([06:48](#)):

So if you love the FDA and you're a risk averse person, I get it. You'll let it have the Good Housekeeping Seal of approval or the Allure Best in Beauty or the J.D. Power and Associates of drugs. It could be any of

these certification mechanisms which we use in other areas of consumer decision-making. And then if people want to take a chance because they think it's worth it for them, that should be there right

Anthony Comegna ([07:11](#)):

Now, so your case right there, I think blended both in a sort of a economic argument for market anarchism and sort of overlapping competing different methods of providing services like law and order or public information for different types of public goods. But then you also have this argument from bodily autonomy and individual rights. So I wonder if you could do some connecting the dots for us between your work on the FDA killing people and your work in other areas, like for example, sex work.

Jessica Flanigan ([07:54](#)):

Right. So in general in a lot of my work, I take the kind of approach of, whatever your moral theory is, I will try to build a bridge and show that there are reasons for rethinking a lot of our policies on both bodily rights grounds and also consequentialist grounds like health and wellbeing type considerations. But ultimately, I think the most compelling case for rights of self-medication or the most compelling case for decriminalizing sex work is going to be grounded in bodily rights considerations. So as it happens, I think that people being given the autonomy to make decisions about their bodies is often a policy that's going to promote their health and wellbeing as well, because nobody has a greater interest in making these types of decisions well than the person whose body it is.

Jessica Flanigan ([08:40](#)):

But of course we've all met some people who are going to make bad decisions and who are not going to be the best judges about what's going to promote their health and wellbeing. So like certain kinds of drugs, you might have that. Even if a decision isn't in the person's overall interest, even if it doesn't promote health and wellbeing, I still think that it's their bodily decision to make. So take intimate choices, so choices about like who a person would sleep with. I'm sure that we've all known people in our lives who have had intimate partners who are just not good for them and it's not a great choice. But you would never say like, "Oh, that's a bad partner. That's a bad person for you to choose."

Jessica Flanigan ([09:18](#)):

You should be legally prohibited from choosing your intimate partners. Why? Because we think that the right to choose your intimate partners is a really important fundamental right, which is justified by bodily autonomy and rights of privacy and freedom of association considerations and all of these other really fundamental protections that we require as part of being a person.

Jessica Flanigan ([09:39](#)):

So now, consider whether or not when those types of bodily choices and intimate choice of going into the marketplace and sex work, whether or not it would be permissible to limit those choices in the marketplace on the grounds that in some cases it might not be in the interest of the worker. I think that as long as a person is making a fully informed, voluntary, consensual decision to choose their intimate partners, it shouldn't matter whether or not money is being exchanged. And so I do happen to think that it would promote overall health and wellbeing to decriminalize sex work. But I think the most compelling reason is just that people have a right to choose their partners and the fact that an economic choice doesn't change that right at all.

Anthony Comegna ([10:22](#)):

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Now, I want to get your reaction to a potential challenge here because have you ever seen a TV show called Married at First Sight?

Jessica Flanigan ([10:31](#)):

No, but I feel like I can imagine it.

Anthony Comegna ([10:32](#)):

It is exactly what it sounds like. Yeah, it's exactly what it sounds like. Two people get married, they meet each other on the altar. And the whole thing is supposedly put out there as an experiment by a couple of professional psychologists. And how they can still practice, I have no idea, because this show is completely ridiculous and everybody on it is clearly making a horrible decision for their life. And so I guess I wonder about your assumption, at least it seems like it might be an assumption, you can tell me if that's incorrect, that people do always have the greatest interest in their own wellbeing. Sometimes it seems like people who... Especially if you genuinely are in need of help of some sort, medical help, psychological help, whatever kind of support that you don't have and you're making really, really bad decisions, contrary to your normal reasonable interests. How do you handle that?

Jessica Flanigan ([11:37](#)):

Yeah, now I don't mean to say that people are always going to be the best judges of their interests or their health and their wellbeing. Of course not. People make unhealthier decisions that are bad for them all the time. What I mean to say is that in general, if you're looking for a presumption, it's more likely that a person's going to know their own interest and wellbeing than any other given person because they have more knowledge about their interests and their values and they have a greater incentive to make those types of choices. But of course, we've all seen TV shows or known people in our lives who don't seem to fit that profile of the informed rational decision maker. And I wouldn't mean to suggest that's the strongest case in favor of respecting those choices.

Jessica Flanigan ([12:20](#)):

The strongest case is this bodily rights choice, these bodily rights types of considerations. But on the other hand, take even like Married at First Sight, maybe those people are making really bad decisions, but it's not the relevant question. The relevant question is whether or not the fact that they're making bad decisions would make them liable to be interfered with by public officials. And so say that I have a friend and she's dating this guy who was the worst and I hate him. And I think he's no good for her. And so I say, "You know what, friend, if you keep on dating that guy, I'm going to have to start taking some money out of your paycheck just to really encourage you to not date him anymore. You're going to have to pay a fine. And you know what? If you're not okay with that, I'm going to have to kidnap you or the guy and lock you in my basement and use some kind of force against you to [inaudible 00:13:17] that decision."

Jessica Flanigan ([13:18](#)):

I could be I could be right that this guy is no good for her, but she or that guy would in no way be liable to be interfered with by me in virtue of the fact that they're making an unwise romantic pairing in this way. Now, say that I put on a police badge and a mayor sash and I pulled everybody in the neighborhood and we all agree. Would that change the fact that she has an entitlement to make these choices even if they're bad for her? No.

Jessica Flanigan ([13:45](#)):

The fact that a person is occupying a public role, the fact that everybody else agrees these types of decisions are bad is irrelevant to the question of whether or not somebody has a right to make those types of choices. And I think that as long as the choice isn't morally wrong, the fact that it's self-harming or imprudent doesn't make a person liable to be interfered with, even if it would give us reason to try to persuade them not to make that bad choice.

Anthony Comegna ([14:09](#)):

What do you think is the single strongest argument in favor of different sorts of paternalism?

Jessica Flanigan ([14:15](#)):

I think that there is two different kinds of arguments in favor of a kind of paternalism, one of which I would reject and one of which I'm more persuaded by. But I think they're both valid. The one that I would reject just on moral grounds is this idea of social costs. So there's a worry that sometimes we have an interest in prohibiting self-harming decisions because we don't want to pay for healthcare associated with the self-harming decisions later. So we can for example like prohibit smoking because if people smoke maybe they'll require more medical care later, as it happens on smoking. I think that's probably not obviously true because smokers might die sooner and then they consume less medical care.

Jessica Flanigan ([15:03](#)):

But even if it were true, I don't think the fact that a person's going to place greater burdens on the healthcare system in virtue of their choices makes them liable to be interfered with. Because if healthcare were a right that people had a duty to provide, I don't think that a person would forfeit their right just because they were going to use it more later. You don't generally forfeit rights just because you're going to use them later. And if healthcare is not a right and it's beneficence and it's just something that people want to provide those that need of charity or the goodness of their heart or a desire to benefit, although they can just withhold those benefits from people who they think are responsible for their extra healthcare needs and so just say no.

Jessica Flanigan ([15:48](#)):

But I do think that that's like a valid argument. So if you think that it's both very important for everybody to have all of their healthcare costs paid for, and also that some people are making choices that we know reliably are going to cause more healthcare costs, and also that the sustainability of that system needs to be maintained, I think that's a pretty intuitive argument that leads a lot of people to support paternalistic regulations.

Jessica Flanigan ([16:14](#)):

I think that the other case that's pretty compelling is just this idea that people are really irrational. That's the worry is at least. So the thought is people have all of these biases we see in behavioral economics. They're influenced by motivated reasoning, availability bias. So it doesn't look like when people are making decisions that those decisions are tracking the reasons. And I find that compelling because I will see people make decisions that I think are status quo bias. People are close-minded to revisionary conclusion. Sometimes I get frustrated, I'm like, "I think that this is not following the reason. There's a debunking explanation here. It's a bias."

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Jessica Flanigan ([16:59](#)):

But I don't know that that's as compelling of an argument against paternalism in public policy. So I do agree that that could be a compelling reason to think that a person should be persuaded or moved away from a choice, or you should try to engage in this kind of debiasing conduct. But my worry about that argumentative strategy isn't that it's wrong, but it's that I think people fail to acknowledge that public officials are also people. And so whatever deficits and the capacity to make decisions that you attribute to ordinary citizens, you should also see that there are other deficits that public officials have that people take on when they act in a public role.

Jessica Flanigan ([17:43](#)):

So yeah, people are biased, people have incomplete information, people are motivated reasoners, but also so our public officials. So yep, every time you see a failure of an individual decision maker, you should, I think, take that to be wary about multiplying their powers to affect everybody else.

Anthony Comegna ([18:03](#)):

Now, I recently read your book, *Debating Sex Work*, which is, one half is your complete legalization position, and the other half your interlocutor defends, what's called the Nordic model, which is sort of a halfway measure.

Jessica Flanigan ([18:21](#)):

Right, Lori Watson.

Anthony Comegna ([18:23](#)):

Yeah. And now I naturally found your argument far more compelling because I mean it agreed with all of my priors of course. And so I didn't find too much to pick at in there. And it's always refreshing to hear it iterated, this idea that you mentioned earlier, that anything that you have a right to do for free, you're perfectly welcome to charge for it and nobody should stand in the way of such a trade. But to a lot of people, that seems like a justification for the rich and the powerful to get away with doing whatever they want and exploiting people's neediness to get whatever goods or services somebody's poverty essentially can offer the marketplace.

Anthony Comegna ([19:17](#)):

So how do you respond to this more Marxist inflected concern that anything that has to do with distribution of the means of subsistence make people who are poor especially vulnerable to exploitation by people who are rich?

Jessica Flanigan ([19:38](#)):

I get it. Yeah, I mean I think that's a good argument. I think that the way that our economics system is structured right now may underprovide for some people's basic needs and that that is not obviously the kind of thing that we should be accepting of, even from a kind of classical liberal or libertarian or anarchy standpoint. So elsewhere in my work, I have argued in favor of a basic income, and I do think that a basic income can be justified on these kinds of grounds because the imposition of property rules isn't going to perfectly align with people's natural rights. And so I think that people who are unable to meet their basic needs by participating in the marketplace would have a claim to a kind of basic income as a form of compensation for the state and position of the system of property claims that we have now.

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Jessica Flanigan ([20:32](#)):

Where I think that the kind of more Marxist analysis goes wrong is in thinking that the remedy to these worries about exploitation or these worries that people are making decisions solely out of their poverty, when they think that the solution to those types of worries is by taking away the remaining options to the poor. So I don't think that you help a person who's economically badly off, a person who's desperate by taking away further options. I think that you make those choices more voluntary by giving them the means to meet their basic needs.

Jessica Flanigan ([21:00](#)):

And then, if people still decide, in the presence of a basic income, to sell sexual services or work in a factory or whatever, that enhances the voluntariness of the choice. Now, short of a basic income, we don't have a basic income, maybe then you think that we should implement these regulations. Because there's a theory that some types of Marxist analysis have that, if you have an intervention into those marketplace, it'll force other employers to offer better conditions to workers or it'll solve these kind of race to the bottom conditions where people are so desperate that they work under really bad conditions or they take really bad jobs.

Jessica Flanigan ([21:40](#)):

I don't think that's true. I think that the more competitive a labor market is, the more power it gives workers to negotiate the terms and condition of their labor, and taking away additional options in the labor market makes them more vulnerable to exploitation, not less.

Anthony Comegna ([21:57](#)):

Yeah. You know, it strikes me that in conversations about things like these topics like sex work, the sort of Marxists left wants to talk about the means of production and how important they are, and they totally ignore the other side, which is the means of coercion. And the classical liberals or libertarians want to focus all on the means of coercion, and they don't think enough at all about the means of production, how important. But I think we got to do something to bring these ideas into conversation with each other and have some synthesis of perspective.

Jessica Flanigan ([22:32](#)):

Yeah, that's my hope. And I do think that critics of that kind of more market anarchist guest approach, they have a good point, which is that our current system falls very far short, even from the market ideal. So even if you are like a free market person, that is not the American economy. We have a system that's characterized by rent seeking and crony capitalism and arbitrary and positions of rules that are enforced with coercion that are property claims that don't really track onto people's rights.

Jessica Flanigan ([23:03](#)):

So, for example, intellectual property, very unclear whether or not that's like consistent with people's individual liberty or if that's just some kind of thing that the government made up that's intended to promote innovation and so it's intended to promote the social good. But general libertarians don't accept these types of governmental interventions that are intended to just promote the social good at the violation of rights. So like I do think that people overlook the play that we have in thinking about the justice of existing property norms when they only focus on what a perfect market would deliver.

Anthony Comegna ([23:41](#)):

## *Ideas in Progress*, Episode 23, Sex Work is Work, Too with Jessica Flanigan

Now this episode, this interview is going to be sort of book-ended with an interview I actually just finished up with Kevin [Vallier 00:23:47], who you took a bit of issue with in your speech here at IHS a couple of weeks ago.

Jessica Flanigan ([23:55](#)):

And Kevin has this kind of like... Kevin Vallier has this sort of like public reason approach, which is that we have to live together without politics being war, and if you have these fair terms of cooperation for everybody living together, that's going to require that you put up with a bunch of people making decisions that you don't agree with. And as long as they're not below a certain threshold of badness, you just got to live with it. That's Kevin's kind of... I mean that's a gloss on Kevin's view, but it's roughly his view.

Anthony Comegna ([24:23](#)):

So I wondered if you could explain the point of difference that you have with Kevin Vallier and his sort of public reason account of the liberal society.

Jessica Flanigan ([24:34](#)):

Sure. Wow. So I'm going to listen to your interview with Kevin.

Anthony Comegna ([24:43](#)):

Rate and review.

Jessica Flanigan ([24:44](#)):

Yeah. So my issue with the public reason approach is that I don't think that it actually solves many of our deep moral disagreements in the way that it says it does. So public reason intends to shift the debate from circumstances where people disagree at the level of their values and they have deep disagreements about how to live together. So, for example, religious people might want to live under a religious rule, but non-religious people might reasonably reject that kind of rule. And there's uncertainty about which kind of society we should have based on these first-order values.

Jessica Flanigan ([25:24](#)):

So the public reason liberal wants to shift the debate and say, "Well, let's not focus on who's right and who's wrong. Instead, let's focus on which set of rules could be supported by a kind of overlapping consensus. Are there any rules that no person could reasonably reject? We'll just kind of kick it up a level and then focus on, how could we live together despite our underlying disagreement about the truth?"

Jessica Flanigan ([25:51](#)):

But of course if you do that, you have to have some idealization, because you couldn't say like, "We'll just include all views and public reason," because some of us are going to be really intolerant or some types of people aren't going to be committed to fair terms of cooperation. They're not really down with the project of living together. And public reason liberals will call those people unreasonable. So you're excluding unreasonable people from the terms of the debate. And on traditional analysis of who is unreasonable, like libertarians are excluded from the debate because they're considered not committed to living in society under fair terms of cooperation. So they're out. And so what that observation

illustrates is that any standard of reasonableness is going to be importing in some kinds of substantive considerations about justice.

Jessica Flanigan ([26:35](#)):

Then we get this kind of system, which the public reason liberals are going to call a legitimate government, and that might fall of the truth about justice. So say that there's some people who are right about what justice requires in society, but this kind of public reason standard is going to find this overlapping consensus of agreement, which will fall short of the truth about justice because the people who are right are going to make compromises. People whose views are not as obviously close to justice or something.

Jessica Flanigan ([27:04](#)):

And so then my objection to that is that any reason to exclude the reasonable people is also going to be a reason to exclude the people who are just wrong about justice. So any reason that you're going to say, "Well certain views are off the table," and it's also going to be a reason that, "Why we wouldn't we just keep on idealizing which views are included so that we only include the right ones?" But then if we just only include the correct views about justice, then we would just be back to doing first-order moral theory about how we should live together. And then there's like kind of concept of agreement or overlapping consensus or reasonable [inaudible 00:27:39] or anything like that. All of those concepts will just fall away, except in so far as justice requires something like tolerance or justice requires letting people participate or something like that, which it probably does.

Jessica Flanigan ([27:53](#)):

And then if you say like, "Well let's not do that because we want to include all of these voices. We want our government to reflect people's views even if those people's views are wrong. Well then let's go the other direction. Let's include the unreasonable people. Let's include the intolerant people. Maybe even let some libertarians in." But then once you do that, then the way that you're living together starts to look more like you're just taking a poll, and that we know that we're just going to be entrenching other people's wrongheaded views about what justice requires then in virtue of including them within the public political culture.

Jessica Flanigan ([28:26](#)):

So I think that the public reason liberal occupies a very difficult middle ground in terms of what their standard of legitimacy is going to be informed of, because any standard of legitimate government will either have preference to idealize up and then just go for justice, which is what I think we should do, or idealize back down, be more inclusive, in which case you include a bunch of bad views and then you're just like taking a poll to decide how we should live together. And that seems obviously not the way to go.

Anthony Comegna ([28:57](#)):

Jessica Flanigan is a Professor of Ethics and Critical Thinking at the University of Richmond, and she's yet another of our faculty with a strong PPE focus. She brought that background out in full force at her recent Speak for a Sandwich here at the office, it's fundamental throughout her books, and I'm sure you heard it here. Is sex work work? Well, honestly, this really should be another place classical liberals and old school labor lefties can agree. Of course, sex work is work. Of course, it is. Let's not deny a worker's autonomy or their experience and identity for the sake of some kind of moral paternalism.

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