

CHAPTER 1

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RATIONING HEALTH CARE: INHERENT CONFLICTS WITHIN THE CONCEPT OF JUSTICE

1. INTRODUCTION

There is an almost universal conviction today that no society, even one as affluent as ours, can afford to provide all its citizens with the benefits modern medicine makes possible. There is every prospect that this disparity will become even greater in the foreseeable future. As a result some form of rationing is deemed necessary for both the good of individual and the common good.

Any scheme of rationing, de facto or planned, involves an unavoidable tension between what is owed to each person in a society and what is owed to the common good of all the members of society. These are precisely the two beneficiaries rationing is designed to serve. Rationing therefore necessarily brings commutative and distributive justice into conflict. Satisfying one form of justice unavoidably compromises the other.

In this essay I wish to examine this conflict, as well as other conflicts within the concept of justice when it is considered within the context of rationing. I will use managed care as it exists today in America as a paradigm case. But in doing so, I recognize that even if managed care as it is today were to implode, the problem would remain. The conflict within the several dimensions of justice is inherent in any rationing scheme.

Is it possible to reconcile commutative and distributive justice? Or, is the conflict irresolvable without compromising one or both? What are the respective obligations of health care professionals whose traditional focus has been the individual, and the obligations of policy makers whose focus has been the body politic? Can a balance be struck that itself meets the test of justice? How do commutative, distributive, and general justice relate to each other? What is their proper relationship when rationing is necessary?

I will approach these questions in the following sequence: First by an inquiry into the concept of justice and its kinds, second by an application of the most relevant of these concepts to health and health care, third by outlining the conflicts in the obligations of justice arising out of rationing and lastly, by placing the preceding discussion within the context of social justice and the good society.

I shall argue that any system of conscious rationing places the justice owed to individual patients and that owed to the common good in conflict, that the conflict is

reflected most acutely in the clinical encounter and in professional ethics, that there is a proper ordering of individual to the common good which enables health professionals to balance the conflicting obligations of justice and that, finally, accountability for the proper ordering of justice within health care lies as much with society as it does with individual health professionals.

2. THE CONCEPT OF JUSTICE

The history of philosophy is replete with attempts to clarify the notion of justice (Berry, 1989). Different conceptions have been tied to virtue ethics, political philosophy or ideology, and determined by empirical, rational, or socially constructed conventions. No attempt is made here to unravel these sometimes-conflicting ideas of justice. Rather I will use major elements of the classical medieval conception of justice as a virtue as best exemplified in Plato (*Republic* and *Gorgias*), Aristotle (*Nicomachean Ethics*), and Aquinas (so-called *Treatise on Law*). I will use justice also as a principle of bioethics as adumbrated by Tom Beauchamp and James Childress (Beauchamp and Childress, 2001).

Plato's notion of justice is perhaps the least immediately applicable to our problem but its elements are fundamental for any of the others. Plato's *Republic* is a detailed argument for education in the ideal state, intertwined with the idea of justice. In it Plato sets out to say what justice is, and why it is essential to the well being of the individual and the state. Indeed, Plato uses the state as an analogy to make clear what he means by justice in the individual soul. In the state justice means that every member of the community fulfills that function for which he is naturally most fit (*Republic*, 433a-d). But justice in the exact sense can only be found in the soul of man, in that quality through which every part of the soul performs its function and does so in unison with other parts.

Justice is therefore for Plato a virtue, i.e., an habitual disposition to unite the conflicting forces within the soul, which is necessary for happiness. Justice as a virtue is independent of external shifts of politics, power, or government, quite the opposite of the distorted notion of justice as power advanced by Thrasymachus in the *Republic* or Callicles in the *Gorgias*. Justice thus was for Plato a key member of the quartet of the cardinal virtues along with courage, temperance, and practical wisdom.

Aristotle, like Plato, saw justice as a virtue in some ways essential to and underlying all other cardinal virtues. Justice is an internal disposition like the other virtues but it is also externally oriented since it disposes us to act well in our relations with others. It also carries a sense of duty - of obligation, i.e., to render unto others what is their due. This sense of duty is stronger in justice than it is in the three other cardinal virtues, which are more interiorly focused.

In Book V of his *Ethics* Aristotle distinguishes several kinds of justice or more properly several contexts of human relationships within which the virtue of justice may be manifest. One is general justice, which embraces the whole range of obligations each member of society owes to the common good and the community.

It consists in giving the community its due. Distributive justice is for Aristotle a more particular justice in which society or the community renders to each of its constitutive members what is his or her due usually in accord with merit. Or put another way, distributive justice renders equally to equals and unequally to unequals.

A third variety of justice, particularly for Aristotle, is commutative justice that which governs relationships and transactions between and among individuals. Here the obligation is to render to each his due. The community becomes involved here if contracts are broken, harm is done or transactions are unfair. The community then renders justice which is retaliatory, or punitive, or retributive, or compensatory, depending upon the nature of the infraction. When justice becomes the subject of positive law, it is legal justice. Too often today the whole of justice is mistakenly reduced to its legal expression.

In addition, Aristotle speaks of equity or *epikeia* - that is, a correction of law where it might be defective because of its generality (NE 1137-31, 1138, and Rh 1374a-26, b22). This is a correction of legal justice in circumstances wherein it is not possible to make a correct universal statement (NE 1137b10-12). It is expressed in legal systems of the western world as the law of equity.

Aquinas follows Aristotle and defines justice as a habit which makes a man "... capable of doing just actions in accordance with choice" that is to say it is done knowingly, and "... resolutely for a good intention" (ST Q.58, Art1). Aquinas also more definitively, like Cicero, relates justice to the natural law. Along with Aristotle (NE 1130a12), Cicero (De Officiis, I, 7) makes justice in some way essential to every virtue (ST Q5J, Art. 6). "Therefore the proper end of justice is nothing else than to render to each is own" (Q 58, Art. 11). Like Aristotle, Aquinas distinguishes kinds of justice: commutative justice directed to private and individual transactions, distributive justice directed to proportioning common good and among the members of a community (ST Q. 61, Art. 1).

3. PARTICULAR JUSTICE AND MEDICAL AND HEALTH CARE

Each of these divisions of justice has a particular relevance to the question of rationing health care. Of particular interest for this enquiry will be commutative justice, distributive justice, general justice, and *epikeia*.

Commutative justice pertains to what is owed in the relations within clinical medicine, between the health professional and the patient. Distributive justice pertains to what is owed by society to its members in the allocation of health care resources. General justice pertains to what individuals owe to the common good in their uses of health care resources, and *epikeia* or modulated justice pertains to the preservation of equity in each of the other three forms of justice. Retributive justice pertains in the three foregoing as well to the recompense owed those who have suffered injustice in either commutative or distributive justice in the past.



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