Positive rights, negative rights and health care

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ABSTRACT

In the current debate about healthcare reform in the USA, advocates for government-ensured universal coverage assume that health care is a right. Although this position is politically popular, it is sometimes challenged by a restricted view of rights popular with libertarians and individualists. The restricted view of rights only accepts ‘negative’ rights as legitimate rights. Negative rights, the argument goes, place no obligations on you to provide goods to other people and thus respect your right to keep the fruits of your labour. A classic enumeration of negative rights includes life, liberty, and the pursuit of happiness. Positive rights, by contrast, obligate you either to provide goods to others, or pay taxes that are used for redistributive purposes. Health care falls into the category of positive rights since its provision by the government requires taxation and therefore redistribution. Therefore, the libertarian or individualist might argue that health care cannot be a true right. This paper rejects the distinction between positive and negative rights. In fact, the protection of both positive and negative rights can place obligations on others. Furthermore, because of its role in helping protect equality of opportunity, health care can be tied to the rights to life, liberty, and the pursuit of happiness. There is, therefore, good reason to believe that health care is a human right and that universal access should be guaranteed. The practical application, by governments and non-governmental organisations, of several of the arguments presented in this paper is also discussed.

When US politicians speak of the need for healthcare reform and universal coverage, they often do so using the language of human rights. Health care is identified as a right and its provision must therefore be guaranteed by the government. Although politically popular, the belief that health care is a right is not uncontested. Opponents of government-mandated universal coverage may argue that health care is not actually a right and so any effort to guarantee its provision by governmental means is misguided. In this paper, I will examine a libertarian or individualist argument that (1) limits the domain of ‘rights’ to only three—life, liberty, and the pursuit of happiness and (2) rejects the status of health care as a right. I conclude, following Henry Shue’s reasoning, that the argument is flawed and then refute some counterarguments that the individualist or libertarian might apply. Next, I will discuss how life, liberty, and the pursuit of happiness relate to Norman Daniels’ ‘equality of opportunity’ argument for healthcare rights. Finally, I will present cases from the USA and other countries where the arguments I have discussed have been used in practice.

A RESTRICTED NOTION OF RIGHTS

Opponents of government involvement in ensuring universal healthcare coverage often argue that the notion of rights must be limited to ‘negative’ rights. Negative rights, unlike ‘positive’ rights, do not impose an obligation on others to provide you with something. A good enumeration of those negative rights, according to Leonard Peikoff and others, can be found in the US Declaration of Independence—life, liberty, and the pursuit of happiness. These rights share a common feature in that they guarantee the right of individuals to engage in certain activities without interference from others. For example, imagine that having a nice garden makes me happy. It is my right to own a plot of land, choose the flowers I want, and arrange them as I please. Anybody who steals, digs up, or tramples my plants violates my right to pursue happiness. However, the right to pursue happiness does not mean that others must actively support me in my gardening activities by providing me with gardening supplies. In other words, the pursuit of happiness is not a positive right in which other people are obliged to help me along. Taken together, the three rights of life, liberty, and the pursuit of happiness mean that you are free ‘to act, and to keep the results of your actions ... to keep them or trade them with others, if you wish.’

They do not grant you the right to be given the work product of other people—you may only obtain their work product on terms that they agree too, as in a business transaction.

The rationale for this restricted notion of rights is simple—when we extend the domain of human rights to include positive rights, we infringe upon the rights of other people. Suppose health care is a right. If it is truly a right, then it would be unacceptable if people were unable to obtain it. The government must therefore ensure healthcare access for all, including those who are too poor to buy it on their own. As the government does not actually produce anything that it could sell to raise money, it will surely have to levy a tax to help support universal coverage. This taxation to provide unearned goods to one group of people, Peikoff argues, is an immoral infringement of the right of the taxed to keep the fruits of their labour. He takes a particularly harsh view, saying that a system in which you have a right to anything at others’ expense means that they become rightless.

Philip Barlow argues that we cannot call something a right if its provision places an ‘intolerable burden’ on others.

Some support for arguing that all proper rights are negative can be found in the Bill of Rights in the US Constitution. These rights are, according to some, framed negatively as restrictions on government authority, not positively. For example, the right to...
free speech in the First Amendment is more properly described as a right to speak without government interference. The First Amendment does not guarantee a right to have people actually hear your message. Even the staunchest of gun ownership supporters would deny that the Second Amendment provides a positive right to have the government buy you a gun.

Arguing against health care being a right is not equivalent to claiming that it is a good thing for people to be without access to health care. Under the argument I have just described, those who are unable to afford health care on their own must rely on voluntary charity. It does no good, the argument goes, to provide the poor with health care when it comes at the expense of other people’s rights.

Peikoff goes beyond discussing his theoretical view of rights and gives an analogy of what happens when positive rights are guaranteed. Imagine that the government seeks to guarantee a right to hair care by making it free to everybody. Soon, folks are lining up to receive exotic hairstyling services at government expense and expenditures skyrocket. Furthermore, some barbers are gaming the system and becoming excessively wealthy under this scheme. A whole new bureaucracy is formed with regulations to ensure ‘fairness’. As layers of red tape are added, the once pleasurable experience of going to the barber becomes a chore and everybody is left yearning for a past era with less regulation and more freedom.1

CRITIQUES OF THE LIMITED NOTION OF RIGHTS

A gut reaction to the libertarian or individualist argument proposed by Peikoff is that if the government uses taxes to ensure the rights of individuals to get an education or obtain food, why could it not also help provide healthcare access? However, Peikoff would simply deny that individuals have a right to education or food when it comes at the expense of others. If you want education or food without earning it through your own labour, you must rely on charity. Henry Shue’s response to the alleged distinction between positive and negative rights, which I will illustrate next, provides a better response to Peikoff.5

Again, what makes the rights to life, liberty, and the pursuit of happiness special in Peikoff’s argument is that they are rights that guarantee your ability to act, not to have others act in a way that benefits you. In other words, these rights can be secured without putting a positive obligation on others to, for example, provide me with gardening equipment or pay taxes so the government can give me gardening equipment. What is the purpose of government then? Presumably government acts as the impartial body that punishes those who would interfere with the rights of others. After all, without an arbiter, the whole concept of rights becomes a paper tiger.

Who exactly pays for the governmental apparatus that secures these rights? The government tracks, prosecutes, and punishes those who violate the rights of others. It provides a visible police force to investigate crime and help deter criminals.6 The police officers patrolling the streets, detectives investigating crime, lab technicians evaluating evidence, prosecutors presenting evidence in court, and judges presiding in court to ensure a fair trial all must be paid. That payment comes from taxes that are levied on individuals.

When the Philippines were invaded by Japan during World War II, the country was a commonwealth of the USA. Presumably the US government had a special obligation to protect the Filipinos’ rights to life, liberty, and the pursuit of happiness. In order to secure those rights for the inhabitants of the Philippines, the USA, along with its allies, was forced to raise a vast military using a draft. Countless young men, drafted involuntarily into service, died in World War II, including in the campaign to liberate the Philippines. The sacrifice of their right to life was the cost of ensuring freedom for the Philippines and other countries invaded by the Axis powers.

These two examples illustrate Shue’s objection to the distinction between positive and negative rights. They show that protecting even the negative rights of life, liberty, and the pursuit of happiness requires some positive action on the part of citizens, perhaps by paying taxes or submitting themselves to the draft. Shue put it nicely by saying ‘A demand for physical security is not normally a demand simply to be left alone, but a demand to be protected against harm’.5 When individuals speak of their rights to life, liberty, and the pursuit of happiness, they do so expecting that the government will do something to protect those rights. The clear moral boundary Peikoff draws around negative rights thus disappears as does his basis for claiming that health care cannot be a right.

RESPONSE TO TWO POSSIBLE OBJECTIONS: REDISTRIBUTION AND EQUALITY OF NEED

Peikoff could respond that (1) the draft is simply immoral and (2) it is acceptable to levy taxes in support of the negative rights (life, liberty, and the pursuit of happiness) because they do not involve a redistribution of wealth. For example, effective law enforcement is a public good that benefits all of us equally and does not involve providing tangible goods or services to individuals at taxpayers’ expense. This differs from universal, government-supported health care in which taxes are used to help provide services and tangible goods such as drugs to those who cannot afford them. Furthermore, Peikoff could argue that while everybody’s healthcare needs vary, nobody has a greater need than anybody else for life, liberty, and the pursuit of happiness. Perhaps this equality of need could exclude health care from the domain of true human rights.

In truth, even the maintenance of a police force involves redistribution of wealth. While effective law enforcement might benefit all of us, those individuals who have zero income cannot contribute to the tax. Compared with their contribution to the tax pool, these individuals are getting a greater service than taxpayers. Not only did they pay nothing, but since a broke individual may well be homeless, he probably benefits quite a bit more from the presence of a good police force compared with the average citizen. For wealthier individuals who have hired private security, the value added from law enforcement is reduced but they still pay the full tax. Therefore, from the perspectives of both the wealthy and the poor, maintenance of negative rights can be redistributive. Redistribution cannot serve as the moral distinction between positive and negative rights.

An even clearer example of redistribution is found in the right to a fair trial—a right that arguably follows from the right to liberty. A fair trial is partly guaranteed by having the support of effective counsel, provided at the expense of the government (or taxpayers) to indigent defendants. This is not only redistributive, but involves providing services to particular individuals at taxpayers’ expense. Furthermore, it is done to support the negative right to liberty. In fact, the Sixth Amendment states positively, ‘...the accused shall enjoy the right ... to have the assistance of counsel for his defense.’ The implication is clear—as Shue argues, positive actions may be needed to protect negative rights.5 Justice Hugo Black wrote for the US Supreme Court in Gideon v Wainwright, ‘This noble ideal [the right to a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him’.
This should pose considerable trouble for the view that ‘true’ (ie, negative) rights never place obligations on other people.

The quote above from Shue helps refute the equality of need argument. Once it is accepted that the rights to life, liberty, and the pursuit of happiness really refer to the right to be protected from harm, it becomes clear that some people do have greater needs for society-provided protection. Consider again the example of the right to a fair trial. Some people can afford to hire their own attorney. Other people, however, cannot afford an attorney and so are provided one by the government. This example illustrates that some individuals have greater needs for government aid to ensure their liberty is protected. Sometimes these individuals need more protection because of their voluntary choices, while others require more protection because of circumstances outside their control. For example, a criminal defendant might be unable to afford an attorney because of educational difficulties that keep him in low-income jobs. Or, he might be an intelligent but unwise individual who gambled away his entire life’s savings. Either way, he has a right to liberty that must be protected by society, perhaps at the cost of a lawyer paid by taxes. Equality of need therefore also cannot distinguish life, liberty, and the pursuit of happiness from health care.

**WHAT DOES THIS MEAN FOR HEALTH CARE AS A RIGHT?**

Even if Peikoff’s dividing line between positive and negative rights actually does not exist, it does not automatically follow that anything can be declared a right. Most people would believe that while hair care would be unreasonable as a right, access to education, food, or shelter might qualify. The difference between hair care and health care, education, food and shelter is that the latter four can be tied to the three rights of life, liberty, and the pursuit of happiness. Any chance for success in life requires that life, liberty, and the pursuit of happiness be protected. The purpose of rights such as access to health care is to ensure some minimum level of opportunity to succeed in society and life.

The other problem with Peikoff’s story of hair care rights is that it improperly assumes positive rights are absolutely unlimited. However, even the negative rights are limited. Even if I work hard and manage to buy a huge arsenal of fireworks for my own personal enjoyment, I cannot detonate them in such a way that I am likely to set fire to my neighbours’ property. At best, Peikoff’s analogy might provide the starting point for a debate over the merits of a government monopoly on health care. Otherwise, it simply serves to remind us that rights must be limited to prevent significant infringement on others’ rights. In any case, his main objection to government-mandated and supported universal health coverage is not that it is practically unworkable, but that it is unethical for the reasons discussed above.

The view that health care relates to life, liberty, and the pursuit of happiness is supported by Norman Daniels’ work. Daniels argues that if we think ‘fair equality of opportunity’ is important, then healthcare access must be structured to help everyone achieve equal opportunity. The metric of opportunity is quantified as follows. Within a society, there is a range of opportunity consisting of ‘life plans reasonable persons are likely to construct for themselves’. The specific range of opportunity available to an individual is a subset of the society’s normal opportunity range. It is unlikely that one person could reasonably aspire to be either a professional football player or a professional jockey—the physical requirements for each are too radically different. Individuals have a certain opportunity range when they are healthy. Illness impairs ‘normal species-typical functioning’ and thus restricts the range of opportunity. Health care therefore helps ensure equality of opportunity by providing or restoring, as closely as possible, normal function. It is this role that makes health care a right.

It is a key point that equality of opportunity does not mandate that everybody has access to the entire normal opportunity range. Otherwise, as Buchanan points out, this would mandate extravagant spending on health care in a futile effort to achieve an impossible goal. Regarding health care, equality of opportunity simply means eliminating barriers to an individual’s reasonable life plans that arise from deviations from normal functioning.

**EQUALITY OF OPPORTUNITY ARGUMENTS IN PRACTICE**

In the current debate about the US healthcare system, the equality of opportunity argument has been put forward in the call for reform. The Ethical Force Program, organised by the Institute of Ethics at the American Medical Association, identifies equality of opportunity as one of three major American values, with the other two being justice and compassion. Taking these three values together, the Ethical Force Program has proposed a set of four ethical obligations that it believes should guide healthcare reform. Stated briefly, those four obligations are: (1) universal, equal access to adequate healthcare benefits; (2) implementation of an ethical process for determining the extent and limits of healthcare benefits; (3) sustainability of the system; and (4) clear responsibilities and accountability for the relevant stakeholders.

The Committee on Ethics of the American College of Obstetricians and Gynecologists (ACOG) has also issued an opinion on healthcare reform. Like the Ethical Force Program, the ACOG committee identifies values that it believes underlie the need for healthcare reform—the appropriate goals of medicine, the social covenant and justice. The appropriate goals of medicine are essentially ‘to promote health, cure disease, and prevent suffering’. The social covenant reflects a sense of community and interdependence among individuals—all persons are ultimately dependent on the care of others for their health needs’. Finally, the ACOG committee follows an egalitarian view of justice that emphasises equality of opportunity. Health is viewed as a particularly important ‘background condition’ that is necessary for individuals to utilise other goods that society provides fully. As long as defined subsets of the population face worse health outcomes because factors beyond their control prevent access to health care, it is difficult to say that justice and equality of opportunity are being protected.

**SOME PERSPECTIVES FROM OUTSIDE THE USA**

The USA is clearly not the first country to face questions of how best to promote equitable healthcare access. Norway, for example, follows the ‘social democratic welfare state model’ in which health services are largely the responsibility of the government. A 2007 document released by the Norwegian government lays out plans to help reduce disparities in health. One passage reads:

‘...it is important to respect the right of the individual to have authority and influence over their own life. However, the individual’s sphere of action is limited by factors outside the individual’s control. Even lifestyle choices such as smoking, physical activity, and diet are greatly influenced by socioeconomic background factors not chosen by the individual.’

This passage can help refute the ‘equality of need’ argument I considered earlier. In staking out this position, the Norwegian
government has accepted the view that individuals, due to circumstances that are often beyond their control, may be impaired in their ability to effect change in their own lives. That is, some individuals have greater needs for society-provided protection than others. This view can also be closely related to the social covenant and interdependence emphasised by the ACOG Committee on Ethics—we all, in some way or another, are dependent upon others for the protection of our health.

In neighbouring Sweden, many studies have been carried out on how different subgroups of the population utilise healthcare. As lower socioeconomic status is associated with poorer health, it would make sense that the poor would have a higher utilisation rate of healthcare services. However, this group’s actual demand for healthcare is lower than expected, a finding attributed to outside factors influencing the decision to seek care. In other words, perceived need is not the sole determinant of healthcare demand—other factors that include access, economics and education also affect demand. The finding that healthcare demand does not directly relate to perceived need provides empirical evidence to support the Norwegian government’s statement above that outside factors can limit an individual’s ‘sphere of action’. It would make good sense for the government to take steps to correct the unfair restriction in different subgroups by taking steps to correct the unfair restriction in individuals’ abilities to help themselves. In fact, the Norwegian white paper continues:

‘As long as systematic inequalities in health are due to inequalities in the way society distributes resources, then it is the community’s responsibility to take steps to make the distribution fairer.’

In this particular sentence, substituting ‘legal defence effectiveness’ for ‘health’ would yield a rather uncontroversial statement in agreement with the Gideon v Wainwright decision. Why should health care be different?

CONCLUSION

There is more to Daniels’ theory of equality of opportunity, including questions of whether it can help make decisions about rationing care. These issues have already been discussed in the literature. My primary point with this paper has been to refute the belief (1) that only negative rights are ‘true’ rights and (2) that health care is therefore not a right. Adequately protected negative rights, like positive rights, can impose obligations on others, as Henry Shue has clearly shown. Furthermore, different people may need different levels of positive, redistributive action by government to protect their rights, whether it is the right to life or the right to health care. The health policies of Sweden and Norway provide examples of how different governments have understood that the full realisation of rights can require public sector intervention. Access to health care, as argued by Norman Daniels, the Ethical Force Program and ACOG, plays an important role in ensuring equality of opportunity for individuals to succeed in society. Far from ruling it out, the rights to life, liberty, and the pursuit of happiness cited by the libertarian and individualist actually provide a reasonable foundation for establishing a right to health care.

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