Debate

Another peep behind the veil

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Abstract

Harris argues that if QALYs are used only 50% of the population will be eligible for survival, whereas if random methods of allocation are used 100% will be eligible. We argue that this involves an equivocation in the use of "eligible", and provides no support for the random method. There is no advantage in having a 100% chance of being "eligible" for survival behind a veil of ignorance if you still only have a 50% chance of survival once the veil is lifted. A 100% chance of a 50% chance is still only a 50% chance. We also argue that Harris provides no plausible way of dealing with the criticism that his random method of allocation may result in the squandering of resources.

Harris maintains that a rational egoist behind the veil of ignorance (ie choosing impartially) would reject QALYs as a method of allocating resources for which he or she is in competition. He maintains this, in part, because he believes that rational egoists are risk-averse:

"The person behind the veil is, by hypothesis, a rational egoist. Such individuals are presumed, certainly by Rawls, to be risk-averse. The risk-averse weigh the down side more than the upside. What risk-averse rational egoists want behind the veil is the best chance of not being the ones who fail to benefit from treatment by any selection procedure used once the veil is lifted".[1]

However, in presuming that individuals behind the veil of ignorance are risk-averse Harris is begging an important question. Rawls certainly did *not* assume that a rational egoist must be risk-averse by virtue of the fact that he or she is a rational egoist. He left this very much an open question. In talking about the principles which might be chosen from behind the veil Rawls explicitly states:

"The essential thing is not to allow the principles chosen to depend on special attitudes toward risk. For this reason the veil of ignorance also rules out the knowledge of these inclinations: the parties do not know whether or not they have a characteristic aversion to taking chances".[2]

It is an open question, then, whether the rational egoist is risk-averse. Not surprisingly, we maintain that the rational egoist is a utility maximiser, and will only be averse to taking risks when this attitude of caution will maximise his or her expected utility gain. But the whole question of risk-aversion is really a red herring. As we maintained in our rejoinder to Harris, whether treatment is offered according to QALY principles or randomly, since it is only offered to one patient, there is a 50% chance of being the patient who receives no treatment and dies. Since this is common to both methods of allocation, the rational egoist could disregard it. But similarly, on both methods of allocation there is a 50% chance of being the patient whose life is saved. Then what the rational egoist is offered if treatment is allocated according to QALY principles is a 50% chance of getting a big utility gain (having your life saved when you will have a long life of good quality). On the other hand what the rational egoist is offered if the treatment is allocated randomly is a 25% chance of the same big utility gain and a 25% chance of a small utility gain (life-saving treatment when you will die within a few days anyway).[3]

So the rational egoist has a 50% chance of losing and ending up dead on both the random method of allocation and the QALY method of allocation. This being the case the rational egoist will surely ask which method offers the greater potential gain if he or she does *not* end up dead. The QALY method, we maintain, is superior on this score: with the QALY method there is a 50% chance of a big utility gain, whereas with the random method there is a 25% chance of this gain and a 25% chance of a smaller utility gain. The rational egoist will not reject the greater potential gain the QALY method offers on the ground that he or she has a 50% chance of ending up dead, because there is the same chance of ending up dead on the random method. The question of risk-aversion simply does not arise.

Why then does it play such an important part in Harris's criticism of the QALY approach? We will attempt to answer this question in what follows, and at the same time expose the flaw in Harris's reasoning.

In his response to our example Harris claims:

"... if you are one of those who find yourself with the chance of survival, but with smaller utility, *it is not true that had you chosen QALYs you would have had a larger utility, nor a larger chance of a larger utility.* Had you chosen QALYs you would be dead already!".[4]

How are we to interpret this? When Harris uses the expression "find yourself" and claims that "you would be dead already" if you had chosen QALYs, it is natural to think that he is talking about *after the veil is lifted*. We might therefore paraphrase the passage in this way: ... if you are one of those who survive but with smaller utility, it is not true that had you chosen QALYs you would have survived and had a larger utility. Had you chosen QALYs you would be dead already.

True but irrelevant

This is true but irrelevant. It is true that, if you turn out to be one of those who survive with a smaller utility score on the random method, you will be better off than if you had chosen the QALY method. But this is irrelevant, because behind the veil of ignorance – when you must make the choice – you do not know that you will end up in this group. That is the whole point of the veil of ignorance. You must choose a principle of allocation, as a rational egoist, without knowing which group of potential beneficiaries you will ultimately belong to. *Of course* it would be rational (if you are self-interested) to choose the random method if you knew you would be better off once the veil is lifted. But this you do not know.

In the light of other things Harris says, however, this paraphrase may not be a correct interpretation of what he means. Despite his use of the expression "find yourself," he may in fact be referring to the situation *before* the veil is lifted. This is made clearer in the following passage:

"If QALYs are used as the allocative procedure, only 50% of the population will be eligible for survival. If random methods are used 100% will be eligible. In each case 50% will survive. Would the rational egoist opt for a method where only 50% of the population have a chance of survival and he has no reason to suppose he will be in that privileged 50%, rather than a method where 100% have a chance and he knows he will be one of those with a chance because all have a chance?".[5]

Only 50% of the population will be "eligible" for survival if the QALY method is used in the sense

that only 50% of the population have a sufficiently high QALY score to survive once the veil is lifted. Even behind the veil of ignorance, 50% of the population are debarred in this sense, though the rational egoist does not know whether he belongs to this group or not. By contrast, 100% of the population will be "eligible" if the random method is used, in the sense that any individual might get lucky when the coin is tossed, even if they have a low QALY score. This is clearly crucial for Harris. It explains why he thinks that risk-aversion is relevant: with the random method the rational egoist has a 100% chance of having a 50% chance of survival, despite his or her QALY score, whereas with the QALY method he or she has only a 50% chance of survival, since only 50% of the population have a QALY score high enough to result in their survival. Who would not prefer a 100% chance to a 50% chance?

However, we believe that Harris is quite mistaken in his thinking here. The apparent advantage of the random method arises from an inconsistency in the meaning of the term "eligible" in the passage cited above and an implied numerical error in the calculation of the probability of survival arising from this. If random methods are used it is true that 100% will be "eligible" but "eligibility" implies the right to a 50% chance of survival. If the QALY method is used 50% will be "eligible" but here "eligibility" implies a guarantee of survival. The overall probability of survival, correctly calculated by the rational egoist, will be identical if the misleading use of the term "eligibility" is clarified. There is no advantage in having a 100% chance of being "eligible" for survival behind the veil if you still only have a 50% chance of survival once the veil is lifted. (A 100% chance of a 50% chance is still only a 50% chance.) With the random method, the event which determines your fate occurs after the veil is lifted: a coin is tossed (or whatever) and you either get the life-saving treatment or you do not. With the QALY method, the event or events determining your fate (ie all of the events which shape your QALY score) have already occurred before you begin your deliberations. This is why Harris says that only 50% of the population are eligible for survival on the QALY method. But this should make absolutely no difference to a rational egoist. The rational egoist neither knows his QALY score nor what the result of the coin toss will be; he or she only knows that there is a 50% chance of having a low QALY score and (a 100% chance of) a 50% chance of losing the coin toss. The rational egoist will therefore look at which system offers the greatest rewards if he or she does win.

A simple example

This point is easily made by means of a simple example. Imagine that you must choose under which of two cups a pea is hidden, and that you have the choice of playing one of two games. With game

One the pea is already hidden under one of the cups, but you do not know which one. With game *Two* the pea will be deposited under one of the two cups by a totally arbitrary procedure after you make your selection (say, by pointing to a cup). Would you prefer to play one game to the other? We maintain that there is no rational ground on which to prefer one game to the other. Nor would it make one iota of difference if you were given the following information. The cup under which the pea is placed in game *One* is determined by your height (or some other genetically determined characteristic): if you are over a certain height the pea will be placed in one particular cup (though you do not know which one) and if you are below that height it will be placed in the other. We maintain that one game is still as good as the other, because both offer a 50% chance of winning and a 50% chance of losing. By contrast, Harris would maintain, falsely, that a rational egoist would prefer to play game *Two*. With game *One*, he would argue, you only have a 50% chance of winning, because 50% of the population are antecedently precluded from winning by virtue of their height. But with game *Two* you have a 100% chance of being "eligible" to win, because everyone has a chance of picking the right cup in game *Two* despite their height. The fallacy in this reasoning should be obvious: there is no difference between having a 50% chance of winning and having a 100% chance of a 50% chance of winning. It is irrelevant from the point of view of the person making the decision that the pea is already deposited under one of the cups in game *One*, and that this depends on his or her height. This only means that there is no difference between being "eligible" to win and winning in game *One*. So game *One* offers a 50% chance of winning (which is equivalent to being "eligible" to win), whereas there is a 100% chance of a 50% chance of winning in game *Two*. But this is a totally empty distinction: from the point of view of the person making the decision, both games still offer a 50% chance of winning and a 50% chance of losing, and that is all that is relevant.

Actual properties

Imagine now that you are told that the pea in game *One* is made of gold and is worth $1,000 whereas the pea in game *Two* is made of silver and is worth $500. In both games, the winner gets to keep the peas. Would you prefer one game now to the other? We maintain that you would. If your chances of winning and losing are the same in both games you will opt for the game which offers the greatest benefits if you *do* win. (Rational egoists are utility maximisers.) By contrast, Harris would maintain, falsely, that you would only opt for the game offering the greater benefits if you had a greater chance of winning.

"[A] rational egoist would surely only give preference to saving the life of the person with the highest interest in continued existence when he is also *most likely to be that person*".[6]

We maintain that this is false: it is better to play game *One* than game *Two* if the former offers the more valuable prize.

All of this is tied to Harris's somewhat puzzling remark that "the veil of ignorance is supposed to *conceal* identity not *precede* it." In insisting that the veil of ignorance does not precede identity, that it merely conceals identity, Harris appears to be saying that the actual identity of the person behind the veil of ignorance (including his or her gender, age, health profile, and so on) is relevant to his or her deliberations about which allocation decision to favour. But it should not be. According to Harris:

"if the veil of ignorance conceals gender, then while it is true that behind it I do not know whether I am a man or a woman, it is not true that I have any chance of being anything other than a man when the veil is lifted.... I do not have a 50% chance of being pregnant when the veil is lifted or of having carcinoma of the cervix".[7]

It is clear that Harris is thinking about himself behind the veil of ignorance here, with all of his actual properties (gender, age, health profile, and so on). But he feigns ignorance of these properties for the purpose of the exercise. This is fine, so long as none of these actual characteristics influence his deliberations on the choice of an allocation procedure, for then his choice may not be impartial. But if none of Harris's actual characteristics are allowed to influence his thinking – by virtue of the nature of the exercise – why does he insist that the veil merely conceals his identity but does not precede it? Why is it relevant at all? Why should it be Harris pretending to be a rational egoist rather than just a rational egoist, abstractly conceived, behind the veil of ignorance?

It is clear that Harris is thinking about the rational egoist behind the veil of ignorance as an actual person. If it is not Harris himself, it is someone with fixed properties beyond being merely rational and self-interested; in particular, someone who has either a high or a low QALY score. Why does he make this assumption? Clearly, because he believes this makes a difference to the chances facing the rational egoist. If the rational egoist is a real person (if the veil of ignorance *conceals* his or her identity but does not *precede* it) – ie if he or she has a determinate QALY score – then he or she only has a 50% chance of being "eligible" to survive. Whereas on the random method the person has a 100% chance of being "eligible" to survive, despite his or her QALY score. But as we have seen, this is totally irrelevant. It makes no difference that 50% of the population

playing game *One* are "ineligible" to win because they have a 50% chance of being too tall (or too short). This only means that being "eligible" to win and winning are the same thing in game *One*. If you are a rational egoist you will still reason, correctly, that having a 50% chance of winning is no worse than having a 100% chance of having a 50% chance of winning. Indeed, knowing that the potential reward is bigger in game *One* you will eschew game *Two* with its random method of allocation.

Here is a further reflection by Harris on the same point:

"To put the point another way, Singer *et al* treat the people behind the veil as candidates in a lottery in which the draw will take place at or after the lifting of the veil. All people behind the veil have a certain chance of winning or losing. However, unless identity occurs after the lifting of the veil, this is not the situation. Rather the lottery was run a long time ago and people are born with tickets that are already winning or losing tickets – they have no chance of either wining or losing with the tickets they possess because they already have won or lost".[7]

But it is irrelevant that "the lottery was run a long time ago". It is irrelevant that the cup under which the pea is placed in game *One* is determined by your height, which is determined by your genes – ie something set "a long time ago". It is true that, if you choose to play game *One*, you are "born with a ticket that is already winning or losing," in the sense that the pea has been placed under a particular cup prior to your choice. This means that you only win if you are "eligible" to win; ie being "eligible" to win and winning are the same thing. But it is not true that "you have no chance of either winning or losing with the ticket you possess because you have already won or lost". You still have a 50% chance of winning and a 50% chance of losing, depending on which cup you choose.

Aristocracy of the healthy

Harris argues that "if those with a better chance are always to be preferred this inevitably creates an aristocracy of the fortunate".[7] Our argument demonstrates that this conclusion is invalid. Behind the veil of ignorance it is not known who has the better chance. It is not known who is the member of the aristocracy: all have an equal chance of benefiting. And if Harris really means that the QALY method will create an aristocracy of the *healthy* – that under the QALY method of allocation, people will live longer and healthier lives – then we say that this is right.

We have accused Harris of making things easy on himself by his choice of examples.[8] Harris has made the same accusation against us.[9] In conclusion then, let us look briefly at Harris's hard case for the QALY method and our hard case for the random method, and see how we and Harris might defend our respective views:

Hard case 1. The QALY method: Harris points out that applying the QALY method might have the effect of giving life-saving treatment to Mr Hubert in preference to Mr Post, because Mr Hubert has a higher QALY score than Mr Post, even if the difference is only slight. For example, Mr Hubert might have thirty years to live and Mr Post might have thirty years and two days to live. The QALY method would favour Mr Hubert, other things being equal. But given the slight difference between them, would it not be fairer, Harris asks, to allocate the life-saving treatment randomly, and in this way give Mr Hubert and Mr Post an equal chance at living whatever life is available to them?

Hard case 2. The Random method: As we pointed out in our rejoinder to Harris,[10] the random method which he favours dictates that Otto and Richard should have the same chance for life-saving treatment, even if Otto will live only two days in relatively poor health, whereas Richard will live for thirty years in perfect health, so long as Otto wants to live for those two days. But would it not do more good to save the life of Richard? Would it not constitute an indefensible squandering of resources to save Otto's life for two days only, at the cost of denying Richard his thirty years?

Sensitivity

How do we propose to defend the QALY method in the face of Hard case 1? First, as we argued in our rejoinder to Harris, we see the fact that the QALY method can (theoretically) take account of small differences in quality of life and quantity of life as a virtue of this approach: it is true that someone with a slight QALY advantage – someone who stands to benefit only marginally (though still measurably) more in terms of quantity of life or quality of life improvement – will be a higher priority for treatment on the QALY approach (if all else is equal). But we see this as appropriate: it is a sign of the sensitivity of the QALY approach – its capacity to take account of even small benefits, if they are genuine, and there are no other differences between claimants on which to base a decision – ie all else is equal.[11]

Second, as we also pointed out in our rejoinder, if favouring people in the allocation of resources for having slightly higher QALY scores is likely to lead to social disharmony or fear, then use of the QALY method can be restricted. Moreover, there is a principled way of governing the restrictions: the QALY method should be restricted when, and only when, it threatens to diminish social utility. Thus we do not think that health care should always be distributed so as to produce the largest possible

number of health-related QALYs. There is more to overall utility than health-related QALYs, and it is plausible to suppose that tilting the balance of health care towards the more disadvantaged members of society will reinforce feelings of concern and sympathy, and lead to a more compassionate society. This in turn may be a society with more community feeling and therefore one that provides a higher level of general welfare than a less compassionate society.[12]

So we would be prepared to restrict the application of the QALY method in particular circumstances if it threatened to have adverse consequences sufficient to outweigh any corresponding benefit it might have. Unlike Harris, however, we do not want to abandon the QALY method altogether because of this possibility, and adopt a random method of allocation instead. Rather, we hold a presumption in favour of the QALY method, except where it can be shown to conflict with the wider goal of maximising utility.

How would Harris deal with Hard case 2? It is difficult to find any concrete suggestions in his reply to our original article, or his reply to our rejoinder. If all individuals are equally entitled to life-saving treatment regardless of their quality of life or life expectancy, and regardless of how intense their interest in continued life is, so long as they do have such an interest, then that would seem to be an end of the matter: all we can do is toss a coin and allocate randomly. Otto might get the treatment and live for two days in relatively poor health, or Richard might get the treatment and live for thirty years in perfect health.

Threshold of discrimination

Elsewhere Harris has acknowledged that short extensions to life may be of little value to those who receive them. "Normally, we want to have our death postponed for as long as possible but where what's possible is the gaining of only very short periods of remission, hours or days, these may not be worth having".[13] One suggestion he makes is that, when assessing the potential benefits to be gained from allocating scarce resources in a particular way, "we can discount small gains in time as below the level of discrimination".[14] But this just raises the question: exactly where is the threshold of discrimination? Harris suggests that it should be left up to individuals themselves to decide when an extension of life is worthwhile: "even brief remission can be valuable in enabling the individual to put her affairs in order, make farewells and so on, and this can be important. It is for the individual to decide whether the remission that she can be granted is worth having".[15] This is a laudable position to take when the question of limited resources is not an issue: patients (in consultation with their physicians, families, etc) should decide whether they want life-prolonging treatment, when it is available, or

whether they wish to forego such treatment. But when individuals and groups are in competition for resources this will not work. It would not be possible to allow groups of patients to decide what resources should be devoted to the treatment of conditions to which they are prone, or from which they are suffering, because all groups would want as much as they could get. In brief, Harris gives no plausible way of dealing with Hard case 2 that we can discern.

Furthermore, as with Hard case 1, there is certainly a likelihood of social disharmony in Hard case 2, though it is difficult to think how Harris would deal with it. If Richard is unlucky he and his relatives must be told: "You have an excellent prognosis but will not be treated because we choose to use our resources on someone else with a very poor prognosis". We suspect that many would be outraged by the squandering of limited resources on Otto when they could confer very large benefits on Richard. Harris may argue that people are ethically misguided, but if this is their response how can Harris accommodate this problem? As utility is not a concern of Harris it appears that his random allocation method could not be modified. He would simply ignore social disharmony. When we "set out our stalls in the market place of ideas" we suspect that this indifference to people's concerns and preferences would lead to very few customers for his product.

We continue to maintain, then, that the QALY method is under no threat from the arguments that Harris has raised in his debate with us over the moral defensibility of the QALY method. On the contrary, it appears that Harris's own position lacks a sound foundation. We maintain that the QALY method would be chosen by a rational egoist in preference to a random method of allocation, and that the hard case Harris raises against the QALY approach can be dealt with in a principled way by situating it within the wider context of utilitarian ethics.

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References and notes

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5 See reference 1: 211.

6 Harris J. Double jeopardy and the veil of ignorance – a reply. *Journal of Medical Ethics* 1995; **21:** 153.
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9 See reference 6: 155.
10 See reference 3: 204.

11 See reference 3: 205.
12 See reference 8: 149–150.
13 Harris J. QALYfying the value of life. *Journal of Medical Ethics* 1987; **13:** 120–3.
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News and notes

From Ethics to Law, from Law to Ethics

The Swiss Institute of Comparative Law, Lausanne, the Institute of Health Law, Neuchâtel, the International Association of Law, Ethics and Science and the Swiss Society of Biomedical Ethics are organising an International colloquy, "From Ethics to Law, from Law to Ethics", which will be held from 17–18 October, 1996, in Lausanne.

The languages of the conference will be English, French and German.

For information please contact the Swiss Institute of Comparative Law, CH-1015 Lausanne-Dorigny. Tel: +41 21/692 49 11; e-mail: secretariat@isdc-dfjp.unil.ch.

News and notes

The Seventh Annual Medical Device Technology Conference

The Seventh Annual Medical Device Technology Conference and Table-Top Exhibition will take place from 18–19 November, 1996, at the Swissôtel in Düsseldorf/Neuss.

This conference will provide delegates with a comprehensive update on the implementation of the medical devices directives, focusing on current concerns such as technical standards, product liability and environmental considerations.

For further information please contact: Sonja Lloyd, Associate Conference Manager on Fax: +44 (0)1244 370 011.

News and notes

III World Congress of Bioethics

The III World Congress of Bioethics will be held in San Francisco, California, USA from 20–25 November this year. It is being organised by the International Association of Bioethics in conjunction with the American Association of Bioethics.

Topics include: Feminist approaches to bioethics; Studying human genetic diversity: can we do it right?, and The globalisation of bioethics: international human rights and health professionals.

For further information please contact, as soon as possible: Congress Secretariat, III World Congress of Bioethics, Pacific Center for Health Policy and Ethics, University of Southern California, Los Angeles, CA 90089-0071, USA. Tel: (213) 740–2541; fax: (213) 740–5502. World Wide Website http://www.usc.edu/dept/law·llb/bioethics/world/congress.html.