Justice and the NHS: a comment on Culyer

H V McLachlan

J Med Ethics 2005;31:379–382. doi: 10.1136/jme.2004.009829

The nature and significance of equity and equality in relation to health and healthcare policy is discussed in the light of a recent article by Culyer. Culyer makes the following claims: (a) the importance of equity in relation to the provision of health care derives from the human need for health in order to flourish; and (b) for the sake of equity, equality of health among the members of particular political jurisdictions should be the aim of health policy. Both these claims are challenged in this paper. The argument put forward is that it is only when needs arise and are met in particular contexts that need and equity are fused. The state and its agents and agencies should distribute what it distributes impartially, whatever it distributes. Whether or not equity applies to the distribution of healthcare services depends on how they are provided and not on their nature as “primary goods”. Contrary to what Culyer suggests, a policy of trying to produce the outcome of health equality would be inequitable. It would not be impartial and it would fail to treat persons as persons ought to be treated.

In his account of equity and health care, Culyer makes the following two broad claims¹:

- the importance of equity in relation to the provision of health care derives from the human need for health in order to flourish
- for the sake of equity, equality of health among the members of particular political jurisdictions should be the aim of health policy.

Both claims will be challenged in this paper.

EQUITY, JUSTICE, AND IMPARTIALITY

Of equity in general, Culyer writes²:

In essence all equity approaches judge the treatment of individuals inequitable if it is capricious or relates to “irrelevant” characteristics Equity in health care requires that patients who are alike in relevant respects be treated in like fashion and that patients who are unlike in relevant respects be treated in appropriately unlike fashion.

I go along with Scruton’s view that, other than in a peculiar legal sense of the term, “[e]quity is

another name for just dealing”.³ Culyer seems to me to be referring to a particular instance of the general principle of justice that people and agencies should do what they have a duty to do and should be given that which they have a right to receive.⁴ It is, in some contexts, a matter of justice or “equity” that people are treated impartially; that is to say, in some, although not all contexts, some people have a right to be treated impartially and other particular people and agencies have a duty to mete out such treatment.

Impartiality as such is not a virtue. It assumes its morally laudable nature in the context of rights and duties. Furthermore, impartiality in relation to equity is something more than and other than the mere consistent application of rules of behaviour. Actions, in order to be good ones must treat persons appropriately as persons. This is the bedrock of all good actions and, therefore, of all good just actions.

A man who treats his own wife and his neighbour’s wife impartially when it comes to the distribution of, say, his pay and his sexual attentions, would be treating his wife inequitably. The same man, were he to be, for instance, a judge or a university lecturer would be required, when acting *qua* judge or lecturer to treat all convicted felons and students who came before him as such (including his own and his neighbour’s wife) impartially. Where a relevant reason exists for treating them differently, then he must discriminate between them; otherwise he must not do so in any significant way. If an unmarried judge or university lecturer is, in his capacity as a private citizen, choosing a casual sexual partner or choosing people to invite to a party he is throwing, then he is not required by equity to treat people impartially. No one has a right to be invited to his party or a right to his sexual favours: he can distribute his invitations and his sexual favours partially and without any justification for favouritism without acting inequitably.

The Yorkshire Ripper was not impartial in his choice of murder victims. He chose only women. However, had he been “an equal opportunities” slaughterer and killed men and women indiscriminately, his actions would have been no less wicked and no less inequitable. Equity involves not merely the relevantly equal treatment of persons but the treatment, equally and indiscriminately, of persons as persons ought to be treated. The recent writings of Levine capture this notion well. He writes that: “Dueness, fairness and impartiality all entail a kind of equality, the kind associated with equal regard for personhood”.⁵

Correspondence to:
Dr H V McLachlan, School
of Social Sciences,
Glasgow Caledonian
University, Cowcaddens
Road, Glasgow G4 0BA,
UK; h.mclachlan@gc.ac.uk

Received 21 June 2004
In revised form
15 September 2004
Accepted for publication
21 September 2004

DWORKIN'S EGALITARIAN OBJECTION TO CULYER'S EGALITARIANISM

According to Dworkin: "No government is legitimate that does not show equal concern for the fate of all those over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community—without it government is only tyranny..."⁶ This is an interesting formulation of the issue whether or not it is completely satisfactory. Governments should treat citizens impartially but not because they should be equally concerned about them. Whatever the nature and extent of their concern, that is what they are obliged to do. Mention of the "fate" of individual citizens is curious and would seem to be unnecessary. If we treat people properly and, thereby, show appropriate concern for individual persons as persons, we have done enough: concern for the fates of the people concerned is not an additional requirement.

Dworkin shows that equality of resources is not the same as—nor will it lead to—equality of welfare. As an egalitarian, he argues for equality of resources rather than of welfare. He presents the following argument against any sort of advocacy of equality of welfare, of which Culyer's argument is an instance. Different people will have different preferences for different sorts of good things including, we can say, health and health care. Dworkin contends that: "people cannot be treated as equals by making them equal in some dimension they value unequally..."⁷ It is not clear how Culyer would respond to the objection that there is an arbitrariness and unfairness about his selection of health as that which should be equalised.

By way of a possible illustration and adaptation of Dworkin's point, imagine four members of a community and suppose that they were all equally healthy partly as a consequence of the public spending on health care. One of them, let us suppose, would rather be better educated than he was and prefer to have less money spent on health care and more on education even if he were in consequence less healthy. Another might prefer to be better defended against external attack even if, as a consequence, fewer resources are devoted to education and/or health care. The third might prefer to devote more resources to charitable foreign aid and/or to savings and investments for the sake of the wellbeing of her grandchildren even if, as a consequence, her health, although good, was not as good as it might have been. The fourth would prefer to live a shorter but a more prosperous life and pay less in taxes and have more money in her own pockets. To insist, come what may, on a policy of equal health, as Culyer appears to do, would be to disregard the essential personhood of those who would benefit or suffer from the implementation of it.

WHY, IF, AND WHEN IT DOES, DOES EQUITY MATTER?

Culyer raises the question: "Why be concerned about equity in health care distribution?"² According to him, equity is of importance in relation to healthcare provision because of the nature and significance of health and health care. The distribution of health care, or so he argues, is and should be thought of as being different from the distribution of normal goods and services. It is Culyer's view that: "Entities such as health derive equity significance from their ability to enable people to 'flourish'..."² Culyer writes:

What is this particular significance about health that raises its status in equity above other services? The answer seems to be that health, like the cognitive skills developed by educational institutions, is one of a special set of characteristics (sometimes called "primary goods") about

whose distribution people are particularly concerned ... Aristotle termed this concept "eudaimonia", which is usually taken to mean "flourishing".

I would argue that, if the state provides a good or service then, whether or not there is a need for it and whether or not it leads to human flourishing, the state should distribute it equitably because the state and its agents and agencies have a duty to treat citizens impartially and they have a corresponding right to impartial treatment. Where the state does not, directly or indirectly, provide the good or service, considerations of equity do not necessarily apply in the same way even if the good or service is needed for human flourishing.^{8,9}

Consider the latter point first. Among the things that I require in order to flourish, in order, even, to live are, for instance: food, blood, water and oxygen. In order to flourish and not to languish, I need, for instance, music, literature, religion, and sex. It does not, as a matter of logic, follow that, because I and other people need these things, the state should provide them for us. Whether it would be a good idea to have a system whereby the state provided any or all of these requirements would depend on factors other than our need for them. There will be advantages and disadvantages of the state provision of particular goods and services in different circumstances. For instance, some conditions such as plagues, famines, earthquakes, or wars can make the case for the state rationing and direct provision of foodstuffs morally, politically, and economically compelling. We need food no less in normal conditions where such state distribution, however equitable, would be far worse than a non-equitable plenitude. Without oxygen I will very quickly die. However, a system where I depended on the state for the provision of such oxygen that I need would, even if a practical possibility, be hellish. Perhaps at some time in the future there will be a National Oxygen Service and people will need to use it. Then the state would be obliged to distribute oxygen equitably. It is only when needs arise and are met in particular contexts that need and equity are fused.

Some of the things that the state and its agents distribute are more important than others. Some are literally a matter of life and death whereas others are trivial. The duty to act impartially holds throughout. For instance, consider state lotteries. Whether the prize is several million pounds or a ten pound note, there is a right to impartial treatment held by the participants and a corresponding duty of impartiality borne by those who run the lottery. In all actions where a difference of treatment of the individuals who officially come before them involves a difference in benefit or burden to these individuals then the agents and agencies have a duty to act impartially and the individuals have a right to receive impartial treatment. Of course, some infractions of the duty of impartiality are more heinous than others. Sometimes, too, considerations other than that of equity make some inequitable actions more or less blameworthy than they would otherwise be.

When the National Health Service (NHS) distributes health care then it has, as a duty to act impartially, a duty to treat (in the non-medical sense) those who have claims on their services impartially. In comparison with matters of life and death, some—perhaps most—of the services which the NHS has to offer are trivial. However, it is obliged to distribute them, no less than the others, impartially. It would be no less inequitable to distribute—for example, bedpans than heart transplants on the basis, say, of the political views of the claimants although it would be on other grounds a more serious inequitable action. Consider an analogy: in one sense, it is far worse to steal £1000 than to steal £5 but, in another sense, it is the quality of the action—the nature of it rather than its quantifiable aspect—wherein lies its wrongness.

People can have legal and moral rights to things that they do not need nor want. For instance, the suicidal and the terminally ill have, no less than anyone else, moral and legal rights not to be killed. If I borrow a five pound note from Bill Gates, he has a moral and a legal right to its recovery whether or not he needs nor wants it. Hence, Culyer is, I think, mistaken when he says: “equity requires that services go only to those who need them...”¹⁰ Culyer is, similarly, mistaken, I suggest, when he says: “Health care that is not related to the protection, promotion, and restoration of health may have ample justification in terms of the satisfaction of consumed preferences, but it is not to be evaluated by equity criteria”.¹¹ The state, its agents, and agencies should distribute what it distributes impartially, whatever it distributes.

When I was a young schoolboy at Paisley Grammar School, I was one of the few pupils in my class to be presented with a splendid tinbox full of sweets. This was to celebrate a particular anniversary pertaining to Johnstone, a nearby town I then lived in. The local council in Johnstone was not obliged by equity to distribute sweets to schoolchildren. However, if they decided, for whatever reason, to distribute sweets, they were obliged to distribute them impartially. I did not need, although I very much enjoyed and appreciated, the sweets. Conversely, even though we might need, say, food, sex, religion, or health care to flourish it does not follow that such things must, as a matter of equity be provided by the state.

DOES HEALTH INEQUALITY MATTER? IF SO, WHY DOES IT?

It is Culyer’s contention that: “An equitable health care policy should seek to reduce the inequality in health (life expectation, self-reported morbidity, quality of life in terms of personal and social functioning) at every stage of the life cycle”.¹² He continues¹²:

Such a policy must meet needs, but in proportion to the “distance” each individual is from the population average ... the principle underlying the selection of needs to be met will not be a simple, proportionate one in terms of needs. Instead, needs will be met so as to reduce the dispersion of ill health in the community.

I would claim that, contrary to what Culyer suggests, a policy of trying to produce the outcome of health equality would be inequitable, however much it might be—if it is—defensible on other moral grounds. Not all morally good outcomes are morally appropriate targets. Not all morally appropriate targets are justified by equity.

Suppose several people request particular books from their local public library and that not all of the requests can be acceded to. Say, in the first instance, that, with the intention of treating each individual requester impartially and fairly, on the basis of “first come first served”, particular books are given to particular people. Consider next an alternative distributional policy whereby books are distributed with the intention of trying to reduce inequalities in erudition among members of and groups in the local community. With the operation of this alternative policy, it is quite likely that if the same people had made the same requests for books, the distribution of the books would have been different: other books, in all likelihood, would have been given to other people. Even if it turned out by a curious chance that both policies had the same outcome and that under both policies, the same books would have been distributed to the same people, the second policy, unlike the first one would not have been equitable. Equity relates not merely to what is done to people but why and how it is done. The second policy does

not consider individual people with fairness and with appropriate and equal respect as individual people: it considers them as means towards the realisation of the egalitarian vision of the policy maker. The library staff have a duty to treat the library users as individuals in their own right. The alternative policy is in breach of that duty. It is also directed to an aim that it is not the business of librarians *qua* librarians to pursue. In their spare time, librarians, doctors, hospital managers, members of parliament, and prime ministers can try to realise their moral visions; when they are acting in their official capacities, there are constraints on what they are permitted and required to do.

Similarly, suppose people were to be given and denied particular medical treatment provided by the state, not on the basis of their individual requests as individual people but, alternatively, on the basis of the intended outcome of such treatment with reference to the inequalities of health within the communities of which they are members. Such a policy would be inequitable; it would be a breach of the principle of impartiality. The different medical treatment given to different people would not relate to relevant differences between the people themselves but to the egalitarian whim of the policy maker. Furthermore, the people would not have been treated appropriately as individual persons. Even if the actual medical treatment given and denied to particular individuals would, in some circumstances or other, be the same under the operation of both policies, the latter policy would, I suggest, still be inequitable because of how and why it was done. The latter policy and its outcomes might, of course, be justifiable but if they were, they would be justified by grounds and virtues other than equity.

CULYER’S POLICY PROPOSALS AND MINE IN PRACTICE

If three people request major heart surgery and another three people request treatment for ingrowing toenails, under the NHS or a similar state funded healthcare system, in what order should the people be allocated treatment? In my view, an equitable procedure would be to allocate what treatment was available on a first come first served basis. However, equity alone cannot determine what health care should be available and how it should be distributed. Equity rules out rather than specifies particular courses of action.

Does it matter whether or not the prospective patients need the treatment and how much they need it? For reasons other than equity—for instance, consequentialist concerns about the increase of happiness and the decrease of pain and also, say, public perceptions of fairness—we might make it a rule of the NHS that citizens must need what treatment they request in order to be considered eligible for it. Similarly, we could make it a rule that no NHS resources are devoted to medically minor matters such as ingrowing toenails while there are patients who need more medically important treatment such as major heart surgery. Equity does not require that patients are treated on the basis of need. However, treatment on the basis of the needs of patients as individuals is not inconsistent with equity: it is not necessarily inequitable.

Suppose that of the people seeking heart surgery, one of them lives in a multiply deprived area of Glasgow and another is a member of an ethnic minority and that, of those seeking treatment for their feet, one is unemployed and another is a single parent. In my view, this information is irrelevant for the equitable allocation of health care. Culyer’s approach is quite different. According to Culyer, “What ought to dominate is *the distribution of health* and how health care interventions can alter that for the better”.¹² Policymakers and implementers, according to Culyer, require to act upon: “Information on the current distribution of resources and

health (or sickness) in relation to 'target groups' [that is, social categories of people with particular propensities for ill-health] and any other groups perceived as ethically significant..." and to make "Informed judgements about the effect of changes in resource distribution on the health of individuals and especially target groups".¹³

Culyer says that policy makers should take into account and be aware of certain things for the sake of equity that I say, for the sake of equity, they should ignore. He says that, for the sake of equity, the allocation of health care should be directed to particular social categories, geographical areas and "target groups": I say that, for equity's sake it should be directed to individual citizens *qua* individual citizens.

WHAT IS DONE AND WHAT HAPPENS

Culyer runs a number of curious claims together when he says²:

If it is felt that all residents of a political jurisdiction ought to have equal opportunities for their lives to flourish, then it follows that health care is one of those goods and services whose right distribution must be ensured.

What Culyer says follows does not follow at all. Culyer is here conflating quite different questions¹⁴: What, were it to happen, would be a good outcome? What ought to be done? Who ought to do it?¹⁵ Even if it is the case (which one might dispute) that it would be good, were it to happen, that all residents of a political jurisdiction had equal opportunities for their lives to flourish, it does not follow that you, we, the Prime Minister, or the NHS or the government (or anyone or anything) should act in such a way as to bring that state of affairs about. Our obligations might well pull us towards other courses of action.

Even if he is correct in assuming that it would be good if all residents of a community had the sort of opportunities which Culyer talks of here, it certainly does not follow that the state should regulate the distribution of health care—far less the distribution of health—in the way that Culyer advocates. If the state provides health care then that health care should be distributed impartially by the state. If health and ill health are unequally distributed, even as a partial consequence of this equitable treatment, so be it. The state is responsible for its actions and has an obligation to try to ensure that its actions are just. It is not obliged to ensure that the outcome of its actions, in combination with a host of other factors, will produce a fair, nor in any other respect a morally desirable distribution of health. The distribution of health is not the business of the state, nor of its agents or agencies. The state (and its agents and agencies) is not responsible for what turns out to be people's portion of health. The state, like the rest of us must, as a prerequisite of justice, mind its own business.

In relation to fairness, equity, and justice, the state is required to act fairly, equitably, and justly: it is not required to ensure or to try to ensure that its acts—in conjunction with a host of other factors beyond its control and responsibility—produce fair, equitable, and just outcomes.

CONCLUSION

Both Culyer's claims about equity and health care are dubious. The importance of equity in relation to the provision of health care does not spring from the human need for health. The equalisation of health is not an equitable aim of public policy. So I have argued.

Health care—like formal education but unlike health and erudition, which are not transferable—can be considered in economic terms as a "good" or service. Culyer talks of

"primary goods" in this context and in so doing he refers to Tobin and alludes to Rawls.^{16 17} Primary goods for these writers are regarded as fundamentally necessary to the good life; they are needed by all for flourishing. It is, of course, morally good that such needs (if there are such needs) are met and that such goods (if such there are) are provided but it is not necessarily a matter of equity that they are provided. Whether or not equity applies to their distribution depends on how they are provided and not on their nature as primary goods. It is not necessarily appropriate that they are provided by the state. It is not a matter of equity that they are provided by the state. However, if they are provided by the state they should be distributed equitably.

There is a distinction between equality of treatment and equality of outcome. Similarly, equitable treatment is not the same as "equitable outcome", if this is an intelligible notion. Outcomes can be morally appraised but it is not clear that they can be either equitable or inequitable. The crucial point is this. We are responsible for what we do: we are not similarly responsible for the outcome in its entirety of what we do. The state cannot control and it has no responsibility for the distribution of, say, erudition and health in general: rather, it controls and has responsibility for only that formal education and that health care that it provides. It is responsible for providing it equitably. It is not responsible for the outcome of that equitable provision. That outcome will be affected by a host of factors other than that state provision. By analogy, it is the responsibility of, for instance, courts to give all individuals who appear before them impartial, fair, and just treatment. What the outcome of this treatment in conjunction with a batch of other factors and treatment and outcomes will be is not the responsibility of the courts nor is it a matter of equity. If the courts tried to produce what was thought of as a socially equal outcome with, say, as many men and women and white people and non-white people and so forth in prison as their numbers in the population suggested, they would be acting inequitably thereby. Culyer's proposed policy, if it were to be adopted by the NHS, would be no less inequitable even if less heinously so. Of course, to say this is not to say that outcomes do not matter. Politics is not reducible to ethics: ethics is not reducible to the principle of equity. A library service or, say, a health service that had only one virtue would not provide much of a service if that virtue were equity. Other less equitable but busier, cheaper, and less fussy ones might be more satisfactory.

REFERENCES

- 1 Culyer AJ. Equity—some theory and its policy implications. *J Med Ethics* 2001;27:275–83.
- 2 See reference 1: 276.
- 3 Scruton R. *A dictionary of political thought*. London: Pan Books, 1982:153.
- 4 See Barry B. *Justice as Impartiality*. Vol II of *A Treatise on Social Justice*. Oxford: Clarendon Press, 1995.
- 5 Levine DP. *Self-seeking and the pursuit of justice*. Aldershot: Ashgate, 1997:3.
- 6 Dworkin R. *Sovereign virtue: The theory and practice of equality*. London: Harvard University Press, 2002:1.
- 7 See reference 6: 63.
- 8 See McLachlan HV. Justice, rights and health care: a discussion of the report of the Commission on Social Justice. *Int J Social Soc Policy* 1998;18:65–84.
- 9 See McLachlan HV. Scotland, social justice, health and inequality. In: Nottingham C, ed. *The NHS in Scotland: the legacy of the past and the prospect of the future*. Aldershot: Ashgate, 2000:106–23.
- 10 See reference 1: 280.
- 11 See reference 1: 277.
- 12 See reference 1: 281.
- 13 See reference 1: 282.
- 14 This conflation is not peculiar to Culyer. It is, for instance, imbedded in utilitarianism and in welfare economics.
- 15 See McLachlan HV, Swales JK. A drunk driver, a sober pedestrian and the allocation of tragically scarce and indivisible emergency hospital treatment. *Health Care Analysis* 1999;7:5–21.
- 16 Tobin J. On limiting the domain of inequality. *J Law Econ* 1970;5:263–78.
- 17 Rawls J. *A Theory of Justice*. Cambridge: Harvard University Press, 1971.