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DO JUSTICE, LOVE MERCY:
THE INAPPROPRIATENESS OF THE CONCEPT OF JUSTICE
APPLIED TO BEDSIDE DECISIONS

Discussions about the allocation of scarce resources to individual patients have frequently been based on the concept of justice. I am going to argue that it is usually not appropriate to ground individual treatment decisions on ideas of justice. Compassion and mercy are the moral concepts better suited to the inequalities and individual differences of the sick.

Understanding justice in the context of medical care is made more difficult by several common confusions. First, medical care is primarily concerned with the care of the sick and not with health. Second, the origins of national health insurance programs (which are, of course, sickness insurance programs) have more to do with decreasing the costs to the state of poverty, disease, disability, and premature death than concern with the individual sick person. Third, attempts to apply principles of justice at the individual bedside falter for a number of reasons, both symbolic and factual. Fourth, invoking principles of justice in the setting of individual sickness denies the reality and potency of individual differences as well as denying the existence of fate.

Let me first address the fact that medical care is primarily about the care of the sick and not about health. While it is certainly true that pneumonia is an impediment to health, not having or recovering from pneumonia is an insufficient criterion for health. But, preventive medicine, as conventionally discussed and practiced, is concerned with the prevention of disease, not primarily with the promotion of health. The word 'health' is often used in the United States as a euphemism to conceal the presence of 'sickness'. That is the case, much as the Hospital for Special Surgery was originally called the Hospital for the Ruptured and Crippled. Sterility clinics became fertility clinics and contraceptive clinics became family planning clinics. Another example is a program being funded by a prominent foundation for the 'health impaired elderly'. Those words are a euphemism for the old and the sick (which is what they call themselves). Euphemisms are fine until they begin to fool their users. The euphemism works because most people put health and disease at the opposite end of the same spectrum. That understanding, however popular, will probably not withstand critical examination — especially in view of the difficulties of finding a definition of health. Whether or not health and disease are more than passingly related to each

other, it is the case that medical care is overwhelmingly the care of the sick. The distinction is important because it seems easier to decide whether, in a just society, a sick person should receive care regardless of the ability to pay, than to decide whether a person has a right to health — whatever that may be.

Now for the second confusion. At first glance, it would seem that health insurance programs, or national health care systems, are really an extension of human activity that stretches back into antiquity — charity to the sick. What seems new in this century is the idea that all sick persons should have an equal right to medical care independent of their ability to pay. In that context, the word 'charity' is often considered onerous. It may be pertinent, however, to remember that national health insurance programs have their historical basis not primarily out of concern for the individual sick person but, rather, out of concern for the burdens of the state. Edwin Chadwick, who had been secretary to Jeremy Bentham ([6], pp. 32 ff), published his 'Report on the Labouring Classes of Great Britain', in 1842 [4]. The investigations that formed the basis for that publication grew out of ferment for reform of the 'poor laws' of Great Britain. Chadwick showed systematically how much more disease, disability, and premature death were to be found among the poor than among the comfortable. Whatever his humanitarian concerns, his basic argument for removing that disease burden by sanitary reform was that the poor were poor (and a drain upon the state) because they were sick (Chadwick's observation that the poor have more sickness than the comfortable has been repeated generation after generation and remains true today in the United States and even in Great Britain). What Chadwick proposed was pure Bentham utilitarianism. The legislation that created Britain's National Health Service was a direct descendent of the poor law reform of the mid-19th Century. In view of the history of National Health Insurance, its fundamental objectives, and its philosophical foundations, questions of distributive justice are entirely appropriate, as are discussions of a right to medical care. But the focus of the concern remains, not the care of a particular sick person, but that person's needs in relationship to the needs of others and in the light of the resources of the state.

But the debate about justice and medical care has gone further: Now we ask what are the limits of the equal distribution of medical services (regardless of ability to pay) and, more, how are scarce resources to be allocated? This is often symbolically phrased: Which of several patients with end-stage renal disease should get 'the kidney'? At first glance, the sick-room appears to be an appropriate place to examine the concept of justice. The sick seem

an apt reminder of why the concept must first have arisen. The idea of justice is a response to the plight of persons subject to a power over which they have little control and injured by that power beyond anything they deserve. They have not been rendered to as was their due (if I may draw on one of the earliest definitions of justice).

In the beginning, and in most discussions, the concept 'justice' is employed in opposition to the concept of 'injustice'. If that is the case, justice may not be the appropriate concept when illness is considered because, when those terms are used, human agency and interest is involved (even in the derivative words applied to God, the community or the state). However, the sick are not sick because of human agency and intent but overwhelmingly because of the action of fate. Fate is called fate precisely because it is without human intent — fate cannot be unjust nor can it be just. The category of justice is simply not relevant. It has become fashionable to displace fate by speaking as though the sick have largely made themselves ill by their ways of life, that illness comes because of someone fouling the environment. But both ideas are naive because, ultimately, everybody sickens and dies no matter what their life style and no matter how clean the environment. Even habits which are known to be illness-producing, such as cigarette-smoking, produces sickness in only a minority of their habitués. Even when sick persons do things which seem (inexplicably) calculated to make themselves worse, it is almost never because the sick actively wish to be sicker. Such behavior merely testifies to the complexity of the state of illness and of the human condition.

An example, albeit over-simplified, of a situation often discussed which employs the concept of justice might be helpful: Two sick persons lie in adjacent beds — one is poor and one is rich, but both are in severe pain. As the doctor goes by, he or she gives pain relief only to the patient who can pay. Would we characterize the doctor as unjust, or would we say he is cruel, without mercy, has no pity, or lacks all compassion? Another example: two persons are dying of diseases similar in absolutely all respects. There is medicine (or a kidney, a treatment, a machine) to save only one. Who shall get the medicine? The question has been repeatedly argued on the basis of principles of justice. One that basis, I find no answer satisfactory. If the younger, more productive, smarter (use what criteria you wish) receives the treatment, you may argue the justice of the solution because he or she was due more. But the other patient died — was that also his or her due? Even by lottery, justice is not served because one must die. Indeed, we resort to lottery where no just solution appears possible. One might say that the

