DOES JUSTICE REQUIRE THAT WE BE AGEIST?

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ABSTRACT

This paper restates some of the principal arguments against an automatic preference for the young as advocated by Kappel and Sandøe, arguments many of which have been extant for over a decade but which Kappel and Sandøe largely ignore. It then goes on to demonstrate that Kappel and Sandøe's "indifference test" fails to do the work required of it because it can be met by unacceptable conceptions of justice. The paper develops a number of new arguments against what I have called "ageist" preferences for the young or for those with long life expectancy. Finally I show that Kappel and Sandøe must believe that murdering older people is less morally wrong than murdering the young and that people relying on arguments such as theirs will have to accept the moral respectability of killing the innocent in order to maximise units of lifetime.

"Other things being equal we ought, when distributing resources essential for survival, favour the young." So say Klemens Kappel and Peter Sandøe in their 'QALYs, Age and Fairness' (*Bioethics* 6:4, October 1992). They wish to establish that QALYs are not ageist enough, that fairness requires that we distribute health care resources "so that the fundamental interests of [people] are fulfilled to the same degree"¹ and that, since staying alive is a fundamental interest, this means that, other things being equal,² different lives should be of equal duration as well as equally fulfilled in other ways.

Kappel and Sandøe arrive at this conclusion partly as a result of isolating and criticising five assumptions upon which they believe my claim that QALYs are unjust is dependent.³

¹ Klemens Kappel and Peter Sandøe 'QALYs, Age and Fairness' *Bioethics* Vol. 6. No. 4 October 1992.

² Things to which we will come in due course.

³ Kappel and Sandøe have constructed assumptions tailored to beg the question as to whether or not survival and certain other fundamental interests are divisible and distributable. I do not in fact make nor rely upon the assumptions they list. Moreover they have quoted from perhaps the shortest of the many things I have

Kappel and Sandøe distinguish what they call life-time views from present-time views, suggest that I subscribe to a present-time view and attempt to show why life-time views are better. I don't find their terminology particularly helpful and I certainly don't recognise my own position as constituting a present-time view. However, since these labels are embedded in their text I will use them for present purposes. We should note for the record that what Kappel and Sandøe call life-time views may take two forms. There are those, like Kappel and Sandøe, who believe we should always prefer the younger competitors in any distribution of life saving resources, whereas those who give weight to a 'fair innings' would treat competitors as equals until they had achieved enough years to constitute a fair innings. Only then would they automatically lose out to those who had not crossed the threshold of a fair innings.⁴

In criticising my treatment of QALYs Kappel and Sandøe develop a complex and ingenious position which it is challenging to unravel. They also succeed in fogging what is essentially a clear difference in moral outlook and one which cannot perhaps be resolved by argument alone. I shall concentrate on the account they give of the connection between age and fairness.

LONGEVITY AND FAIRNESS

"Now we want to claim against Harris that 4) is only true on the present time view of equality, but that the present time view is highly implausible." 4) states: "If younger patients are given priority the fundamental interests of the older patients are not being fulfilled to the same degree as those of the younger ones." This assumption is cited as one on which I rely. I do not. The phrase "to the same degree" begs the question at issue as we shall see. If younger patients are given priority, the fundamental interests of the older patients are not merely not being fulfilled to the same degree, they are not being fulfilled at all.

Kappel and Sandøe "spell out the criticism" of me like this:

Assume for example that there are two patients competing for the same liver transplant. One patient is 20 years old and the other

written about QALYs and perhaps the only one that does not answer specifically or indeed pre-empt many of the points they make. My "More and Better Justice" (in J. M. Bell and Susan Mendus Eds. *Philosophy and Medical Welfare* Cambridge: Cambridge University Press 1988) for example considers the merits of one type of so called lifetime view as, in some detail, does, Chapter 5 of my *The Value of Life* (Routledge & Kegan Paul, 1985).

⁴ In Chapter 5 of *The Value of Life* I discuss these issues at length and reluctantly see merit in the fair innings argument. I now see less merit in it for reasons that will appear.

60. Both will die if they don't get the liver and if they get the liver they can both expect to live for about ten more years . . .

They point out that the present time view is indifferent as to who gets the liver, as are QALYs, and then conclude that both views are wrong:

If we give the liver to the older person, he will get another ten years on top of those 60 that he has already got. And he will end up with 70 life years. Whereas if we give the liver to the young person he will only end up with a total of thirty life-years. To give the liver to the older person rather than to the younger is like giving money to the rich rather than to the poor.⁵

There is some merit in this argument as I have always conceded. However as I noted in 1985 it has its problems.⁶

Kappel and Sandøe believe that two people have their interest in survival satisfied to the same degree if they survive for the same length of time in total — a person is rich if he lives to be 70 and poor if he lives to be thirty. Justice on their view requires that we try to equalise resources between people including those resources which consist of units of lifetime.

LIFE IS NOT A RESOURCE

Now of course there is an important dis-analogy between units of lifetime and units of money or other material resources. Money can be *re-distributed*; life cannot. When I allocate life-saving resources from Peter to Paul the life years I take from Peter are not literally received by Paul. More importantly, Peter and Paul are not more equal when the transaction is complete. Peter will have ceased to exist and hence is simply not there; he is in no state to be compared to anyone because he is in no state at all.

However, because life is not the sort of thing that can be distributed or re-distributed Kappel and Sandøe's assertion that to "value the lives of different citizens equally we must in our distribution of resources for survival give priority to the young" is false in their own terms.

⁵ Ibid. page 314. Kappel and Sandøe footnote this passage to Michael Lockwood's article in Bell and Mendus (note 3. *supra*) and credit him with calling it 'the fair innings argument'. Again, had they read my article in the same book they would have noted that I christened this argument more than three years earlier, spoke in favour of one application of it and pointed up the problems it has, which we are about to review.

⁶ See my *The Value of Life* Chapter 5, page 91 ff.

Consider a slightly different scenario. Peter is twenty years old, Paul is forty, they both need a kidney transplant and can each expect an extra forty years as a result. If the young get priority Paul will die at forty and Peter will overtake him and live to be sixty, gaining twenty unfair years. He will thus end up with the same unfair advantage over Paul that Paul enjoyed over him when the allocation was made and upon which its justification was based. To be fair as between Peter and Paul, Kappel and Sandøe must believe that Peter can only get the resources if he is to be killed at forty because, as they say, "to value the lives of two persons equally we should aim at distributing resources so that each in his life viewed as a whole will have his fundamental interest fulfilled to the same degree as the other person".⁷ Equally we may presume that if the same resources can either save the life of Dylan who is twenty, or Peter Paul and Mary who are each forty, then again Dylan should be saved so long as he is killed at forty, even though this means sacrificing three (or any number of such) lives to save one.

Kappel and Sandøe try to define equality in a way which would remove some of these problems. To understand their account and also to see why it fails we will have to look at it in detail.

INDIFFERENCE AND THE ENVY TEST

Suppose we imagine the following four scenarios for our own life: 1) living until the age of 20 and then dying because of lack of a liver transplant. 2) Getting a liver transplant at the age of 20 and then living 10 more years. 3) Living until the age of 60 and then dying because of lack of a liver transplant. 4) Getting a liver transplant at the age of 60 and then living ten more years. We would probably prefer 4) to 3), 3) to 2), and 2) to 1) (other things being equal).

Kappel and Sandøe then suggest

To treat people equally can plausibly be spelled out to mean that we should distribute resources among them in a way so that when in turn imagining their respective situations we get as close as possible towards being indifferent between being in the shoes of one person or being in the shoes of the other . . . We would be as close as possible to being indifferent by giving the transplant to the young person (since we are closer to being indifferent between 2) and 3) than we are to being indifferent between 1) and 4).⁸

⁷ Kappel & Sandøe page 313.

⁸ Ibid. Page 314.

They then conclude that we should give the liver to the young patient.

There are two important problems with the suggestion that people are treated equally with respect to rival outcomes when they are indifferent between them. The first has to do with the notion of equality involved, the second has to do with the proposed test of indifference.

EQUAL INDIFFERENCE

The force of the Kappel and Sandøe example is not immediately clear. They seem to have in mind a test given some philosophical prominence by Ronald Dworkin, but ultimately rejected by him as a test of equal distribution. In the second of a famous pair of articles originally published in *Philosophy & Public Affairs*, Dworkin outlines a possible test for equal distribution of resources which he dubs the "envy test".⁹ The test is introduced thus:

Suppose a number of shipwreck survivors are washed up on a desert island which has abundant resources and no native population . . . These immigrants accept the principle that no one is antecedently entitled to any of these resources, but that they shall instead be divided equally among them. They also accept (at least provisionally) the following test of an equal division of resources, which I shall call the envy test. No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle.¹⁰

Note that if anyone envies, *is not indifferent to*, another's bundle, the division cannot be called equal. Dworkin goes on to point out a way in which the envy test may fail to constitute an equal distribution which has a moral for us. He imagines that a distribution which passes the envy test has been made and notes:

The distribution might still fail to satisfy the immigrants as an equal distribution, for a reason that is not caught by the envy test. Suppose . . . the divider achieved his result by transforming all the available resources into a very large stock of plover's eggs and pre-phylloxera claret (either by magic or trade with a neighbouring island that enters the story only for that reason) and divides this glut into identical bundles of baskets and bottles . . . all but one are delighted. But if that one hates plovers' eggs and pre-phylloxera claret he will feel that he has not been treated as an equal in the division of resources.¹¹

⁹ Ronald Dworkin "What is Equality? Part 2: Equality of Resources", in *Philosophy & Public Affairs* Vol 10 No. 4 Fall 1981.

¹⁰ Ibid. page 285.

¹¹ Ibid.

Dworkin then outlines a better test which involves an auction or market in which all people can freely purchase and hence *choose* their own allocation of resources. The point however is that the two elements which make the envy test, as modified, plausible, are first that no-one envies another's bundle *at all* and second that each is *satisfied* with his own bundle.

WHY THE PROPOSED INDIFFERENCE TEST FAILS

Now let's see how unlike the envy test Kappel's and Sandøe's version of the indifference test is. First indifference is not achieved, it is merely approached; but no nearer than by a distance of thirty years. Secondly and more important, they fail to treat each of the candidates for resources as equals, as people whose preferences and interest in survival count the same in the distribution. Finally, because their indifference test allows for us to be equally indifferent "between being in the shoes of one person or being in the shoes of the other", it fails to give any moral content to the idea of equality. Let me explain in terms of the following example drawn from more general resource allocation issues.

One method of allocation of a scarce resource which apparently satisfies the requirements of justice and of the indifference test is of course not to allocate that resource to anyone!¹² All are then treated equally, in the sense that they are all left equally without benefit of the resource in question. This is sometimes thought to be a viable application of the requirements of justice and indeed to constitute a just allocation of resources. It is sometimes advocated as a reason for not introducing a new technique that cannot immediately be made available to all those who could benefit. The fallacy of such a supposition is easily illustrated. The principle of justice, and indeed the principle of equality, are *moral* principles. That is, they are principles with some moral content, principles that are designed to be more than impartial, that are designed among other things to respect and to do justice to persons. In some sense this must involve some benevolent attitude to persons which is often abbreviated as 'respect for persons'. Such an attitude to others is as different as it's possible to be from simply showing *an equality of lack of respect* or *an equal indifference to the fate of others*.

The failure to allocate resources that would save lives or protect individuals could not then be part of a claim to satisfy the requirements of equality because this principle has at its heart the claim that people's lives and fundamental interests *are of value, that they matter*. Anyone

¹² In terms of the present example: keep the liver and let them all die.

who denied life saving resources, or resources which would protect life and other fundamental interests, is not valuing the lives of those to whom she denies these protections. Although she is treating them all equally in the sense of treating them all *the same*, she is not treating them *as equals*, as people who matter and hence matter equally.¹³ The alternative dog-in-the-manger approach treats all people as *equally unimportant* and hence as equally without value.

The proposed indifference test could be met in a range of ways which would certainly count as treating people *the same* and would certainly leave all indifferent as to whose shoes they stood in, but would fail to have any resemblance to equality as a moral principle.

The idea of Kappel and Sandøe seems to be that 2) 3) and 4) are closer to each other than is 1) to any of them, so we should make 1) closer to the other three. We are clearly not equally indifferent but, so I suppose it is claimed, we should approach indifference more nearly. If 1) gets the organ he will end up the same as 2) and closer than he would otherwise have been to 3) and 4). Therefore giving to 1) makes them more nearly equal with respect to the length of their life at its end. But it hardly treats them as equals. This is because it fails to take seriously the idea of the importance and dignity of each individual, the idea that each counts for one and none for more than one. This failure is what Derek Parfit once memorably called "innumerate ethics".¹⁴

PEOPLE MATTER

Kappel and Sandøe concede that their whole argument begs the question against those who think that each person matters equally regardless *inter alia*, of race, gender, nationality, and age or life expectancy. They justify this question begging approach by suggesting that those who disagree with them owe "us an argument which shows that extra life-years are special compared to other things [that may be distributed, like money] . . . Until this argument is forthcoming we will allow ourselves to assume that extra life years are not special".

It is not unnatural to be generous in one's own cause, but this assumption can hardly be warranted. Life, as the necessary condition for the enjoyment of any resources and any level of welfare of necessity has a special place. We have noted that life years cannot be distributed between persons. When life years are distributed the subjects of the

¹³ See Ronald Dworkin's compelling elucidation of this distinction in Dworkin, 1977, p. 227.

¹⁴ Derek Parfit "Innumerate Ethics", *Philosophy & Public Affairs*, Vol 7, No 4. Summer 1978.

distribution are not left more equal. Some are left and others are not; these others cease to exist.

My point is now and has always been that where we have to choose between lives, we must choose in a way which shows no preference. Two people have their interest in survival satisfied to the same degree if the wish of each to survive as long as they can is satisfied. Such a wish does not admit of satisfaction to a degree.

The anti-ageist argument that Kappel and Sandøe demand and have failed to notice can be (and has been) stated thus:

All of us who wish to go on living have something that each of us values equally although for each it is different in character, for some a much richer prize than for others, and we none of us know its true extent. This thing is of course 'the rest of our lives'. So long as we do not know the date of our deaths then for each of us the 'rest of our lives' is of indefinite duration. Whether we are 17 or 70, in perfect health or suffering from a terminal disease we each have the rest of our lives to lead. So long as we each fervently wish to live out the rest of our lives, however long that turns out to be, then if we do not deserve to die, we each suffer the same injustice if our wishes are deliberately frustrated and we are cut off prematurely.¹⁵

It is this outlook that explains why murder is always wrong and wrong to the same degree. When you rob someone of life you take from them not only all they have but all they will ever have, it is a difference in degree so radical that it makes for a difference in the quality of the act. However, the *wrongness* consists in taking from them something that they want. That is why suicide and voluntary euthanasia are not wrong and murder is.

Kappel and Sandøe must believe that in so far as murder is an injustice, it is less of an injustice to murder the old than the young and since they also believe that life years are a commodity like any other (specifically like money and time off¹⁶) it is clear that in robbing people of life you take less from them the less life expectancy they have.

FAIRNESS AND QUALITY OF LIFE

Finally Kappel and Sandøe turn to quality of life issues and argue that resources required for survival should be distributed not only

¹⁵ Harris 1985. page 89.

¹⁶ Kappel & Sandøe *op cit.* pp 314 & 315.

so as to favour the young but also so as to favour those whose quality of life has been relatively poor.

Two patients . . . both about 40 years old . . . need a liver transplant but only one suitable liver is available. One of the patients [the first] has had a much worse life than the other . . . In this case it seems most fair to give the liver to the first person. This supports the life time view.¹⁷

Again, such a view has some appeal, but it has two major problems, one practical and the other theoretical.

The practical problem is that we could never make decisions as to how to allocate life saving or indeed other scarce resources between people until we had their whole (and very complete and detailed) life history. Without this data all sorts of injustices would be compounded. Better perhaps to treat each person as counting for one and none for more than one than to embark on the massively invasive (of privacy) data collection which it would be necessary to hold and have instantly available on each and every citizen and which could never be complete, accurate, or proof against abuse.

The theoretical problem is, and it applies to quantity of life as well as to quality, that if it is right to attempt to even out quality and quantity of life as between people, then we should do so as a matter of public policy throughout society, not simply in the rare cases where allocation of life-saving resources decisions in health care arise. This might have to include making sure that no-one lived longer than the person who has the shortest lifespan and no one was happier than the most miserable.¹⁸

Equally, if fairness is the issue it is surely also unfair (even less fair?) to arrange things so that the burden of making society or the world a fairer place falls only on those who are in competition for life saving resources. In the example Kappel and Sandøe produce it would surely be fairer to kill a particularly successful and happy sixty year old and use his liver and then both the forty year olds could be saved!¹⁹ If Kappel and Sandøe are really serious in their bizarre claim that extra life years are not special, then those life years are not special *for anyone*, not even for those who do not need resources to keep them alive (and which of us does not?). If we are playing the game of asking who owes whom an argument, then what, on the Kappel and Sandøe view, exactly is the wrongness of depriving people of further life years? It

¹⁷ Ibid. p. 315–316.

¹⁸ This might of course be dysfunctional in terms of species survival but we will ignore this problem for obvious reasons.

¹⁹ Or is it better to kill a particularly miserable and unsuccessful one?

clearly is not unjust to do so, so long as those years are appropriately 'redistributed'.²⁰

Of course Kappel and Sandøe can tough it out, they can embrace the problems I have here identified and say that is the price we pay for trying to be fair. Ultimately we will be comparing different moral priorities.

There is, I believe, much to be said for taking individual persons and their wishes and fundamental interests as what matters from the point of view of morality. This means that each is to count for one and none for more than one regardless of such things as race, gender, and age. We must recognise that although all persons' lives will differ in length, happiness and success, in short in the degree to which their fundamental interests are satisfied, that they all, each and every one, matter morally despite these differences not because of them.

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²⁰ I will not press the point because I have provided an answer to this question *inter alia* in *The Value of Life* but also in my "The Survival Lottery" in *Philosophy* Vol 50 1975. In this latter place of course the suggestion just made is justified only because, regardless of age, it reduces the number of people who will have their wish to go on living frustrated.