Taking Health Needs Seriously: Against a Luck Egalitarian Approach to Justice in Health

Nielsen, Lasse

Go to publication entry in University of Southern Denmark's Research Portal

Taking Health Needs Seriously: Against a Luck Egalitarian Approach to Justice in Health

Introduction

How to prioritize within public health care systems represents one of the most important political debates of our time. At the center of this political debate lies an even more fundamental inquiry for political philosophers, that is, how to set the most just standard for the distribution of health and health care. In a recent exchange, Shlomi Segall and Norman Daniels have argued, respectively, for a luck egalitarian and a normal functioning approach to distributive justice in health. In recent works, Segall defends his own luck egalitarian approach against the objections raised by Daniels and others, who argue luck egalitarianism to be too wide in some ways and too narrow in others to uphold distributive justice in health. In this paper, I argue that this defense is largely unsuccessful.

In order to accommodate Daniels' objections, Segall has suggested a pluralistic luck egalitarianism taking the demand of meeting everyone's basic needs into account as a more fundamental moral requirement than luck egalitarian justice (Segall 2010a, p. 69). Following this pluralistic setup, it seems as though his luck egalitarianism has two separate purposes: First, it ought to be applied as the standard for leveling inequalities fairly *above* a threshold of basic needs satisfaction; and second, it should be used as a tiebreaker *below* this threshold to decide which patients should be given priority whenever patients are sufficiently equal in basic needs and sufficiently unequal in matters of responsibility.

The purposive division between luck egalitarianism above and below the threshold of basic needs will structure my argument. First, I argue that Segall's defense of the application of a luck egalitarian distribution above a threshold of basic needs is inadequate. Though his pluralistic account enables him to cope with problems related to the distinction between cosmetic and

1

reconstructive surgery upon which Daniels' builds some of his critique, it cannot defend luck egalitarian health distribution above a standard of normal functioning. Thus, if normal functioning constitutes the threshold of basic needs, many will find luck egalitarianism counterintuitive above this level. Segall's pluralistic luck egalitarianism remains unqualified in this way.

Secondly, I argue against the application of luck egalitarianism below a standard of normal functioning, even in specific tiebreak situations of equal neediness. Segall suggests a weighted lottery model to cope with the implications of *the abandonment objection* raised by Elisabeth Anderson (1999, p. 295). I make two objections to this model that will serve as an internal critique of Segall's pluralistic luck egalitarianism. One, the model tends to repeatedly override the demand of luck egalitarian justice, which is internally problematic if luck egalitarians are to take their justice ideal seriously. Two, the model is not responsibility-sensitive in the proper sense and thus remains incompatible with the luck egalitarian outlook.

Finally, I provide an external critique of luck egalitarianism in general, arguing that we ought not to be responsibility-sensitive in matters of health care distribution at all below the threshold of basic needs, since doing so will fail to acknowledge that people are entitled to basic health and health care merely due to being *persons*. By failing to acknowledge this, I conclude, luck egalitarianism cannot uphold justice in health.

A luck egalitarian approach to justice in health

Luck egalitarianism is the idea that it is unfair for a person to be worse off than others "due to reasons beyond her control" (Segall 2010a, p. 10). Thus, the idea rests upon a distinction between brute luck, over which a person has no control, and option luck, over which a person has full or at least partial control. By control here I do not mean control over outcomes *as such*, which a person will never (fully) have in any situation involving luck. Rather, 'control' refers to the deliberate

choice a person can make from among a number of different possibilities. The distinction can be traced back to Dworkin's article from 1981, in which he defines option luck as "a matter of how deliberate and calculated gambles turn out" and brute luck "as a matter of how risks fall out that are not in that sense deliberate gambles" (Dworkin 1981, p. 293). The basic idea, then, is that it is unfair for people to be worse off than others due to brute luck. According to Cohen, Dworkin does egalitarianism "the considerable service of incorporating within it the most powerful idea in the arsenal of the anti-egalitarian right: the idea of choice and responsibility" (Cohen 1989, p. 933). Cohen himself elaborates on this idea in the development of his own approach to distributive justice, suggesting that attention be paid to the distinction between choice and luck. The relevant question for egalitarian justice, he argues, is whether "someone with a disadvantage could have avoided it or could now overcome it" (Cohen 1989, p. 920). In his later work, he emphasizes that a more appropriate understanding of the question is whether we can reasonably expect people to have avoided their disadvantages (Cohen 2004, p. 11). According to Cohen's later writings, egalitarian justice thus requires that we should compensate people for disadvantages that it would not be reasonable to expect them to avoid or overcome. Shlomi Segall concurs with this line of thought and has recently applied this luck egalitarian outlook to distributive justice in health. In the remainder of this section, I briefly account for Segall's version of the luck egalitarian approach.

Establishing his version of a luck egalitarian approach to justice in health, Segall reformulates the concept of brute luck. Echoing Cohen, he defines brute luck as "the outcome of actions (including omissions) that it would have been unreasonable to expect the agent to avoid (or not to avoid, in the case of omissions)" (Segall 2010a, p. 20). Due to this definition of brute luck, Segall's approach copes well with cases that have typically been problematic for stricter versions of luck egalitarianism (e.g. taking residence in a high-risk area and the need for medical care during pregnancy). Segall leaves much to be said about how to define the idea of reasonable avoidability.

Since this discussion is not the main aim of this paper, however, I shall leave it aside and consider it a general qualification of the approach that Segall limits luck egalitarianism to focus on leveling inequalities that it would be unreasonable to expect people to avoid, not all inequalities for which people are themselves responsible, since by the latter it risks holding people responsible for too much.

Segall qualifies his approach even further by adopting a pluralist account of luck egalitarianism, holding that in addition to the point of reasonable avoidability, people should be secured the satisfaction of their "basic needs" (Segall 2010a, p. 69). As far as I understand Segall on this point, the idea is that we must distinguish between the realm of distributive justice, in which luck egalitarianism holds the most plausible principles of distribution, and the more fundamental moral requirements, such as meeting everyone's basic needs. According to Segall, the fundamental moral requirements have priority over principles of distributive justice. By acknowledging this, a luck egalitarian will therefore not tend to abandon patients with basic needs due to the fact that their neediness is their own fault, even though he thinks that questions about distribution should normally be given a responsibility-sensitive answer.

Segall's distinction between distributive justice and fundamental moral requirements can, I believe, be understood as a separation of the realm of justice from that of basic needs, the relevant question in relation to which is whether the worst off has a right (of justice) to have their basic needs secured by society or, rather, that every citizen has a duty (not of justice) to secure the fulfillment of the basic needs of others. Segall argues for the latter, holding that "[i]t is because we have a duty to meet basic needs, not because people have a right to have their basic needs met, that one may not waive away one's entitlement to medical care" (Segall 2010a, p. 78).

Consider for a moment how luck egalitarianism then actually comes to work in issues of justice in health. It seems as though the prioritized relationship between basic needs requirements and luck

egalitarian justice leaves open only two ways in which luck egalitarianism comes into play. First, if we are dealing with issues of health distribution above the sufficient level of basic needs, luck egalitarianism would supposedly provide the best standard for a just distribution. Thus, luck egalitarianism should be applied above the sufficiency threshold. Second, if we are dealing with issues of distributive justice below the sufficient level of basic needs, we would be morally required to secure everyone's basic needs equally, independent of the individual patient's self-responsibility (unless in cases of scarcity). If resources are scarce, luck egalitarianism should be applied as a tiebreaker to appoint priority to the less over the more responsible patient; that is, if the different patients are equally (or sufficiently equally) needy below the threshold level and unequally (or sufficiently unequally) responsible.[1] It seems as though these are the only ways in which Segall can apply luck egalitarianism to justice in health (Segall 2010a, p. 69).

In brief, for reasons of fundamental moral requirements, Segall accepts that people should be compensated for the lack of satisfaction of their basic needs and holds further that a luck egalitarian approach to justice in health requires that "society ought to fund biomedical treatment for any condition that:

1. is disadvantageous;

2. could be fixed by biomedical intervention;

3. it would be unreasonable to expect the individual to avoid" (Segall 2010a, p. 127)[2].

Though I find Segall to provide insufficient information about the potential criteria for reasonable avoidability and his specific outline of luck egalitarian pluralism, I generally take these qualifications to strengthen the luck egalitarian position. I therefore take Segall to provide a relatively strong version of luck egalitarianism. Consequently, the rejection of this approach represents a rejection of luck egalitarianism in one of its strongest formulations.

Should luck egalitarianism be applied above normal functioning?

Norman Daniels' approach to justice in health, expanding the Rawlsian principle of "fair equality of opportunity" to concern health, builds on the idea that it is unfair for a person to be below normal functioning; that is, in Daniels' own terms,

> "the fair equality of opportunity principle applied to health needs does not rectify or level all inequalities in function among people. It aims only to keep people functioning normally and thus to assure them the range of opportunities they would have in the absence of disease or disability" (Daniels 2008, p. 58).

Hence, the satisfaction of basic health needs is equivalent to normal functioning. According to this view, it is not demanding to level inequalities in health above a level of normal functioning, and thus luck egalitarianism demands too much when holding that people should be compensated for disadvantages beyond their control. To see this, consider cases of cosmetic surgery which have been intensively debated in the literature (Buchanan et al., 2000, p. 110; Daniels 2008, p. 73; 2009). The point of criticism here is that luck egalitarianism appears to imply public funding for cosmetic surgery, since an unappealing appearance constitutes an involuntary disadvantage. Nonetheless, this is a proposition that we do not normally find justified. Therefore, the criticism goes, luck egalitarianism shows itself to be too wide.

This criticism somehow misses the point. I am not hereby saying that it fails to point out very relevant difficulties for luck egalitarianism, but rather that it has not adequately explained the problematic aspect of luck egalitarian distribution above normal functioning. The criticism seems to encourage an answer to the question, *what kind of surgery should we offer as compensation for*

disadvantages? In my view, this is a question for doctors and medical scientists to answer; not political philosophers. Rather, political philosophers should address the question, *for which disadvantages should we offer compensation?* Hence, although Daniels' critique is in my view justified, it seems to have encouraged its opponents to answer the wrong question.

In regards to the latter question, Daniels relies on Thomas Scanlon's suggestion that the answer depends on the urgency of the disadvantage. Here, Scanlon relies upon what he calls *an objective criterion* that

> provides a basis for appraisal for a person's well-being which is independent of that person's tastes and interests, thus allowing for the possibility that such an appraisal could be correct even though it conflicted with the preferences of the individual in question, not only as he believes they are but even as they would be if rendered consistent, corrected for factual errors, etc (Scanlon 1975, p. 658).

On this account, the objection that luck egalitarianism is too wide should not focus on whether cosmetic or reconstructive surgery is the more appropriate compensation, which would merely be an answer to the first question above, but rather on the fact that luck egalitarianism seems to imply that we also ought to compensate for disadvantages that are not at all *urgent*. This latter fact, I believe, is the real reason why many find the luck egalitarian account to be excessive. In the following, I discuss Segall's reply to the objection that luck egalitarianism is too wide. As already mentioned, this criticism seems to encourage answers to the wrong question, and I therefore take Segall's reply to miss the crucial point of the criticism. However, an evaluation of Segall's reply emphasizes the importance of the degree of urgency of the disadvantages in question and will thus lead us toward a strengthened reformulation of the objection that luck egalitarianism is too wide. I

conclude on this reformulation that luck egalitarianism should not be applied above normal functioning. Now, let me turn to Segall's two directions of reply to the critique.

The priority of reconstructive over cosmetic surgery

On the one hand, Segall claims there could be valid reasons for a luck egalitarian to give priority to reconstructive over cosmetic surgery. Segall gives two reasons that I shall discuss below.

The first reason concerns the fact that cosmetic surgery is more susceptible to moral hazard than reconstructive surgery, since, as Segall rightly assumes, "many more women would opt to change the size of their breasts who would otherwise not have", if cosmetic surgery was made free of charge for all (Segall 2010b, p. 352). By moral hazard, Segall merely means the "changing of one's preferences due to free coverage" (Segall 2010b, p. 352). I agree with Segall in that an increased risk of moral hazard is in fact problematic, but is the risk of moral hazard really greater for cosmetic than reconstructive surgery? Suppose all types of surgery were made free of charge. We would then expect many people, who otherwise would not have, to opt for cosmetic surgery such as breast enhancement, nose corrections and so forth. But would we not also expect that many people, who otherwise would not have, to opt for reconstructive surgery such as hair transplants, eyesight correction or a regeneration of the physical strength of youth? I, for one, cannot tell which type is more susceptible to moral hazard.

If Segall is correct that the risk of moral hazard is greater for cosmetic than reconstructive surgery, I would agree that this could be a valid reason for a luck egalitarian to give priority to reconstructive surgery. However, I would like to emphasize that this reasoning must come from the complementarity of the luck egalitarianism with a standard of basic needs and not from luck egalitarianism as such. The problematic aspect concerning the women's morally hazardous behavior is how they exploit the free coverage for biomedical intervention that is not *necessary*, even though

it might be *preferable*. The reasoning behind judging moral hazard as something morally problematic thus seems to be founded upon considerations of urgency. If there were no such considerations, why should we be worried about people changing their preferences? It seems that without the aspect of people getting what they *desire* but do not *need*, we would not be troubled by morally hazardous behavior.

Another reason for luck egalitarians to generally give priority to reconstructive over cosmetic surgery, according to Segall, is "the fact that a loss of a breast is almost always much worse than having intact breasts that are either 'too small' or 'too large'" (Segall 2010b, p. 352). But I find this claim problematic. The disadvantages in the example are obviously uneven and it seems as though they would have to be more equally balanced if the example is to provide grounds for giving priority to reconstructive over cosmetic surgery. So consider instead two women, both of whom only have one breast. One of them has recently lost a breast as a result of a mastectomy; the other was born with only one breast. Assume that the disadvantage of living with only one breast is equal for the two women. Now, should we give priority to the reconstruction of the first woman's lost breast over the cosmetic surgery that would provide the additional needed breast for the second woman? I do not think so. Thus, the fact that a loss of breast is almost always worse than having 'too small' or 'too large' breasts is no legitimate reason to give general priority to reconstructive over cosmetic surgery, since it is uncertain whether a loss of a breast is worse than never having had a breast.

Segall's examples provide no reason to grant priority to reconstructive over cosmetic surgery. On the contrary, they emphasize the importance of urgency. The reason that we should give priority to the reconstruction of lost breasts over cosmetic breast procedures is that the former constitutes a more urgent disadvantage. Possessing the appropriate physical attributes for one's gender is central to anyone's life. That these attributes are perfectly sized and shaped is not. If urgency is the crucial

moral factor here, then the question arises whether luck egalitarianism can appropriately take this factor into account. It seems as though Segall's pluralistic luck egalitarianism has a way of doing this, since it adopts a sufficientarian standard of basic needs. Consequently, basic disadvantages would be more urgent than non-basic disadvantages.

However, this does not suffice to show that luck egalitarianism should be applied above normal functioning. The reasoning implies that basic disadvantages matter more than non-basic disadvantages, but it does not follow that non-basic disadvantages matter at all.

Consider Eve, who utterly regrets that her otherwise normal breasts are not perfectly symmetrical. In terms of her satisfaction with her own appearance, Eve is at a disadvantage (both interpersonally and compared to how satisfied she could otherwise be). Should we then offer Eve the required surgery? In light of the reasoning above, Segall might say that Eve's request is not our top priority, since her disadvantage is not basic. But suppose there are no other (more basic) requests. Does society then owe Eve cosmetic surgery?

Segall can respond in one of two ways. He could say that in this specific (and very rare) situation, society actually ought to provide the requested surgery free of charge, since Eve's condition is disadvantageous; could be fixed by biomedical intervention; and she could not reasonably be expected to avoid it. In my view, this is counterintuitive. Eve does not need anything independent of her rather pernickety preferences. Thus, following the objective criterion that substantiates Daniels' account of health needs, her disadvantage is not urgent and she is therefore not entitled to compensation. Even if we take Segall's own sufficientarian standard of basic needs as the appropriate account of urgency, Eve's disadvantage would not be urgent. To defend Eve's entitlement to compensation one would have to adopt a subjective criterion taking people's preferences to be constitutive of the morally relevant account of well-being. But by building a luck egalitarian account on a subjective criterion, we neglect the relevance of disadvantage-urgency and

would thus be required to compensate people for any unsatisfied preferences they may have that are not the result of their own choice or fault. Many will find this to be too demanding and thus take luck egalitarianism to be too wide.

Alternatively, Segall could insist on a more objective account of need taking the distinction between basic and non-basic disadvantages to be ultimately decisive. This would allow him to say that Eve is in fact not disadvantaged in the relevant sense, since her request is non-basic. By doing so, however, he limits the application of the luck egalitarian approach to matters of basic needs, thereby accepting that a luck egalitarian standard of distributive justice should not be applied above a sufficient functioning level. This strategy is not a way of defending against but rather a way of accepting the objection that luck egalitarianism should not be applied above normal functioning. I take it that Segall favors the former response and that he therefore accepts the implications which I have found counterintuitive (Segall 2010a, p. 129). If this is so, I cannot develop this argument further. One must decide for oneself what to make of these implications.

Is publicly funded cosmetic surgery counterintuitive?

On the other hand, Segall claims that public funded cosmetic surgery may not be morally counterintuitive after all (Segall 2010a, p. 132; 2010b, p. 352). To defend this claim, he refers to examples where cosmetic surgery appears to be the appropriate (or only) way to restore justice. I will argue that this defense is somewhat solid but again misses the crucial point of criticism. While I agree that cosmetic surgery might be the appropriate way to restore justice in some cases and I take Segall's examples to be a valid indication of this, I maintain that this is because someone is in fact below an acceptable level of functioning. I therefore fail to see how this justifies applying luck egalitarianism above normal functioning.

To argue that cosmetic surgery is not always counterintuitive, Segall draws attention to cases where people feel embarrassed or have low self-esteem due to their appearance (Segall 2010b, p. 352). For example, suppose a man is of perfectly normal health but has very unsightly skin. He is ashamed and refuses to show himself in public for fear of being humiliated. The interesting point in this example is that even though the surgery needed is all about changing appearance, the currently functioning level is not really *normal*. To be perfectly clear, it is normal in Daniels' sense due to his species-based account of normal functioning—that is, to be normally functioning is to live in absence of pathology. According to this view, feeling embarrassed and ashamed is not below normal functioning; hence, people should not be compensated for it (Daniels 2008, p. 151). It is important for me to note here that I do not share Daniels' intuition on this matter; not because I disagree with Daniels in that people should not be compensated for their preferences above a sufficient level of functioning, but rather because I disagree with his pathology-based understanding of what constitutes that level of functioning. Daniels adopts a biostatistical account of species-typical functioning which I am inclined to reject[3]. Consequently, while feeling ashamed or embarrassed might not be a matter of pathology (and I guess it actually could be), obviously it is not *normally* functioning. The critical factor here, it seems to me, would then again be the urgency of the disadvantage; not that he has not brought it upon himself.

Proceeding slightly further in this direction of thought, suppose the man in my example does not even have unsightly skin, but rather perfectly normal skin, but feels embarrassed and ashamed nonetheless. Suppose that unless he looks exactly like Adonis, he will feel utterly embarrassed. While I admit that this does not concur with Daniels' approach, I would tend to say that this fellow is functioning below normal. While there is absolutely nothing physically wrong with him, he is undoubtedly suffering from a rather urgent psychosocial disability. Permanently feeling

embarrassed about oneself is *not* normal functioning. That there is actually nothing to be embarrassed about does not make the condition any more normal.

Does this mean that he has a legitimate claim on society for cosmetic surgery to make his appearance Adonis-like? Well, that depends on whether or not this is the appropriate treatment for the condition. As I have suggested, this is less a question for political philosophers and more for doctors and medical scientists. Nonetheless, it seems to me that other treatments are possible for such disadvantages and cosmetic surgery therefore might not be the most appropriate. Clearly, the problem is less his appearance and more his perception of his appearance.

Segall also turns to the case of a change in skin color as an example that biomedical intervention for merely cosmetic reasons is not necessarily counterintuitive. He refers to an example from John Harris to demonstrate this (Harris 2007, p. 92; Segall 2010a, p. 132; 2010b, p. 353). According to the example, the reader is urged to imagine that dark skin has proven better in reducing risk of skin cancer than light skin, which becomes significant in the example due to supposedly increasing levels of UV radiation, and further that operations for changing skin color are medically safe, possible and inexpensive. "If this seems plausible", Segall notes, "then it is the case that there is nothing wrong with public funding for skin-color change as such" (Segall 2010a, p. 132). Consequently, the notion of providing public funds for operations to change skin color ceases to appear counterintuitive.

I agree with Segall that there might be rare cases in which changing skin color is the appropriate way of compensating people for some disadvantages. But it seems to me as though this is only in situations where someone is below an acceptable functioning level and skin-color intervention is the appropriate (or only) way to help them. A high risk of skin cancer due to increasing UV radiation levels is one way of being below an acceptable level of functioning, and if there is no alternative to reducing this risk other than operation to change skin color, then society ought to provide these

operations free of charge. If you remove the threat of skin cancer from the Harris example, however, I fail to see how anyone can argue for the public financing of operations to change skin color. At this point, it is the risk of suffering an urgent disadvantage that is the problem; not the skin color as such.

The revised objection

We can now sum up the revised formulation of the objection that luck egalitarianism is too wide. The central point of criticism is not so much that luck egalitarianism does not acknowledge the relevance of the distinction between cosmetic and reconstructive surgery. In fact, I have argued that this distinction is not in itself relevant for political philosophers. Rather, the core criticism is that luck egalitarianism cannot by itself account for the difference in urgency of various disadvantages and thus it "seems to expand the range of claims for assistance even into areas where most people feel they have little obligation to assist" (Daniels 2008, p. 73). As I have argued, Segall's pluralistic luck egalitarianism has a way of accounting for these differences, since he does adopt a sufficientarian standard of basic needs; by allowing this standard to appoint urgency of the disadvantages in the relevant sense, however, he will admit to the objection that luck egalitarianism should not be applied above a range of normal functioning. I conclude that luck egalitarianism remains unqualified in this way.

Should luck egalitarianism be applied below normal functioning?

Another general criticism of luck egalitarianism claims that it is too narrow in an important sense (Daniels 2008, p. 74). The most important point of this criticism is that it underestimates the demands of justice by refusing to compensate those in need of medical care due to the fact that they are responsible for their own situation. Consequently, luck egalitarianism will tend to abandon the

reckless. Daniels owes much credit to Elizabeth Anderson for this point, which I shall call *the abandonment objection* (Anderson 1999, p. 295).

Though Segall agrees that luck egalitarianism in itself cannot cope with the abandonment objection, he believes that his own pluralistic account can (Segall 2010b, p. 349). Rather optimistically, he holds that "the combination of indeterminate luck egalitarian fairness with the concern for basic needs yields a coherent guide to policy that avoids the abandonment objection" (Segall 2010a, p. 69). Segall thus follows what Voigt has referred to as "The 'Minimum Threshold' Strategy" of responding to the abandonment objection (Voigt 2007, p. 404).

In this section, I present three objections to his use of this strategy. The first two provide an internal critique directly aimed at Segall's suggested weighted lottery; first, that it ultimately repeatedly overrides luck egalitarian justice; and second, that it is incompatible with luck egalitarian responsibility-sensitivity. Finally, the section argues against luck egalitarianism in general—that it fails to acknowledge the moral foundations of basic health and health care entitlements. Before presenting the specific objections, let me begin by considering some of the implications of Segall's pluralistic luck egalitarian approach.

By adopting a two-layer model of sufficientarianism and luck egalitarianism, Segall faces two conflicting demands when dealing with issues of health distribution below the sufficiency level. The fundamental morality demands that everyone's basic needs should be met at all times, and the criterion of reasonable avoidability demands a responsibility-sensitive distribution of health. Since fundamental moral requirements have priority over a responsibility-sensitive distribution, the conflict only actually occurs in tiebreak situations, where resources are scarce, neediness is sufficiently equal, and responsibility sufficiently unequal.

Now, how should we balance responsibility-sensitivity against the basic needs requirement? It seems as though giving priority to the innocent patient *whenever* two patients are equally needy

might be an excessively harsh[4] strategy, even from a luck egalitarian perspective. Even though you find it fair that we hold the reckless driver somewhat responsible for his recklessness, you might find it unfair to make him bear the entire costs and possibly leave him to die. I take Segall to agree with this point (Segall 2010a, p. 71). As to balance responsibility-sensitivity against basic needs requirements, Segall suggests a weighted lottery, giving some―but not absolute―priority to the innocent patient (Segall 2010a, p. 72; 2010b, p. 350). However, this suggestion of weighted balance is in itself problematic, and below I make two objections to the weighted lottery model. Notice, then, that these objections are not aimed at luck egalitarianism in general but are instead meant to serve as an internal critique of Segall's specific defense against the abandonment objection.

My first objection to the weighted lottery model is that it ends up overriding luck egalitarian justice. If treating an innocent patient for a health deficit which she is not herself responsible for *is* a matter of justice―whereas treating a reckless patient for a health deficit which he is himself responsible for *is not*―then the weighted lottery model is in a way overriding the concern of justice when suggesting that the reckless patient ought to be provided medical care even though they have no claim (of justice) for this. Now, Segall makes perfectly clear that his luck egalitarianism is not a "mandatory-desert theory" (Segall 2010a, p. 16). This is so because it does *not* require that reckless patients are *not* offered treatment. Rather, it simply denies that the reckless are entitled to treatment as a matter of justice. In tiebreak situations, however, the treatment of the reckless will always be at the expense of treatment of the innocent. And since the innocent do have a claim for treatment, any treatment offered to the reckless in such situations is unjust as a matter of luck egalitarian justice. Thus, the weighted lottery is by definition unjust in terms of luck egalitarian justice, since it provides less chance to the innocent than they deserve and more to the reckless than they deserve.

As Cohen famously argues, acting in accordance with justice is possibly only partly what we should do (Cohen 2008, p. 302). If this is correct, the overriding of justice does not necessarily

constitute a problem for pluralistic luck egalitarians like Segall since it stems from the fact that there are other considerations that will occasionally outbalance justice. However, this implies that the weighted lottery model is not a luck egalitarian practice but merely a scheme of some practical rules of regulation that, although compatible with the overall pluralistic luck egalitarian framework, inevitably will overrule the concern of luck egalitarian justice. The role of luck egalitarian justice is therefore heavily restricted (especially if accepting my criticism of the applicability of Segall's luck egalitarianism above normal functioning).

Segall might then argue that the overriding of justice will only occur in cases of resource scarcity and, thus, we do well by continuing to emphasize the importance of the general luck egalitarian ideal below the level of normal functioning. However, since resource scarcity is assumingly the standard case of health and health care distribution, the overriding of justice becomes constantly present and thus the role of luck egalitarian justice further contracted. One need not, as Rawls, consider justice "the first virtue of social institutions" (Rawls 1999, p. 3) to agree with what I argue here.[5] More modestly, it would be sufficient to claim that, as Miller has pointed out, "Justice must be something we take seriously here and now" (Miller 1997, p. 88). Hence, if luck egalitarian justice is something that we ought to take seriously, I would find it highly unsatisfactory to overrule this concern as a standard health policy procedure. The weighted lottery model simply constitutes an excessively heavy restriction on luck egalitarian justice.

My second objection takes its cue from the concept of blameworthiness, so let me start by considering what we mean when saying that someone is blameworthy. You are blameworthy as an agent when your action makes certain negative responses fitting. When exactly such negative responses to actions are fitting is a matter for discussion; however, due to the importance of others' *consent* to actions that may affect them, knowingly and unnecessarily imposing a risk of harm to others is normally thought to be a weighty reason for blameworthiness (Feinberg 1971, p. 105;

1987, p. 116). Surely, one can also be blameworthy due to the risk of harm imposed on oneself, but the risk of causing harm to others is normally thought to be a weightier blamable factor. Another important aspect is the degree of harm one risks causing others, which is why we would say that the reckless driver is more blameworthy if driving a truck blindfolded than if riding a bike blindfolded. Thus, it would be fair to say that the more your behavior involves a risk of harm to others and the greater the harm to others you risk causing, the more blameworthy you are; and that the risk of harm to others invokes greater blameworthiness than the risk of harm to oneself.

Now see how this comes to be a problem for the weighted lottery model in *the reckless road-trip case*. Consider two neighboring countries, A and B, with different health care distribution policies. County A has ex ante decided on a no-lottery policy—that is, they give 100 percent priority to the innocent patient in tiebreak situations. Country B has ex ante decided on a weighted lottery policy giving 80 percent priority to the innocent (and thus 20 percent to the reckless) in tiebreak situations. Suppose a reckless driver X decides to go on a road-trip through A and B, driving equally badly in both countries—that is, the risk of getting hit by X is the same for citizens in A and B. But if you agree with what I have said about blameworthiness, you will have to say that X is more blameworthy in country B than country A, even though X's behavior is the same in the two countries, since the risk of harming others who will not receive the required health care is greater in B (20 percent) than in A (0 percent). Thus, it seems as though the more weight we give to the treatment of the reckless, the more blameworthy the reckless becomes. Following luck egalitarian intuition, the more blameworthy the person, the more they ought to bear of the costs of their blamable behavior. In fact, however, the weighted lottery model appears to imply the exact opposite.

Segall seems to think that his suggested weighted lottery constitutes a reasonable compromise between luck egalitarian justice and more fundamental moral requirements, since it reflects "a

responsibility-sensitive account that is not unduly harsh" (Segall 2010a, p. 72). However, the reckless road-trip case shows that this solution is not responsibility-sensitive in a proper luck egalitarian sense―that is, the *more* blameworthy you are, the *less* you are entitled to treatment. In fact, the weighted lottery seems to imply that the greater weight we give to the reckless in the lottery, the *more* blameworthy they are for imposing a risk on innocent others; however, the *more* likely they are to receive treatment. The distributive outcome of the weighted lottery is therefore incompatible with the responsibility-sensitivity implied by luck egalitarianism and should therefore not be accepted as a luck egalitarian solution.

Segall could rightly respond to this objection that the rejection of the weighted lottery would leave the innocent with only a fifty-fifty chance of receiving the required health care and thus make the reckless even more blameworthy. However, since many critics of luck egalitarianism separate the question of responsibility from that of basic entitlements, they are not inclined to accept blameworthiness as a relevant limiting factor in matters concerning basic needs. It would therefore appear as though this remains a luck egalitarian problem.

I have thus far argued against how Segall balances justice against basic needs. However, I have not yet provided a sufficient argument against a pluralistic luck egalitarian approach to health care distribution *as such*. The remainder of this section shall briefly attempt to provide such an argument.

The basic idea of pluralistic luck egalitarianism is that while we should take responsibility into account, it is not *all* that matters. Such an approach would, I suppose, state that *responsibility matters, all other things equal*; the intuition would thus be that we ought to favor the innocent over the reckless patient whenever resources are scarce other things being equal. I take Arneson to provide a useful example of the matter. Imagine a rescue team facing the tragic dilemma of deciding whether to rescue a group of experienced but reckless climbers that have voluntarily

followed a high-risk hiking path or a group of innocent schoolchildren caught in an unexpected blizzard. As Arneson notes, it would seem wrong not to take the responsibility in question in this case into account (Arneson 2000, p. 348).

However, I believe the example here is slightly more complex than it has been put forward. First of all, the example contains information that might be morally relevant but has nothing to do with responsibility, say for example that one group consists primarily of inexperienced children, the other of experienced adults. One could have valid moral reasons beyond responsibility-sensitivity for rescuing non-experienced climbers before helping the experienced climbers. Experienced climbers are both physically and mentally superior in their ability to survive catastrophic events, so the chances for someone saving themselves and surviving the situation are better if we save the schoolchildren before the experienced climbers. Furthermore, one could have valid moral reasons for generally rescuing children before adults. A consequentialist approach based upon a health economic metric like QALYs or DALYs would support a general moral rule like that, the children's years of life to come count for more than the adult's already-lived years.

If pluralist luck egalitarianism is the idea that responsibility matters *all other things equal*, the useful perspective of Arneson's example is simply that a rescue team must decide to rescue one of two groups of equally basic needs, for whom the only difference is that one of them is innocent, the other is reckless. In this case, I agree with Arneson that it initially seems attractive to conclude that one should favor rescuing the innocent before the reckless. In fact, however, I take this attraction to be morally flawed. The intuitive force of the hypothetical example is, in my view, derived from the fact that the choice-luck distinction is *the only* information we have. In a way, it is like the unjustified desire to rescue *Angel* before *Demon* due to the mere difference in the connotations of their names.

Many will find it rather troubling to reject the moral importance of the choice-luck distinction altogether in matters of health and health care distribution. Here, I shall briefly explain why I think that this is nonetheless what we ought to do. In my view, health and health care are basic human entitlements. People are entitled to basic health and health care due to the mere fact that they are *persons*—that is, being a person entails the right to be able to live a life of normal human functioning—and thus these entitlements are inalienable. I rely here on Darwall's point that the right to care comes from the *worth* of being a person, not from the *merit* of being a deserving person (Darwall 2002, p. 78) and on Nussbaum's account of basic human entitlements (Nussbaum 2000, p. 78). Therefore, you cannot lose your right to basic health care. Furthermore, you cannot even lose your right to basic health care *to some degree* compared to others, since you do not become less of a person by being a bad person. It follows that the innocent do not have a stronger claim on health care than the reckless.

Thus, I conclude upon these reflections that in order to acknowledge properly the moral importance of meeting basic health needs—that is, the objective urgency of basic human entitlements stemming from the worth of being a person—one must set aside considerations of responsibility. In this way, even a pluralistic luck egalitarian account remains too narrow. Thus, in sum, this section concludes that we should not apply a luck egalitarian distributive standard below a level of normal functioning (even if it is only to serve in tiebreak situations of equal neediness).

Conclusion

I have argued in this article that Segall has not adequately defended the application of luck egalitarianism to distributive justice in health. Firstly, this is because he has failed to show that health inequalities above a level of normal functioning are problematic as a concern of justice. Secondly, it is because his suggested weighted lottery model is an inappropriate way of balancing

demands of justice and more fundamental moral requirements, since it tends to override the demand of luck egalitarian justice itself, and furthermore, it is incompatible with luck egalitarian responsibility-sensitivity. Finally, it is because the right to basic health and health care cannot be dependent on considerations of responsibility but must rely merely on the worth of being a person.

I believe I have now reached a point where I am able to suggest an answer to the question Segall raises in the preface of his very recent book on the topic, for which he gives credit to his friend and colleague Nir Eyal: "If we both find luck egalitarianism so intuitively appealing (or is it just that we were bowled over by Jerry Cohen's personality?), then why is it that the theory appears so counterintuitive when applied to health care?" (Segall 2010a, p. ix). Since I, regrettable as this may be, can say nothing about Cohen's personality, my suggested answer is the following: It is because it does not take health needs seriously.

References

Anderson, E. 1999. What is the point of equality? *Ethics* 109: 287–337.

Arneson, R.J. 2000. Luck egalitarianism and prioritarianism. *Ethics* 110: 339–349.

Buchanan, A., D.W. Brock, N. Daniels, and D. Wikler. 2000. *From chance to choice: Genetics and justice*. Cambridge: Cambridge University Press.

Cohen, G.A. 1989. On the currency of egalitarian justice. *Ethics* 99(4): 906–944.

Cohen, G.A. 2004. Expensive taste rides again. In *Dworkin and his critics*, ed. J. Burley: 3–29. Oxford: Blackwell Publishing.

Cohen, G.A. 2008. *Rescuing justice and equality*. Cambridge, MA: Harvard University Press.

Daniels, N. 2008. *Just health: Meeting health needs fairly*. New York: Cambridge University Press.

Daniels, N. 2009. Just health: Replies and further thoughts. *Journal of Medical Ethics* 35: 36–41.

Darwall, S. 2002. *Welfare and rational care*. Princeton: Princeton University Press.

Dworkin, R. 1981. What is equality? Part II: Equality of resources. *Philosophy and Public Affairs* 10(3): 185–246.

Feinberg, J. 1971. Legal paternalism. *Canadian Journal of Philosophy* 1(1): 105–124.

Feinberg, J. 1987. *The moral limits of the Criminal Law Volume 1: Harm to others*. Oxford: Oxford University Press.

Harris, J. 2007. *Enhancing evolution: The ethical case for making better people*. Princeton: Princeton University Press.

Miller, D. 1997. What kind of equality should the Left pursue? In *Equality*, ed. J. Franklin, 83–99. London: Institute for Public Policy Research.

Nussbaum, M.C. 2000. *Women and human development*. New York: Cambridge University Press.

Rawls, J. 1999. *A theory of justice*. Cambridge, MA: The Belknap Press of Harvard University Press.

Scanlon, T.M. 1975. Preference and urgency. *The Journal of Philosophy* 72(19): 655–669.

Segall, S. 2010a. *Health, luck, and justice*. Princeton: Princeton University Press.

Segall, S. 2010b. Is health (really) special? Health policy between Rawlsian and luck egalitarian justice. *Journal of Applied Philosophy* 27(4): 344–358.

Sen, A. 1985. Well-being, agency and freedom: The Dewey Lectures 1984. *The Journal of Philosophy* 82(4): 169–221.

Temkin, L. 2003. Equality, priority or what? *Economics and Philosophy* 19: 61–87.

Voigt, K. 2007. The harshness objection: is luck egalitarianism too harsh on the victims of option luck? *Ethical Theory and Moral Practice* 10: 389–407.

---

[1] This means that there is a case for a luck egalitarian tiebreak if patients are perfectly equal in terms of their lack of basic needs but differs even to the smallest degree in responsibility, and if patients are almost equal in terms of their lack of basic needs but sufficiently different in terms of their degree of responsibility. To see this, consider two cases, A and B. In A, two patients are equally in lack of basic needs (-100; -100) but differ only slightly in terms of responsibility (100; 99). Due to the perfect equality of neediness, the slight difference in responsibility would be a tiebreaker. In B, two patients are almost equal in terms of their lack of basic needs (-100; -99) but differ to a significant

degree with respect to responsibility (100; 0). The large difference in the degree of responsibility might possibly outweigh the small difference in neediness and could therefore be a tiebreaker. It seems as though both A and B could be cases for a luck egalitarian tiebreak.

[2] Some might find this a rather strange outline of luck egalitarianism, since it seems to imply that we ought to fund treatment for disadvantages that *everybody* suffers due to reasons beyond their control. However, this seems to ignore the *relative* aspect that we do normally ascribe to luck egalitarianism. To avoid this ignorance, I choose to read "disadvantageous" interpersonally.

[3] In fact, I suggest a capability-based understanding of normal functioning, also taking social disabilities into account. See Nussbaum (2000) and Sen (1985).

[4] Some claim that since this is an inevitable trade-off between an innocent and a reckless patient, it is in fact not harsh at all. I take this to be a valid point but will set it aside for now, since Segall himself finds this to be too harsh (Segall, 2010a, p. 71).

[5] In fact, I am grateful to an anonymous reviewer for pointing out that if this was the case of my argument, it would be dogmatic.