Substance in procedures for healthcare resource allocation, and a much-needed focus on administrators: a reply to Smith

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ABSTRACT

William Smith's recent article criticises the so-called orthodox approaches to the normative analysis of healthcare resource allocation, associated to the requirement that decision-makers should abide by strictly procedural principles of legitimacy defining a deliberative democratic process. Much of the appeal of Smith's argument goes down to his awareness of real-world processes and, in particular, to the large gap he identifies between well-led democratic deliberation and the messiness of the process through which the intuitively legitimate Affordable Care Act (ACA) was created. This reply aims to demonstrate that the ACA provides no counterexample to orthodox views, seizing this opportunity to explore the specific space that the procedural principles populating orthodox accounts are meant to regulate. Neither general questions of healthcare justice concerning, for example, universal access nor, relatedly, the activity of elected politicians falls within the natural scope of application of such principles, revealing a much more complex picture of the interactions between justice and legitimacy as well as substantive and procedural considerations than acknowledged by Smith. In the end, orthodox accounts of healthcare resource allocation turn out to provide a precious fund of theoretical resources for the normative study of administrators, which might be useful well beyond bioethics and health policy.

In a recent article, William Smith[1] launches an all-out attack on what he labels 'the orthodoxy' in the study of how healthcare resources should be allocated, represented by authors including Leonard Fleck, Amy Gutmann, Dennis Thompson and, above all, Norman Daniels both individually and in his joint work with James Sabin. These theorists put the framework of legitimacy centre-stage to guide resource allocation decision-making. Their understanding of legitimacy is depicted by Smith as essentially procedural, with legitimate decisions being those produced through a deliberative democratic process, respecting requirements such as transparency, public involvement, opportunity for appeal and a commitment to only advance reasons whose relevance no one could deny. For Smith, divorcing the legitimacy of decisions from their substance is implausible. Consequently, the orthodoxy deserves toppling.

In support of his conclusion, Smith suggests that the orthodoxy is internally inconsistent. Smith highlights that orthodox theorists generally admit that although unjust decisions can sometimes be legitimate, 'a law or policy cannot be legitimate if it is vastly unjust' (p3).[1] To exemplify vastly unjust conditions, Smith describes a society that is modelled on the pre-Affordable Care Act (ACA) USA, where a large portion of the population lacked access to healthcare. What if, due to factors like entrenched ideological bias, there is no hope for the government to pass legislation that will improve this situation without playing dirty, for example, by hiding the actual goals of reform? Based on Smith's reconstruction, orthodox theorists hold both that legitimacy is the result of deliberative democratic processes and that no policy choice perpetuating a vast injustice can be legitimate, making deliberative democratic but doomed attempts at reform both legitimate and illegitimate.

Smith's argument assumes a vastly oversimplified version of the orthodoxy. Traditionally, deliberative democrats are keenly aware that no meaningful deliberative democratic process is possible unless certain substantive preconditions are met, including redistribution of economic resources and, most relevantly for us, universal access to healthcare that, through prevention and treatment, protects citizens' ability to be part of the political process. If non-deliberative action really constitutes the only way to move closer to a precondition for deliberative democracy like universal access to healthcare, deliberative democrats will accept it, without contradiction (p79–80).[2]

This is just one way in which Smith appears to misunderstand the orthodoxy. Throughout his article, the example of the Obama government looms large, fudging controversial issues while fighting to pass the ACA. As a result of blatant violations of democratic deliberation, should American citizens feel under no obligation to obey the ACA, for example, by paying taxes into the new additions to the healthcare system? Smith believes we have strong intuitions that those obligations exist, providing a seemingly powerful counterexample to the orthodoxy.

This counterexample, however, betrays Smith's lack of appreciation of the specific space that the orthodoxy's procedural requirements of legitimacy are meant for. The orthodoxy typically employs procedural requirements (1) to tackle a subset of issues concerning healthcare funding, constrained by substantive answers to more general questions of healthcare justice that can be solved with greater confidence; and (2) relatedly, to regulate administrators and, at times, medical staff who, although typically in charge of the bulk of healthcare resource allocation decisions, suffer from a legitimacy deficit due, for example, to their not being democratically elected. A law passed by Congress and signed by the US President certainly does not fall under (2). Also, the intuitive support that Smith can muster for the ACA, centrally committed to widening access to healthcare, signals that there is indeed broad agreement that the ACA fostered healthcare justice, falling outside (1) too.

Point (1) is a very conspicuous feature of orthodox theories, which often start by applying a framework of distributive justice. Daniels[3] draws on John Rawls's substantive principle of fair equality of opportunity (FEO) to demonstrate that access to healthcare is morally special, that is, to be distributed in a broadly egalitarian manner, largely divorced from ability to pay. Specialness requires the universal access to healthcare that the ACA pushed towards and a healthcare package that is comprehensive in the sense that it does not completely forget about the opportunities of, say, mental as opposed to physical health patients, therefore solving *No Mental Health*, another case that Smith takes to be insoluble for orthodox views (p29–78).[3] However, even if the healthcare system is shaped at a general level so as to meet the requirements of specialness, resource allocation decision-makers scattered across the system will routinely face much more concrete issues for which,

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according to Daniels,[3] we do not have principles of justice that are fine-grained enough. *These* are the issues procedural principles of legitimacy are meant to govern, supplementing, not replacing, substantive healthcare justice; in Fleck's words, FEO is one of the 'constitutional principles' of democratic deliberation, pushing 'off the conversational agenda' any proposal that violates it (p19).[4]

Despite how central (1) is to the orthodoxy, the possibility that on orthodox theories, the scope of procedural principles might be constrained by justice comes to Smith as an afterthought—introduced late in his article and rejected after a brief discussion that only considers a fraction of the relevant literature. Smith simply summarises Gopal Sreenivasan's classic argument that given the large impact that the social determinants have on the health and, in turn, the opportunities of social groups, FEO might be used to justify lack of access to healthcare for some as long as they are compensated by targeted interventions on the social determinants. The problem here is that the relevant debate has moved on, now including arguments suggesting that FEO still singles out healthcare as special despite the impact of the social determinants,[5] that we cannot even make the causal claim that the social determinants have such an impact,[6] and that there are substantive principles of justice other than FEO that might ground universal access and constrain procedural principles.[7]

Turning to (2), the history of procedural accounts of healthcare resource allocation is largely one of investigations into the workings of administrative agencies, public and private, sometimes reaching front-line bureaucrats and bedside rationers, with lots of ink spilled over bodies like the Health Management Organizations in the USA and the National Institute for Health and Care Excellence in the UK. This makes sense given that the questions that substantive theories of healthcare justice are best equipped to tackle are typically those that, due to their generality, elected politicians will be responsible for, leaving to administrators the more concrete and messier issues that procedural requirements are constructed for.

While (1) is a conspicuous feature of the orthodox literature, the fact that such literature is effectively made up of normative analyses of administrative decision-making is perhaps less obvious and generally overlooked. Therefore, (2) provides an excellent topic with which to conclude my discussion of Smith's article, which has the merit of further strengthening the links between political philosophy and the study of healthcare resource allocation.

Smith's chosen direction of travel, however, is the usual one, drawing on political philosophy to add to the debate about resource allocation. It is time to stress that resource allocation theorists have much to contribute back to political philosophy. The normative principles regulating the discretionary power inevitably left to administrative agencies, both public and private, constitute an important but notoriously under-researched topic in political philosophy and political theory, which has only recently started to receive minimally sustained attention.[8 9] Orthodox accounts of healthcare resource allocation provide a fund of theoretical resources to specifically discuss normative principles for administrative agencies, offering, *pace* Smith, a nuanced account of how justice interacts with legitimacy, and substantive with procedural considerations. In this debate, there is certainly room for the heterodox approaches that Smith gestures towards, provided that they can find objections to the orthodoxy that finally hit their mark.

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