

REAL AND ALLEGED PROBLEMS FOR DANIELS'S ACCOUNT OF HEALTH JUSTICE

J. Paul Kelleher

University of Wisconsin-Madison, Madison, Wisconsin, USA

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ABSTRACT: Norman Daniels's theory of health justice is the most comprehensive and systematic such theory we have. In one of the few articles published so far on Daniels's new book, *Just Health*, Benjamin Sachs argues that Daniels's core "principle of equality of opportunity does not do the work Daniels needs it to do." Yet Sachs's objections to Daniels's framework are deeply flawed. Where these arguments do not rely on significant misreadings of Daniels, they ignore sensible strands in *Just Health* that considerably dull their force. After disarming Sachs's arguments against Daniels's theory, I explain why I agree with Sachs's conclusion: Daniels's equality of opportunity-based account of health justice rests on shaky foundations.

1. Introduction

It is widely acknowledged that Norman Daniels's theory of health justice is the most comprehensive and systematic such theory we have. This makes the recent publication of his book *Just Health* a major event within the fields of bioethics, political philosophy, and health policy (Daniels 2008). In this new work, the core of Daniels's theory is largely carried over from his defense of it in *Just Health Care* (Daniels 1985). *Just Health* also addresses residual theoretical and practical problems with admirable clarity and philosophical humility. Often, the answers Daniels offers to these residual problems are unexciting. This is because he proposes the same answer for so many of them, namely: since widespread agreement on substantive philosophical answers to the problems is elusive, we must use fair deliberative procedures to arrive at

democratically legitimate policies. Fair enough; unexciting answers can still be the best answers we've got. Nevertheless, this proceduralist turn means that the philosophical arguments that will attract the most attention will continue to be the core of Daniels's theory of health justice. It is a core that consists in a conception of equality of opportunity that Daniels says is "borrowed" from John Rawls's theory of justice and then expanded so that it explicitly addresses the question, *What do we owe each other healthwise?*

In one of the few articles published so far on *Just Health*, Benjamin Sachs promises to draw on "the most faithful possible reading" of that book in the service of an argument showing that Daniels's "principle of equality of opportunity does not do the work Daniels needs it to do" (Sachs 2010, 403, 404). Sachs concludes that "the scaffold around which all the other interlocking parts of Daniels's integrated theory of justice and population health is built... appears to be in danger of crumbling" (Sachs 2010, 411). I am sympathetic to Sachs's conclusion, and near the end of this essay I shall set out some of my own reasons for this. But my main goal is to show that Sachs's arguments for rejecting Daniels's framework are flawed. Where these arguments do not rely on misreadings of Daniels, they ignore sensible strands in *Just Health* that considerably dull their force. Perhaps, in the end, there is little that can be said for the theoretical tack Daniels takes on the issue of health justice. But one thing that can be said is that he does not offer the unfortunate arguments Sachs ascribes to him.

2. A Conception of Equality of Opportunity

Because much of my disagreement with Sachs is interpretive, it's crucial to gain an accurate picture of Daniels's approach. Sachs claims that this is difficult because Daniels does not offer a pithy statement in *Just Health* of the principle of equality of opportunity that is supposed to serve as the foundation of his theory (Sachs 2010, 403). Sachs is right that there is no italicized or double-indented presentation of what the principle of equal opportunity amounts to. But here is one early passage that seems to do the job but which Sachs never quotes:

The intuition behind fair equality of opportunity is to restore the fair opportunity range for individuals to what it would have been if social arrangements were more just and less unequal...The impairment of normal [species] functioning by significant pathology, such as serious disease, injury, or disability, restricts individuals' opportunity relative to the portion of the normal range that their skills and talents would have made available to them were they healthy. If individuals' fair shares of the normal range are the life plans they may reasonably choose, given their (corrected) talents and skills, then disease and disability shrink their shares from what is fair. (Daniels 2008, 44-45)

As Sachs points out, what Daniels means by the “normal range” of opportunities is that array of life plans that citizens of a given society could reasonably adopt. But now don't we have a fairly neat statement of what equality of opportunity, for Daniels, consists in? Equality of opportunity obtains when each citizen can effectively choose among the reasonable life plans that his or her innate talents and skills are suited for. True, the last sentence of the passage I just quoted is a conditional statement. But Sachs would not disagree that Daniels endorses the antecedent of that conditional—that is, Daniels believes that justice demands citizens be given access to their fair share of the normal opportunity range.

In fairness, near the end of his essay Sachs does quote a less specific but still helpful passage from *Just Health*:

The fair equality of opportunity account does not require us to level all differences among persons in their share of the normal opportunity range. Rather, opportunity is equal for the purposes of the account when certain impediments to opportunity are eliminated for all persons—most importantly, discrimination in job placement or impairments of normal functioning” (Daniels 2008, 60; quoted at Sachs 2010, 408).

(Elsewhere, Daniels follows Rawls in adding race and class background to the list of unjust impediments to access to the normal opportunity range [Daniels 2008, 58]). Why doesn't Sachs take this passage as an explicit statement of Daniels's principle of equality of opportunity? The answer seems connected to a distinction Sachs draws between positive and negative "templates" for principles of equal opportunity. Negative templates, he tells us, take the form: "Opportunity for _____ should not be influenced by _____," where the first blank is filled in by some set of goods or goals—e.g. "reasonable life plans"—and the second blank is filled in by factors that should not impede citizens' access to those goods. Positive templates take the form: "Opportunity for _____ should be equal among _____," where again the first blank is filled in by some good, but where the second blank specifies the particular group whose members are to have equal access to that good. According to Sachs:

Only a principle that conforms to a positive template can capture the fundamental idea that liberals take themselves to be committed to, since that fundamental idea is the idea of something to be achieved: the idea that everyone should have an equal chance of success and that the playing field should be even. (Sachs 2010, 410)

I do not see why the elimination of racial discrimination in hiring, or the elimination of inferior life prospects for children from low-income families, is not "something to be achieved" or is not a way to even the playing field. But this seems to be the problem Sachs finds with the negative formulation of Daniels's equal opportunity principle. In any case, Daniels evidently offers both a "positive" formulation of that principle (found in the passage I quoted that Sachs does not discuss) and a "negative" formulation (found in the passage Sachs quotes and discusses). It is therefore simply not true that Daniels "nowhere...say[s] just what version of that principle he accepts" (Sachs 2010, 402). More importantly, Sachs runs into trouble precisely where he seeks to formulate a principle of equal opportunity on Daniels's behalf. The next two sections describe these difficulties.

3. Alleged Problems of Currency

Since he fails to detect the positive formulation of Daniels's principle that I located in section 2, Sachs seeks to construct such a formulation from his reading of *Just Health*. As we have seen, positive formulations are constructed by filling in the blanks of the following template: "Opportunity for _____ should be equal among _____." Sachs labels the sort of thing that could fill the first blank a "currency," and then rightly notes that Daniels's preferred currency is the array of reasonable life plans within a society. Hence the positive formulation Sachs constructs on Daniels's behalf: *Opportunity for achieving any one of the array of reasonable life plans should be equal among the members of some yet-to-be-specified population*. Specifying the relevant population is, in Sachs's term, an issue of "scope," and I discuss that issue in the next section.

According to Sachs, Daniels's choice of currency "is open to the charge of being perverse" (Sachs 2010, 405). This is because it is wrong to prohibit inequalities of access to reasonable life plans when permitting them might produce what Sachs calls "synergistic inequalities." Consider the example of someone whose opportunity to become a virtuoso pianist is improved relative to another person's opportunity to do the same. Sachs says that "one person's improved opportunity to become a virtuoso pianist could actually *boost* others' opportunity to achieve a plan of life...if their plans include the enjoyment of well-played music" (Sachs 2010, 405, emphasis in original). So unlike some competitive contexts in which opportunities are zero-sum, the "competition" for plans of life need not be viewed as a competition at all, given the possibility of synergy.

It is curious that Sachs would call this alleged problem for Daniels a problem of currency, given that the real culprit here appears to be the distributive rule of equality. But let us put that point aside and ask: Is Daniels really so committed to *equality* of opportunity? The answer that I find in *Just Health* is mixed and benign. On the one hand, equality is rightly important to Daniels. Sachs says that adopting the currency of reasonable life plans "removes the motivation for equalizing opportunity" (Sachs 2010, 405). But surely if the best life plans were available exclusively to white children of upper-income parents, such an inequality would be troubling, *regardless* of how synergistic it might also be. This suggests that even if the value of synergy

outweighs the value of equality in some circumstances, it is certainly not perverse to remain committed to equality as a fundamental and sometimes dominant value.

On the other hand, there *is* a crucial argument in *Just Health* that shows Daniels agrees with Sachs to some degree. As we have seen, health is relevant to justice, according to Daniels, because of the contribution it makes to citizens' abilities to access their fair share of the normal opportunity range. In borrowing a principle of equality of opportunity from John Rawls's theory of justice, Daniels also borrows a second principle of distributive justice that is supposed to have purchase only in contexts where it does not conflict with the equal opportunity principle. This second principle, the difference principle, holds that income inequalities are permissible if they are to the maximal economic advantage of the worst off members of society. It therefore recommends a form of synergistic inequality, since the incentivizing inequalities it permits make the absolute quality of the worst off position better than it would have been if incomes had been more equal. But now what should be said about income inequalities that raise the quality of the worst off position beyond what it would otherwise be, but which also tend to upset equality of opportunity? This question is relevant given evidence, presented by Daniels and noted by Sachs, that income inequality *as such* is bad for population health, with the worst effects accruing to the those in the worst off socioeconomic positions. If health is a determinant of opportunity (as Daniels argues), then an economic inequality that differentially damages health also upsets equality of opportunity. How, then, should we think about trade-offs between equal opportunity (which entails equal health) and the economic prospects of the worst off (which can be boosted by health-damaging income inequalities)? Here is Daniels's suggestion:

The theoretical issue is whether the theory requires us to reduce *further* those otherwise justifiable inequalities because of the inequalities in health status they create...Would it ever be reasonable and rational...to accept a trade-off in which some health inequality is allowed in order to produce some nonhealth benefits for those with the worst health prospects?

...

[There is] strong reason to think that the priority given to health, and thus opportunity, is not as clear-cut as the previous [Rawlsian] argument implies, especially where the trade is between a *risk* to health and other goods that people highly value. Refusing to allow any (ex ante) trades of health risks for other goods, even when the background conditions are otherwise fair, may seem unjustifiably paternalistic, perhaps in a way that refusal to allow trades of basic liberties is not. (Daniels 2008, 97-98, 99).

On this issue, *Just Health* largely follows the line set out by Daniels in earlier collaborative work with Bruce Kennedy and Ichiro Kawachi (Daniels, Kennedy, and Kawachi 2000). The Rawlsian framework they developed weakens the absolute priority Rawls himself gave to the equality of opportunity principle, so that now some health-harming but otherwise useful economic inequalities are permitted. *Pace* Sachs's claim that Daniels is "perversely" too rigid on the issue of useful inequalities, Daniels's own equality of opportunity principle has the status of a *prima facie* or *pro tanto* principle that can be outweighed when opportunity-damaging economic inequalities are amply efficient and synergistic.

4. Alleged Problems of Scope

The second blank in Sachs's template for positive principles of equal opportunity is to be filled in by what Sachs calls a scope variable. The scope variable specifies the group whose members are to enjoy equal opportunity. I have already quoted a passage from *Just Health* that appears to indicate Daniels's intended scope. Here again is the conditional whose antecedent Daniels clearly accepts:

If individuals' fair shares of the normal range are the life plans they may reasonably choose, given their (corrected) talents and skills, then disease and disability shrink their shares from what is fair. (Daniels 2008, 45)

By “corrected talents and skills” Daniels means the talents and skills that individuals would display in the absence of unjust social circumstances that impede their formation. So for Daniels, each group of citizens with the same innate talents and skills forms a set whose members are to enjoy equal opportunity for the achievement of the life plans those talents and skills make reasonable. As Daniels puts it elsewhere in *Just Health*, “In both Rawls and my extension of Rawls, a baseline assigned by the natural lottery for talents and skills was taken as a given and equality of opportunity was defined relative to it” (Daniels 2008, 74). This entails that inequalities of opportunity are to be considered legitimate from the standpoint of equal opportunity if they are created by inequalities in innate talents and skills. So Daniels holds that inequalities in the distribution of talents and skills are *legitimate* causes of unequal shares of society’s normal opportunity range.

Sachs offers a strikingly different reading of what Daniels takes to be legitimate causes of unequal shares of the normal opportunity range:

Daniels fills in the scope variable the same way Rawls does: opportunities should be equal among people equally favored in the natural lottery, where the natural lottery refers to contingencies in the distribution of inborn talents and other genetically determined traits such as innate willingness to put forth effort...Fair equality of opportunity has the implication that inequalities in opportunity that result from the natural lottery are legitimate...Therefore, Daniels’s argument for a societal obligation to meet health needs...succeeds if and only if he can establish that inequalities in health needs, which give rise to inequalities in opportunity, are not the result of the natural lottery. (Sachs 2010, 406)

According to Sachs, Daniels and Rawls count as legitimate *all* purely natural determinants of unequal shares of the normal opportunity range (i.e. the determinants caused by the “natural lottery”). Sachs therefore believes that Daniels must show that health needs are socially caused, lest they be classified as natural and therefore legitimate determinants of unequal opportunity. Sachs

even charges Daniels with inconsistency, pointing to a passage in *Just Health Care* in which Daniels characterizes the effects of ill health and disability as “natural disadvantages” (Sachs 2010, 406). On Sachs’s interpretation, this concession by Daniels opens up the possibility that there is no social obligation to address health needs, because naturally caused differences between individuals are legitimate causes of unequal opportunity.

It is difficult to understand why Sachs presents Daniels as committed to the view that all natural differences between individuals are legitimate causes of unequal opportunity. There is one passage in *Just Health* that, when read in isolation, might lead one to Sachs’s interpretation:

Maintaining normal functioning by meeting health needs...lets [individuals] enjoy that portion of the range to which their skills and talents would give them access...It does not presume that we should eliminate or level natural individual differences, which act as a baseline constraint on individuals’ enjoyment of the normal range. (Daniels 2008, 45)

Here Daniels does seem to suggest that “natural individual differences” are to “act as a baseline constraint” on access to the normal opportunity range, by which Daniels means that they are legitimate causes of unequal opportunity. So this lends some support to Sachs’s view that Daniels permits all natural differences to serve as legitimate causes in this way. But Sachs’s interpretation is undermined by Daniels’s very next sentence: “Where, however, differences in talents and skills are the result of pathology, not merely normal variation, we should make, resources permitting, some effort to correct for the effects of the ‘natural lottery.’” Here pathology, and specifically pathology that affects one’s level of talent, is presented as being both a result of the natural lottery and something that is *not* a legitimate determinant of unequal opportunity. This statement by Daniels comports with other passages from *Just Health*. For example:

Just as we must use resources to counter the opportunity advantages that some get in the social lottery, we must also use resources to

counter the disadvantages induced by pathology. We must meet health needs, including health-care needs. Social conditions – including class, gender, race, and ethnic inequalities in obtaining various goods – contribute significantly to the distribution of disease and disability. Much disease and disability is not simply a product of the natural lottery but is influenced by the social lottery as well. Because the social determinants of health have a clear effect on population health and its distribution, health is not so “natural” a good after all. (Daniels 2008, 58)

Here Daniels clearly contrasts disadvantages caused by pathology with disadvantages resulting from the *social* lottery. And while Daniels does argue that “much” disease and disability is influenced by the social lottery, he never suggests that *all* pathology has social origins. Nor does he suggest that pathology would have to be social in origin for it to be of concern to justice.

As we’ve seen, Sachs thinks Daniels holds that society has no obligation to reduce inequalities in opportunity stemming from naturally emerging ill health. As a result, Sachs zeros in on Daniels’s argument that much ill health and disability is socially caused. Sachs correctly notes that “the existence of social determinants of health actually does *not* establish that inequalities in health needs are not caused by the natural lottery” (Sachs 2010, 407). Although, *pace* Sachs, Daniels in fact accepts this conclusion (i.e. the conclusion that at least some health needs are natural in origin), Daniels would likely reject one of Sachs’s central arguments for it. According to Sachs, “In a society well ordered by Rawls’s principles of justice, the socioeconomic status of adults is the result of the natural lottery” (ibid.). If we combine this claim with the social scientific finding that low socioeconomic status harms health, then we end up with yet another reason to think the natural lottery can harm health. But it is false that individuals’ socioeconomic position in a well-ordered Rawlsian society will always flow from their place in the natural lottery. For we have already seen that the difference principle will actively encourage (and perhaps demand) inequalities that raise the economic prospects of the least advantaged beyond what they would be without the inequalities. The difference principle therefore underwrites a form of macroeconomic

engineering. Identifiable and avoidable social policies will thus influence economic outcomes, producing a certain socioeconomic hierarchy. If facets of this socially engineered gradient also influence the health of individuals who occupy various spots on the hierarchy, then Sachs is wrong to attribute a person's socioeconomic status and resulting health to her place in the natural lottery. Moreover, in Rawls's framework, the equality of opportunity principle entails only that certain groups of individuals will have equal *chances* in the pursuit of desirable life prospects. By analogy, if you and I each have a lottery ticket and thus the same chance of winning, it does not follow that your winning and my losing is the result of the natural lottery. Rather, this seems to be an instance of a decidedly social lottery.

So Sachs is wrong that the distribution of life prospects in a well-ordered Rawlsian society "is a result of the natural lottery" (Sachs 2010, 407). He wanted to show this so Daniels could not simply point to health-affecting social processes to prove that the lion's share of ill health is socially caused and therefore of concern to justice. In this regard, the failure of Sachs's argument is of little consequence, since Daniels never claimed that naturally occurring health deficits were of no concern to justice. He therefore never would have ignored health needs that emerge naturally in a well-ordered Rawlsian society.

5. Real Problems for Daniels's Account

I have explained why Sachs's broadside against Daniels's theory of health justice misses the mark. Yet as I mentioned at the outset, I agree with Sachs that Daniels's view faces serious problems. I shall end with what I take to be the most significant of these problems.

Sachs rightly notes that Daniels's theory assumes we possess or could eventually formulate a valid distinction between low talent and ill health. Sachs and others argue that this might be an impossible task (Hausman 2011). But let us assume for the moment that we could do this. Still, Daniels must explain why poor health and low talents should be treated differently in his framework. Daniels is right that "people have a fundamental interest in maintaining a normal range of opportunities" in order to pursue the enjoyable

life plans their society makes possible (Daniels 2008, 36). But surely this interest entails a further interest in pursuing enjoyable life plans that people would be suited for if they could eliminate their talent deficits. Since both health deficits and inadequate talents can inhibit access to enjoyable life plans, it is not clear why an equal opportunity principle should demand redress of the former but not the latter. Put another way, why is it a denial of one's "fair share" of societal opportunity when one's ill health puts a life plan out of reach, but not when one's inadequate talents do so?

Daniels might reply that the incongruity I am highlighting is not as stark and problematic as I suggest, since the principle of fair equality of opportunity is not the sole criterion of justice. Rather, in both Rawls's and Daniels's view, the equal opportunity principle is supplemented by the difference principle. The difference principle "*mitigates*, even if it does not eliminate, the arbitrary effects of the combined natural and social lotteries for talents and skills" (Daniels 2008, 54, emphasis in original). Yet the asymmetry, although now less consequential, remains, and we are still left to wonder why ill health and poor talent should be treated differently under such different principles of justice.

This incongruity is, I believe, representative of the danger in ignoring the original rationale behind Rawlsian principles. Those principles, by and large, are designed to ignore the fact of natural differences between individuals and to distribute the benefits and burdens of social cooperation in ways that are fair to the participants in that cooperation. On the taxonomy suggested by Daniels and his coauthors in *From Chance to Choice*, Rawls's criterion of justice is "social structural"—that is, it associates injustice solely with defective social forces rather than with the unfortunate effects of the natural lottery. On this sort of view, "the emphasis...is on limitations to opportunity that originate in unjust institutions, not in natural differences among persons" (Buchanan, Brock, Daniels and Wikler 2000, 67). By way of illustration, consider an early essay of Rawls's in which he offers a statement of what equality of opportunity amounts to that is virtually identical to the statement found in *A Theory of Justice*, with the one exception that the essay, but not the book, contains the clause I have italicized: "Offhand it is not clear precisely what the desired equality [of opportunity] entails, *but assuming that the analogy with games is*

relevant, we might say that those with similar abilities and skills should have similar life chances” (Rawls 1968, 57-58, emphasis added; cf. Rawls 1999, 63). Although the italicized clause is left out of the corresponding passage in the *A Theory of Justice*, its force is clearly preserved there. In defending a social structural conception of justice, Rawls takes the analogy with games seriously: we do not think it unfair if the rules of a game such as baseball or basketball or cricket do not compensate a team when their players are less talented, or even when some of them are on the so-called “disabled list.”

This helps explain why Rawls was quick to point out that his “difference principle is not of course the principle of redress,” for it does not dictate that “undeserved inequalities call for redress.” Nor does it maintain that “since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for” (Rawls 1999, 86). According to Rawls, the principle of redress is neither the sole criterion of justice nor even a *prima facie* principle of justice: justice does not require that “society...try to even out handicaps” (ibid.).¹

We should therefore question whether Daniels really can borrow the fair equality of opportunity principle from Rawls. Rawls himself seems to have been convinced by Daniels that this is a perfectly acceptable use of that principle (Rawls 1995, 184n14). But I and others have our doubts. Sachs cites Thomas Pogge as someone who seeks to preserve the social structural basis of Rawls’s opportunity principle while extending it to address the issue of health needs (Pogge 1989, 181-196). Since Pogge and Daniels each offer extensive “Rawlsian” accounts of health justice, and since Pogge explicitly raises the problem of Daniels’s asymmetric treatment of poor health and low talent, it is disappointing that Daniels never addresses Pogge’s critique in *Just Health*. (To my knowledge, he has never addressed it in writing.) It would be nice to know more about why Daniels is not so worried about what seems to be a clear theoretical inconsistency and a clear discontinuity with the philosophical

¹ The textual context of these claims indicates that Rawls does not reject the principle of redress *solely* because one way to even out health statuses is to bring the well and abled down to the levels of the unwell and disabled. Surely he’d view this as a reason counting against the principle. But it is clear that he has other reservations about the principle’s demands, reservations that would remain even if this sort of leveling down were forbidden by other considerations of justice.

tradition he invokes.²

Finally, if Daniels cannot draw on Rawls to justify Daniels's preferred conception of equality of opportunity, he may wish to marshal his own intuitive argument for the social obligations he espouses. Sometimes Daniels does just that. For example, in the opening pages of *Just Health* Daniels explains that in both that book and in *Just Health Care* he is centrally interested in the question, "Is health of special moral importance?" He then notes:

My focus on the question then and now is driven by the common observation that people who tolerate vast inequalities in wealth and power are often morally outraged when those who are ill cannot get care because they cannot pay for it...Are these seemingly schizophrenic attitudes toward social and economic inequality as opposed to health inequality incoherent or do they make moral sense? (Daniels 2008, 18).

At times I find that I too have this "seemingly schizophrenic" attitude toward health and income inequalities. But for my part, this leads me *away* from the thought that a principle of equality of opportunity could provide the elusive justifying basis for my impulse to aid compatriots with health needs. After all, if I were so committed to equality of opportunity, wouldn't I be *more* concerned about inequalities in wealth and income, given that this is the traditional battleground for those of us committed to that ideal? And if I am so concerned to address health inequalities to the potential neglect of income and wealth inequalities, shouldn't I look for a fundamental moral *difference* between health and wealth, rather than look for characteristics that might bring them under the same principle of justice?

I do not have a comprehensive theory of health justice. And any useful thoughts I might have on the matter will be the direct result of my

² Daniels does comment on this issue in a brief footnote responding to a Pogge-like argument offered by Nagel (1997). Daniels says that "this contrast of natural and social is misleading because so much of the level of health and its distribution in a population is the result of socially controllable factors" (Daniels 2008, 25n25). At the very least, this reply is insufficient for the very reason Sachs notes, viz. "some illnesses and diseases [e.g. certain genetic conditions] do not have social determinants" (Sachs 2010, 407).

engagement with Daniels's arguments and the arguments of those who have critically engaged with the theory he has produced. In this joint endeavor, it is crucially important that we read Daniels correctly. This is why I have sought to show that the theory I find in *Just Health* stands in stark contrast to the work Sachs portrays and then argues against.

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