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## How to Compromise on Saving the Most Lives: A Commentary on Hellman and Nicholson, “Rationing and Disability”

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# How to Compromise on Saving the Most Lives: A Commentary on Hellman and Nicholson, “Rationing and Disability”

David Wasserman\*

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## INTRODUCTION

Deborah Hellman and Kate Nicholson’s “Rationing Disability”<sup>1</sup> is a skillfully integrated analysis of the legal and ethical challenges of avoiding disability discrimination in setting priorities for the allocation of scarce lifesaving resources. Their analysis goes beyond the important but narrow question of what it means to wrongfully discriminate against people with

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\* Clinical Center Department of Bioethics, National Institutes of Health, Bethesda, MD. The opinions expressed in this commentary are solely the author’s. They do not reflect the views or policies of NIH, HHS, or the Federal Government.

1. Deborah Hellman & Kate M. Nicholson, *Rationing and Disability: The Civil Rights and Wrongs of State Triage Protocols*, 78 WASH. & LEE L. REV. 1207 (2021).

disabilities in this context to the broader question of how to find a principled compromise between the consequentialist goals of public health and the potentially conflicting public value of “equal concern and respect” for each person.<sup>2</sup> I will focus on this broader issue.

I agree with much of their analysis, as well as with their conclusion that the “reserve approach” offers both a principled and practical compromise between these deeply embedded values.<sup>3</sup> And until their article made me rethink the issue, I agreed with the authors that the “probability of survival” (PS) and “resource intensity” (RI) principles they see as presenting close calls were equally consequentialist,<sup>4</sup> relying to the same extent on the tenacious appeal of the imperative to save the most lives when all cannot be saved.

I now believe, however, that that there may be a more plausible nonconsequentialist rationale for RI than the one Hellman and Nicholson address. This rationale is based on the strength of individual claims to scarce resources. I will argue that qualified support for taking survival probability into account can be drawn from philosophers’ proposals for balancing consequentialist and nonconsequentialist values in settings where individuals competing for scarce resources will derive varying benefits from receiving them. In two respects, these proposed compromises are more attractive than the reserve approach. First, they do not require the allocator to decide on the comparative weight of lives-maximizing and equal respect *in general*; they take account of those competing values in ways that are sensitive to their varying strength in choices among claimants whose expected benefits differ to varying extents. Second, they do not require the allocator to make special provision for socially disadvantaged groups. They may, however, be much harder to implement, and may constrain lives-maximizing to an unacceptable extent. But even if these proposals do not offer practical alternatives to the reserve approach, comparing their strengths and weaknesses reveals considerable uncertainty about the standards used to assess what counts as a principled compromise between

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2. *Id.* at 1262.

3. *Id.* at 1279–84.

4. *Id.* at 1261–69.

consequentialist and non-consequentialist tenets, and, relatedly, how clearly or felicitously public policies express the importance of competing values.

I. DOES A GREATER PROBABILITY OF SURVIVAL GIVE THE INDIVIDUAL A STRONGER CLAIM?

Hellman and Nicholson consider and reject Joseph Stramondo's argument that PS is a more defensible principle than RI,<sup>5</sup> because although both maximize the expected number of lives saved, PS has a further rationale: it minimizes the probability that the scarce resource will simply go to waste, saving no one. There is no such possibility under RI, where (it is stipulated), the recipient will survive, even if she uses far more of the resource than rival claimants would.<sup>6</sup> The authors regard this as a virtue of PS, but they note that PS can only reduce, not eliminate, the possibility of waste, and see that concern for waste as consequentialist in character. I agree with the former point and suspect they are right about the latter.

But there is another nonconsequentialist rationale for PS that is also not available for RI: an individual with a higher probability of survival arguably has a stronger claim to the scarce resource, not because a principle assigning it to him would maximize lives saved, but because she has more to gain by getting the resource and more to lose by being denied it. Whether or not a higher probability of survival can be regarded as a greater benefit or a greater benefit yields a stronger claim, this rationale would not even apply to RI. An individual who needs less of a resource to achieve the same outcome does not herself benefit more by getting it; her individual claim is no stronger than that of the individual who needs far more of it. The very RI principle that would assign it to her to save more lives would be a disingenuous basis for the individual to justify her own, individual priority. John Taurek, who famously denied that the numbers count, ridiculed such an attempted justification:

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5. Joseph Stramondo, *Disability, Likelihood of Survival, and Inefficiency Amidst Pandemic*, BIOETHICS.NET (Apr. 6, 2020, 12:10 PM), <https://perma.cc/9MCG-Q72E>.

6. Hellman, *supra* note 2, at 1266–68; *See also* Stramondo, *supra* note 5.

What could there be about these strangers that might induce [the one] to think it worth giving up his life so that they might continue to live theirs? The usual sort of utilitarian reasoning would be comical if it were not so outrageous. . . . “It may not be unreasonable to think that you yourself, were you to continue to live, might succeed in realizing at least as favorable a balance of happiness. But here . . . is a second person. If he continues to live, he too will accumulate a nice balance of pleasure over pain. And here is yet a third, a fourth, and finally a fifth person. . . . It would be most unreasonable for you to think that you could realize in your one lifetime anything like as much happiness as we get when we add together our five distinct favorable balances.” Such reasoning coming from some disinterested outside party might be a little less contemptible, but surely not a bit less foolish.<sup>7</sup>

Taurek goes so far as to claim that there is no compelling reason to save one person’s life to prevent a slightly lesser loss by another. Yet even he acknowledges there may be limits to the acceptable disparity:

There may well come a point, however, at which the difference between what B stands to lose and C stands to lose is such that I would spare C his loss. But in just these situations I am inclined to think that even if the choice were B’s he too should prefer that C be spared his loss. For some people such a point of difference may already have been reached in the case where B stands to lose an arm, while C stands to lose his life. There are profoundly important differences in attitude among people here that I do not know how to reconcile.<sup>8</sup>

Varying survival probabilities might seem a less promising candidate for such morally significant differences. I myself have argued that the odds conferred by a lottery cannot be considered a good whose distribution yields partial satisfaction of the claim for an indivisible good.<sup>9</sup> But consider if B and C are claimants for a single lifesaving resource, with, respectively, 5 percent and

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7. John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFFS. 293, 299–300, 307 (1977).

8. *Id.* at 302.

9. David Wasserman, *Let Them Eat Chances: Probability and Distributive Justice*, 12 ECON. & PHIL. 29 (1996).

95 percent chance of surviving if they receive it. There are, per Taurek, likely to be profoundly important differences in attitudes in such a case as well, but I for one think B should prefer that C receive the resource—although, given how desperately people cling to any chance of survival, I would not criticize her for insisting on a coin toss. And I think a third party might fairly assign the resource to C, as having the stronger claim, with even less of a disparity, say, 10 percent vs. 90 percent.

Taurek's claim about sufficiently great disparities is reflected in a recent proposal for limited aggregation of differing harms/benefits by Alex Voorhoeve. He argues that lesser losses should weigh against greater ones only when an individual faced with the lesser loss would not be morally required to incur that loss rather than allow another individual to incur the greater loss.<sup>10</sup> Claims to avoid such lesser losses are "relevant" to claims to avoid greater losses, while claims to avoid more minor losses are not.<sup>11</sup> Thus, if we would not expect an individual to sacrifice an arm to save a stranger's life, then her claim to saving an arm would be relevant and saving some number of arms could justify the loss of one life. On the other hand, if we would expect an individual to endure a broken finger or headache to save a stranger's life, then her claim to avoid those losses would be irrelevant, and no number of such claims could outweigh the claim to save one life.<sup>12</sup> Whether or not this proposal works to consistently order losses of varying magnitude for purposes of limited aggregation, it may provide a principled basis for giving a scarce resource to a claimant with a probability of survival sufficiently greater than that of any of her rivals. In such a case, their claims would not be relevant against hers, so hers would prevail no matter how many lesser claims there were. Note that this is my adaptation, not part of Voorhoeve's own proposal.

A second proposal, which would impose somewhat weaker limits on aggregation, comes from Frances Kamm, and was

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10. See Alex Voorhoeve, *How Should We Aggregate Competing Claims?*, 125 *ETHICS* 64, 71 (2014).

11. See *id.* at 67 (explaining that a minor ailment is irrelevant in its comparison to a greater loss because "[n]o number of claims to be rid of the very minor harm can . . . jointly outcompete [a] claim to be saved from death").

12. *Id.* at 72.

offered specifically to avoid disability discrimination.<sup>13</sup> Kamm suggests that the greater benefit of saving a life of higher quality does not yield a stronger claim if the a life of lower quality is “a sufficiently good only option”; if, that is, an individual who could only have a life of this lower quality if she received the resources would make as much effort or sacrifice as much to get those resources as she would if she could instead gain the life of higher quality.<sup>14</sup> Kamm’s proposal imposes a weaker constraint on outcome-maximizing than Voorhoeve’s, since, for example, the individual’s quality of life might be too low for her to sacrifice as much for it as she would sacrifice for the life as high-quality that a rival claimant would get, permitting the allocator to give the resource to that other. But it might still be good enough that she could not be expected to forego it so the other could gain a better life. And if it was not, she would have a relevant claim, so that as I have applied Voorhoeve’s proposal, the allocator could not simply give the resource to the other claimant.

These adapted proposals would also yield similar results on the contested issue of expected length of survival as a consideration in allocating scarce lifesaving resources. Both could be taken (though Kamm is reluctant to take hers) to impose significant constraints on life-years maximization.<sup>15</sup> An individual could reasonably be expected to sacrifice as much to gain a few life years, if that were her only option, as to gain a great many. And an individual could hardly be expected, all else equal, to give up her claim to a few remaining life years so a stranger could have many. Although setting priorities on the basis of length of life may be less discriminatory than setting them on the basis of quality of life, it may still be unfair, under either a relevant difference or sufficiently-good-only-option proposal, e.g., to give priority to one 70-year-old over another

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13. Francis M.Kamm, *Disability, Discrimination, and Irrelevant Goods*, in *DISABILITY AND DISADVANTAGE* 260, 278–81 (Kimberley Brownlee & Adam Cureton eds., 2009).

14. *Id.* at 279.

15. Kamm regards the extension to length of life as a “problematic implication” of the sufficiently-good principle *Id.* at 280–81. For a discussion of Kamm’s position and an alternative, Kantian basis for distinguishing length from quality of life in priority setting, see Samuel J. Kerstein, *Dignity, Disability, and Lifespan*, 34 *J. APPLIED PHIL.* 635 (2017).

because the former is expected to live twenty-five years, the latter only five or ten.

## II. COMPARING CONSTRAINED MAXIMIZATION TO THE RESERVE APPROACH

By limiting the use of PS to cases with a vast difference in survival probability, both Voorhoeve's and Kamm's proposals, as I have applied them, would greatly reduce the adverse impact of a PS allocation principle on people with disabilities. They could still yield disparate outcomes, but much smaller ones than an unrestricted PS principle, let alone a general lives-maximizing one. Unlike a reserve approach, though, they could not be readily engineered to eliminate disparities. This would only be a disadvantage, however, if "equal concern and respect" precluded significant outcome disparities, which is a matter of debate.<sup>16</sup> And even if this is seen as a disadvantage, there would be an obverse advantage: the proposed constraints on aggregation are facially neutral; they would require no explicit provision, either priority points or reserve set-asides, for people with disabilities as a social group. Similarly, these proposals would greatly reduce racial disparities in resource-assignment while remaining race-neutral.

The strength of the individual claims of people with disabilities and members of racial minorities could also be increased, and disparities further reduced, by taking account of the role of unjust policies and practices in their need for the resource, and for the extent to which they could benefit less than others from receiving it. These considerations became salient in the course of the Covid pandemic: crowded housing and the inability to isolate made members of disadvantaged groups more likely to become infected; pre-existing conditions created or exacerbated by poverty and poor medical care made them more likely need lifesaving resources and less likely to benefit from them. The higher likelihood of infection should strengthen the claims of unfairly disadvantaged individuals to those resources; the higher likelihood of requiring those resources but benefitting less from them should result in even less weight being given to their lower probability of survival or shorter

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16. Hellman & Nicholson, *supra* note 2, at 1262.



expected life than to claimants whose poorer prospects were due solely to bad luck. Both of these compensatory “boosters” would further reduce disparities in allocation that would remain after imposing either the relevant-difference or sufficiently-good constraint.

A reserve system would certainly be more straightforward to implement. It would require only a few difficult decisions: what proportion of the scarce resources to reserve for which groups; how to handle overlapping membership; and in what order to process the reserves.<sup>17</sup> In contrast, it would be extremely difficult and controversial to establish objective, public criteria for what constituted relevant claims or sufficiently-good options. Setting criteria for the former would be especially difficult, since it would be necessary to make endless pairwise comparison between differences in claimants’ probability of survival or life expectancy. So in the end, these may only be armchair alternatives to the more realistic approach endorsed by Hellman and Nicholson. Still, it might be worth trying to find a practical way to base higher priority on the strength of individual claims—so long as it was one that recognized differences in claim strength only when there were very large differences in probability of survival or life expectancy.

### III. CONCLUDING THOUGHTS

A broader issue raised by Hellman and Nicholson, and by the alternatives to the reserve approach I have suggested, is how to compromise among competing values in policy making. How do we assess which form of compromise is more appropriate, or more felicitous in expressing a commitment to both values? For example, it is not clear why Hellman and Nicholson regard it as a significant drawback for weighted lotteries that they may give the resource to someone with a weaker claim.<sup>18</sup> Does the clarity or felicity of expressing a nonconsequentialist value depend on the outcome? If it does, isn’t this also a problem for equiprobable lotteries among equal-strength claims? After all, the winner is no more deserving than the losers. True, the winner is no *less*

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17. Hellman & Nicholson, *supra* note 2, at 1278–79.

18. Hellman & Nicholson, *supra* note 2, at 1276.

deserving. In contrast, the winner of a weighted lottery may be less deserving than the losers. The more important difference may be that while the consequentialist value is as well served by all outcome in an equiprobable lottery, it is not as well-served by all outcomes in a weighted lottery.<sup>19</sup> But isn't this prospect part of the compromise, something the consequentialist gives up in order to get better, if not the best, outcomes?

As my equivocation in the last paragraph makes clear, I don't have a settled view on how to assess compromises between consequentialist and nonconsequentialist values. It is an important, neglected issue in the ethics of public policy, and Hellman and Nicholson have made a valuable contribution by raising it in such a concrete, topical form.

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19. See, for a fuller analysis, Joseph Millum, *Against Weighted Lotteries for Scarce COVID-19 Treatments*, HEALTH AFFS.: HEALTH AFFS. BLOG (Oct. 26, 2020), <https://perma.cc/NY5W-JSFW>.