

THE RIGHT THING OR A HUMAN RIGHT: RIGHTS, LIBERTIES AND HEALTHCARE REFORM

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Introduction

The recent framing of healthcare as an issue of rights has invigorated public opinion, and given renewed relevance to the opposition between negative and positive liberties in the contemporary debate. The right to healthcare resources can be interpreted as stemming from “positive” liberty and the right to opt-out or be “left alone” as “negative freedom” (Berlin). In this paper, we will describe how the current American debate on healthcare – with its use of the arguments for and critiques of “negative” liberalism - and has its foil in the trajectory of Swedish healthcare reform. Alluding to both public debates and some of the formative philosophical and political texts surrounding the issue, we will describe how both Swedish and American thinkers have used these two liberalisms to elevate healthcare above mere policy debate to the level of human rights, and how canonical texts are mobilized to justify claims about healthcare. Our goal is to invite further conversation on what is undoubtedly a critical and complex crossroads in the political landscape of both Sweden and the US.

Negative Freedom- Right to Opt Out/Be Left Alone

The right to be “left alone” is a prominent locus of American political narrative. The Constitution represents its mission in the Preamble as being “to prevent misconstruction or abuse of power” and all ten amendments constituting in the Bill of Rights are negative in character. In current conversations on healthcare pundits have lifted libertarian tropes and arguments from The Constitution, The Declaration of Independence, and the writings of Henry David Thoreau, Ayn Rand, and John Locke are frequently leveraged to support minimizing state-run social services.

John Locke’s influence on the formation of American libertarianism is particularly attached to the picture he paints of the state of nature as “a *state of perfect freedom* to order their actions, and

dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man” (8). While Locke also supplies the reader with a well-developed set of limitations to this state of “perfect freedom”, it is the image of the persons doing “as they think fit... without asking leave” that resounds; the preference of contemporary debates is to emphasize the Lockean right to revolution and the native freedom of citizens over the finely balanced limits he puts on property rights.

The distrust of government that is common in current rhetoric is nascent in Locke’s general description of the politico-generative moment, which focuses primarily on the necessity of peace and the avoidance of evil, rather than rights pertaining to the development of the individual through political community. Negative freedom focuses on what members of a society will have to *avoid doing* to any individual citizen (harm) as opposed to what they *ought to do* to aid an individual’s development (benefits). For instance, one may *not* take away private property, since possession precedes the political contract that modifies it. The government, thus-conceived, facilitates by protecting the individual from the violations of their bodies and appropriation of their possessions, but does not actively pursue the individual’s well being.

Supporting this conception of human rights and liberties, former Judge Andrew Napolitano, a libertarian commentator for the Fox News Network, argued in a public address in 2009, “healthcare is not a right, it is a good. What’s a right? A right is a gift from God that extends from our humanity.” His fear of “government micromanaging healthcare” explicitly engages Jefferson, and he continues, barely paraphrasing Locke, “We own our bodies- [we have the] right to be left alone... these are natural rights. The government does not give them to us.”

Over the months preceding the passing of the Healthcare Bill, even more forceful versions of this style of argument immersed. More forceful and perhaps less anchored in the logical structure of classical liberalism, than its rhetorical tropes. In a March, 2009 interview with MSNBC,

Representative Zach Wamp of Tennessee stated that healthcare reform “is literally a fast march towards Socialism. About half of [those who don’t have health coverage] choose not to have health insurance. Healthcare is a privilege.” First, healthcare is a choice not an essential good, then the distinction between healthcare as a right and as a good is widened to the degree that healthcare becomes a “privilege” The introduction of the term “choice” is paralleled in the Sweden’s healthcare debate.

After nearly 80 years of uninterrupted Social Democratic government in Sweden, the 2006 elections saw the formation of a governing coalition of right-wing parties in the Riksdag. The new government while not fully adopting the rhetoric of “privilege” and right to non-interference, it has adopted negative liberty as a value and a valid concern in policy argument. This shift has had numerous consequences for how health care is perceived and distributed in the country.

Vårdval Stockholm, or Care-Choice Stockholm, a system giving patients the ability to choose health care providers, was introduced in the capital January 1st, 2008. Promoting the patient’s choice of health care provider within a designated region, Care-choice Stockholm’s supporters did not advocate for consumer choice as a right, but rather as "an opportunity" (Reinfeldt). The arguments for Care-choice Stockholm frame the increase in the quantity of options as good *per se* – a liberal argument in the Lockean idiom, and as a means to improve quality of care through competition – an argument in the tradition of Mill’s attempt to demonstrate that liberalism necessarily make people better off in Utilitarian terms. The emphasis on the patient’s choice parallels the notion of a right to “opt-out”. The shift is arguably a move towards valuing negative freedom, since choice implies the lack of government intervention and direction.

Care- choice Stockholm has, of course, attracted some criticism. Opposition politicians critique it as a system that benefits already-privileged individuals, while simultaneously treating unfairly those living in poorer and more economically vulnerable areas. Jan Halldin, a medical doctor and critic of

the Care-choice system asked "Is it really right to hand over as central a part of our welfare as the health care system *to a market* that is allowed to be regulated on the conditions of a market (economy)?" In these arguments we can see the shear distance that separates the rhetoric of the American right and Swedish left – in the former government involvement in healthcare is *prima facie* undesirable, in the later government regulation is *prima facie* good since it prevents instability and guarantees human rights. However, we can also discern formal similarities between the two combatants; they both arrive at a point of pure *ad hominem*; public health care is bad because it is 'socialist', private health care because it is 'a market'. Further, they both appeal to natural right discourse to undergird their arguments. Some 70 years after the signing of Saltsjöbadsavtalet, Care-choice Stockholm could be viewed as representing a subtle shift away from the view that gives absolute priority to positive freedoms – i.e. understands them as rights - and towards a more complex conceptual landscape that balances positive and negative liberties.

In March 2007, the right-wing government proposed legislation that would limit access to health care by asylum seekers and illegal immigrants by having to pay 'the real price' for health care rather than receiving health care at a heavily reduced cost. The proposed legislation met with debate and protest; the resistance formed around a network consisting of 27 organizations, calling themselves 'allas-rätt-till-hälsa-initiativet', or 'the-everyone's-right-to-health-initiative.' While Care-Choice Stockholm took for granted the right to health care and simply proposed a different mechanism for achieving this end, taking health care away from asylum seekers was a fully frontal assault on the idea that health care could be described as a human right – the core principle of Sweden's social democracy. Political author and journalist, Maciej Zaremba argued that it was "a proposition of a legislation that establishes that paperless people don't have right to health care unless they pay for it themselves. This upset our entire (and fundamental) outlook on people." Interestingly other public opinions, including the official statements used by members of 'the-everyone's-right-to-health-

initiative' justify their stance by citing Sweden's treaty obligations to uphold healthcare as a human right. These arguments emphasize how the new law violates rights found in international declarations, which Sweden has ratified. The Universal Declaration of Human Rights, especially article 24, which declares universal right to health. Other textual support for the right to health care includes the Children's convention, and the first principle stated in the declaration of Lisbon by the World Medical Association, which states: "*Right to medical care of good quality. 1. Every person is entitled without discrimination to appropriate medical care.*"

These explicit, though sweeping written statements about the right to health seem to be a source where debaters get authoritative validity and claim justification for their arguments. Paul Hunt's commissioner report from 2007 is another popular secondary source to quote by members of 'the initiative', as is the "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", which criticizes the impact of this particular legislation on the equal rights to health in Swedish society.

Positive Freedom – The Rights of Human Development

In contrast with negative freedom, positive freedom has received much less attention within American political debates. However, the late American political philosopher John Rawls has brought argumentation based on the value of positive liberty to an American audience in a uniquely American way. Rawls starts with the liberty principle "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others" (53). On the face of it, the liberty principle seems negative in character, but Rawls follows up on it by insisting that individuals have an equal opportunity to exercise their freedoms, thus transitioning from a negative to a positive conception (275). It is not enough to be at liberty to participate in the economy or in government, the state is required to provide those goods the individual needs to be able to take advantage of their liberties. Access to healthcare is easily argued for on this basis; in order for the

citizen to get value out of their economic and political freedoms they must first be of sound body. By giving priority to the practical *value* of negative liberties, rather than their mere legal existence, Rawls subtly subverts the positive-negative distinction while simultaneously supplying arguments for what are normally thought of as positivist freedoms. Positive liberties are normally entitlements to achieve certain privileged goods: freedom from being compelled by want justifies redistribution; freedom from domination justifies political rights of participation and association, etc. In the Rawlsian architecture, the privileged good is the value of negative liberty and positive liberties have value only because the negative liberties they facilitate have value.

These Rawlsian themes can be heard most strongly in Barack Obama's early campaign discussions - most noticeably when he told Joe the Plumber he wanted to "spread the wealth around." TalkLeft and Open Left media published an article on June 12, 2009, which begins with the quip: "If you want to understand President Obama's soul, read his books. But if you want to understand his beliefs, read John Rawls." Whether there is a one-to-one correlation between Rawls' central text *A Theory of Justice*, and policies put forward by the current administration is an open question. The comparison does show, however, that the administration may be moving away from the historical emphasis on the minimal negative rights, and towards a new appreciation of positive freedom. Both the Obama administration and Rawls' texts promote policies which might reasonably require society to act to assure that the least well off get the same opportunities out of their freedoms as the best off among us. Both Obama and Rawls ask citizens to do something. In this restricted sense, Obama's public position on healthcare reform can be interpreted as an instantiation of the politics of Rawlsian Liberalism.

Rights are "embedded" notions in Rawls' conception, rather than the primary focus of dialogue. Rights simply don't come up for Rawls; each liberty is given attention and put into balance with an overall scheme of liberties. There's no room for absolute right. It is the *absence* of rights-speak

that is increasingly noticeable in current political rhetoric, and the choice to emphasize the reasonable need to distribute healthcare resources in a manner which promotes equal access to treatment.

While his administration uses the term “rights” to refer to healthcare, President Obama has used it far more sparingly. Though President Obama did say healthcare was a right in his October 2008 campaign debate against Senator John McCain,¹ his recent address to congress was more cautiously worded: “our health care system is placing an unsustainable burden on taxpayers.” Obama’s recent references have been judiciously moral, but have steered away from the rigidity of describing healthcare as a right as-such. Calling healthcare “the right thing to do” rather than a “natural right” shows that the question has been recast in Rawlsian terms – public healthcare is beneficial to ensure negative liberty and perhaps a morally praiseworthy policy, but not a right. Hence, Obama’s replacement of the term “rights” with the softer expression “the right thing to do” is distinctly Rawlsian. Those without healthcare, in this conception, must be freed from their unreasonable burden. The disappearance or avoidance of the term “rights” may signal the desire to integrate more modern arguments, which attempt to transcend the ideological baggage and arbitrariness of the positive vs. negative liberty distinction.

Even as American policy inches closer to that of Sweden, the contingent nature of the arguments for universal healthcare voiced by Obama would be anathema to a Swedish leftist. In Sweden the default is to think of healthcare as a universal right, together with education, childcare etc.. While we take this notion for granted – Sweden as the stalwart egalitarian socialist state - only a century ago that Sweden was a highly class-based society. The founding document of this tradition is the “Saltsjöbadsavtalet”, an agreement signed in Stockholm by the ruling Social Democrats on December 20th, 1938. While the right to health care was not the focus of this agreement, what followed it was the

¹ “Well, I think it should be a right for every American. In a country as wealthy as ours, for us to have people who are going bankrupt because they can't pay their medical bills -- for my mother to die of cancer at the age of 53 and have to spend the last months of her life in the hospital room arguing with insurance companies because they're saying that this may be a pre-existing condition and they don't have to pay her treatment, there's something fundamentally wrong about that.”

political, economic and societal build-up of 'den svenska modellen', known in English both as 'the Swedish model' and 'the Nordic model.' Central to the text is the idea of a proactive public sector that actively seeks to improve the well-being of the citizenry through redistribution and public ownership of socially important means of production.

The keystone element in the welfare state, which has been instrumental in the formation of the Swedish health care system, is the permanent protection of the individual through redistribution of resources. In the 1950's Sweden began offered an expanded and improved health care system to all Swedes. The development of the welfare state over the last century has been tightly bound to the history of the Social Democratic Party. The Swedish notion of public redistribution parallels the Rawlsian in terms of policy, but differs on the level of argumentation. While in Sweden the Social Democrats have developed the welfare state around an extremely demanding standard of equality of outcomes, Rawls only is more than willing to sacrifice equality if there are resultant gains in efficiency that make it possible to better the situation of the least well-off in society.

Conclusion

Pundits and to a lesser extent politicians have often staged the healthcare reform debate in terms of rights. This paper used two conversations- in the United States and Sweden, along with their original and contemporary advocates - to examine the initial and contemporary theories of each, in support of a more nuanced and inclusive discussion on reform. Our considerations addressed the status of the evaluative question itself, and showed how the rights debate has been used to leverage opposing paradigms. Textual support for both negative and positive rights has often been the most significant factor in shaping the debate. In the American debate, positive rights are beginning to surface, while in Sweden negative rights are being asserted to challenge the status quo. In both contemporary cases an avoidance of the term "rights" has been evidenced at times.

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