Published in final edited form as:

Am J Bioeth. 2018 April ; 18(4): W10–W12. doi:10.1080/15265161.2018.1439546.

Unjust Outcomes and Unfair Process?

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We would like to thank our interlocutors for the interesting discussion of Accountability for Reasonableness (AFR) and how it might increase legitimacy and fairness in environmental decisions affecting susceptible populations. In what follows, we respond to two of the more prominent critiques in the commentaries: that AFR may produce unjust outcomes, and that AFR cannot ensure fair participation from susceptible populations.

Several of our critics argued that AFR—as a procedure—may result in unjust outcomes. For example, Smith (2018) argues that AFR fails as a theory of justice, and Zwolinski (2018) argues that AFR is not well-equipped to replace theories making substantive commitments about the content of justice. Wardrope (2018) says that we do not adequately describe what count as just outcomes. In these cases, the authors worry that AFR—as a procedure, rather than a set of principles—cannot do the work needed from a theory of justice. Others (Vong 2018, Wilson 2018) argue that, regardless of the procedural merits of AFR, relying solely on this procedure is problematic because it cannot guarantee just outcomes.

Briefly explaining our interpretation of AFR may help to defuse some of these worries. Most importantly, we do not understand AFR as a competitor to substantive theories of justice. We argued that AFR is a supplement to theories of justice, the principles of which are often too broad to provide definitive answers to problems of prioritization or to answer fine-grained questions about what is fair.

Is this the correct interpretation of AFR? Daniels and Sabin are somewhat unclear on this matter. AFR was developed in part to help make coverage decisions by managed care organizations more legitimate and fair (Daniels and Sabin 1997). More recently, Daniels has used AFR in order to explain how prioritization decisions should be made when distributing health care and the social determinants of health (Daniels 2008). The problem Daniels is solving, in both cases, arises primarily out of the social obligation to treat and prevent disease, which Daniels argues can be grounded in a liberal egalitarian (specifically Rawlsian) vision of fair equality of opportunity. Daniels argues, persuasively, that many resource allocation dilemmas remain *even given agreement* on the existence of this social

obligation and its grounding in fair equality of opportunity. AFR can add legitimacy and fairness to decisions aimed at resolving these dilemmas. Because he employs AFR within the context of a more robust theory of justice, it seems clear enough that it is not meant to be a competitor to that or other theories about the main principles of justice.¹ Moreover, since Daniels (2018), in his response to our paper, considers libertarianism and utilitarianism to be inadequate on the grounds of justice, he does not use AFR to resolve basic disputes between stakeholders with substantially different visions of justice. For example, he does not use AFR to force consensus between liberal egalitarians and libertarians who may disagree about whether a social obligation to provide health or health care exists in the first place. These considerations all suggest that AFR is best employed as a way of resolving disputes that arise among those who otherwise agree on (at least) basic principles of justice.

However, Daniels himself claims that he and Sabin initially envisioned AFR to do significant work in narrowing disagreement, and criticizes us for treating it as a method meant only to sort out disputes between those who already agree on what count as “good reasons” (Daniels 2018). Perhaps Daniels and Sabin had something more ambitious in mind than resolving disputes between ideological friends. In their original explication of AFR, Daniels and Sabin suggest that AFR can narrow disagreement that may arise from differing comprehensive doctrines—for example, by requiring that “relevant reasons” not mention religious or other controversial comprehensive doctrines (Daniels and Sabin 1997). If AFR can narrow disagreements resulting from holding different comprehensive doctrines, one might think that it can also narrow disagreement between those who hold to significantly different theories of justice, although Daniels and Sabin do not explicitly say this.

Insofar as the exact scope of AFR is unclear, we think it is best to take a modest view of its role. In our opinion, AFR is best understood as a way of mediating disagreements about prioritization or fairness among those who are basically in agreement with each other about the major principles of justice. The reason for this is just that, as our critics’ comments amply demonstrate, it is unlikely that a procedure like AFR can legitimate decisions that would otherwise appear fundamentally unjust. We do not think AFR is a general method for reducing disagreement *between* libertarians and utilitarians, then; at best it can reduce disagreement *among* libertarians or *among* utilitarians about the relative prioritization of several options, each of which is already understood to be required by justice. On this view, AFR should increase legitimacy and fairness of decisions that pursue one requirement of justice at the expense of others.

Under our interpretation of AFR, it should be clear why worries that AFR will produce unjust policy decisions are misplaced. AFR does not determine whether policy decisions are just or unjust, but rather provides a means for deciding between policy options that are already considered just (but cannot all be pursued simultaneously). To illustrate this, let us consider Schrader-Frechette’s interesting case involving chlorpyrifos, an organophosphate pesticide developed by Dow chemicals (Schrader-Frechette 2018). Schrader-Frechette cites several studies showing correlations between organophosphates (including chlorpyrifos) and neurodevelopmental disorders. However, Dow has disputed these findings, and has spent

¹Daniels and Sabin (1997) also argue that AFR is compatible with democratic deliberation.

significant amounts on lobbying efforts to overturn a recent chlorpyrifos ban. Shrader-Frechette (2018) argues that using the AFR procedure in this case may result in an unjust policy decision, in part because Dow evidently has the resources to skew public deliberation, while the “victims” of chlorpyrifos do not.

However, if—as Shrader-Frechette implies—the reasons weighing against the continued use of chlorpyrifos in pesticides are a matter of justice and the reasons weighing in favor of continued use (such as political gain or self-interest) are not, then the question about whether to allow them is not a mere matter of the relative prioritization of various (just) policy options, nor about reasonable but divergent interpretations of what is “fair.” AFR would not be capable of adding legitimacy to the continued use of these pesticides in this case, because their continued use is fundamentally unjust.²

A second concern raised by commentators has to do with the AFR procedure itself. Many—maybe most—of our interlocutors are concerned that the publicity criterion may unfairly privilege some parties over others. Merely requiring public input into a decision does not ensure that all are equally or fairly represented. This reality prompts some commentators to suggest altering the procedure to ensure that every group can be fairly represented. For example, Shrader-Frechette (2018) suggests AFR should “ensure that potential EJ [environmental justice] victims have equal opportunities for the earliest warnings about environmental-health threats, for engaging in the earliest problem formulation, and for funding of their time, work, and scientific experts.” And Tsu (2018) suggests that “higher-risk subpopulations should by default get more than half of the seats in the decision-making body, especially when they have a lot of health risks at stake, and the risks to the general populations are relatively low.”

The commentators are right, that AFR does not specifically address this concern; they are also right to point it out as a weakness in the theory, insofar as the theory purports to achieve fairness. However, there are at least two concerns with formally modifying AFR in order to give more weight or resources to susceptible groups under the publicity criterion.

First, we cannot simply grant susceptible groups more weight in all decision-making processes regarding environmental health on the grounds that their cause is supported by claims of justice. We cannot do this because, as we argued above, AFR is only concerned with making decisions where it is already acknowledged that all stakeholders have claims of justice (or at least, reasonable interpretations of commonly acknowledged principles of justice) on their side. If a stakeholder’s claim for more resources or more stringent environmental standards does not compete with other claims also grounded in justice, then the AFR process is unnecessary. The legitimacy of the decision to support the cause of the susceptible group is rooted in the moral theory showing that the susceptible group has a right

²For a recent example, consider the pressure used by patient advocates with multiple sclerosis to obtain research and treatment funding for the “liberation procedure.” Patient advocates were ultimately successful in obtaining significant funding for research from the governments of Saskatchewan and Newfoundland and Labrador, despite the fact that the Canadian Institutes for Health Research claimed that no reliable data suggested the efficacy or even safety of the procedure (Vincenzi 2010). This effort is apparently similar in kind to other instances in the history of MS (Branswell 2017). Incidentally, the inventor of the liberation procedure recently published the results of a double-blind randomized controlled trial designed to test its effectiveness (Zamboni et al. 2018). The study concludes that the procedure is “safe” but is also a “largely ineffective technique,” and “treatment cannot be recommended in patients with MS.”

to more resources or protective regulations. On the other hand, if protections for susceptible groups compete with other policy initiatives that are also well-supported by claims of justice, giving susceptible groups formal advantages seems unfair and suggests that we already know the answer to the problem that AFR is designed to resolve.

Second, we cannot give special favor to susceptible groups on the grounds that they are especially vulnerable or that they necessarily have a disadvantage in public debate. Susceptible groups are identified merely by their health susceptibilities, and so may or may not be equivalent to groups sometimes called “vulnerable” because they lack education, money, or social capital. This fact can be obscured by using examples where vulnerabilities and susceptibilities have significant overlap, such as the Dow chlorpyrifos case, where the susceptible group—children who have actually developed autism or other problems as a result of chlorpyrifos—are also extremely vulnerable, especially when contrasted with their antagonists, the Dow corporation.

In other cases, surprisingly, susceptible groups may be able to wield disproportionate power over the political process. Consider, for example, the work of patient advocacy groups. These groups lobby for various changes that benefit persons with the susceptibilities or diseases that they represent. These are “special interest groups” in the same sense that corporate lobbying groups are: they advocate for changes that benefit a particular cause. Of course, patient advocacy groups are different from corporations in the sense that they seek health-related outcomes, rather than profit-related ones. The problem with the special interest groups in both cases, when viewed in light of justice, is that the directed efforts of groups with significant special interests may result in policies that ultimately benefit private interests at the expense of public ones.

How can patient advocacy groups wield disproportionate power? Consider examples from medical research and treatment. Patient advocacy groups have, in many cases, been strong enough to successfully lobby for funding to support research or coverage for treatments that seem promising to them, despite the fact that experts widely believe the data is insufficiently promising to support the kind of research or coverage sought.³ The problem is not simply that such groups secure public funding without proper justification, but that their efforts may crowd out other, more promising research that does not have the advantage of being backed by a strong patient advocacy group. Such examples show the problem with seeking to favor particular groups simply because they are susceptible. Although one might assume that susceptible minorities are always at a disadvantage in democracies where majorities rule, the fact that special-interest groups are often very effective at obtaining their policy objectives—even when those are bad for the majority or other, less powerful minority groups—demonstrates that it cannot be that simple.

³Alternatively, if we cannot both discontinue use of chlorpyrifos and meet other requirements of justice at the same time, then the problem is one of prioritization. AFR is designed for just such dilemmas. It may ultimately decide in favor of other concerns and so allow continued use of chlorpyrifos; but in this case, the problem is not with the AFR procedure, but rather with the fact that resources are limited to the extent that we cannot pursue all the requirements of justice simultaneously. This may be a tragedy, but it is not a problem with AFR.

These considerations do not show that unfair representation in public deliberation is not a problem: on the contrary, what they show is that the problem is complex, and that, as a result, there is no simple normative response to this problem. Positive proposals about how AFR could effectively deal with unfair representation, without creating problems of the type explained above, would be most welcome.

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