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Lifestyle as a criterion for prioritising healthcare?

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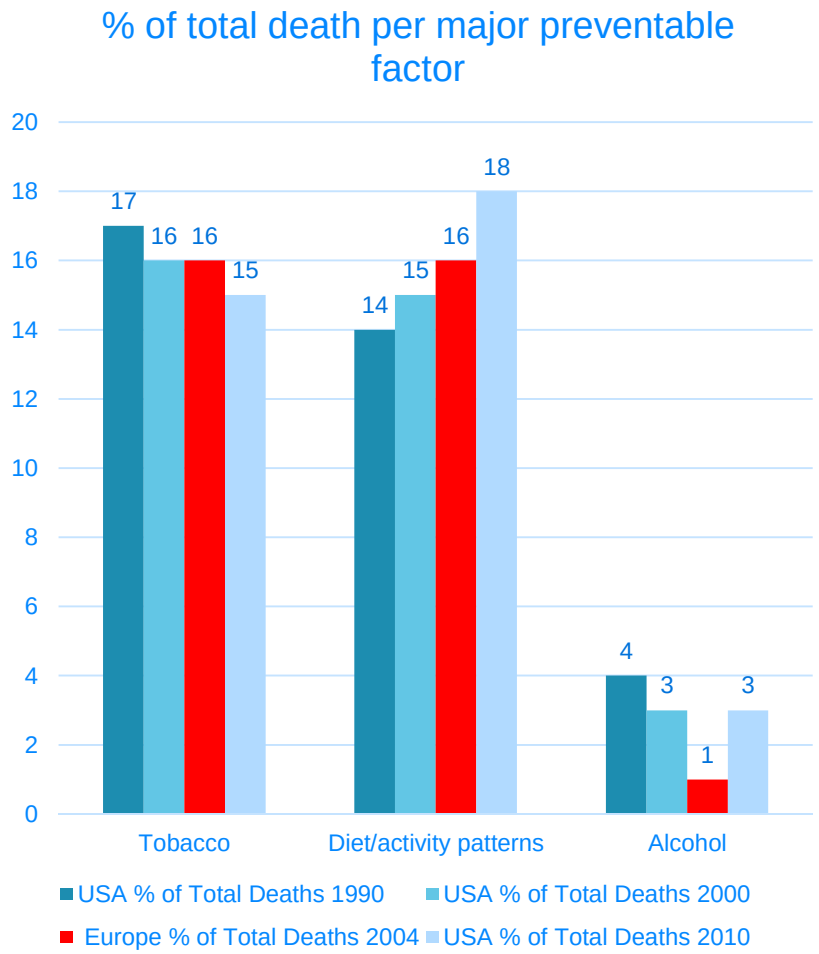
Lifestyle as a criterion for prioritising healthcare?

- Importance of health(y) behaviour: alcohol, tobacco and unhealthy diet
- Lifestyle responsibility touches upon human rights, patient rights and medical deontology
- Directing public means to prevention instead of cure
  - Public health policy of prioritisation in relation to preventable diseases: necessary but complex!
  - Towards a comprehensive lifestyle law & policy in the EU?

Importance of health(y) behaviour

- Preventable disease = disease, illness or death that could be stopped from occurring by avoiding preventable risk factors
- UN General Assembly (2011): non-communicable diseases constitute a major challenge for development
  - Cardiovascular & chronic respiratory diseases, cancers, diabetes…
  - Calls for cost-effective, population wide interventions of tobacco use, alcohol abuse, unhealthy diets & lack of physical activity
- World Health Assembly adopts action plan for the prevention and control of NCDs for 2013-2020 with ambitious targets

Preventable death



Tobacco in EU in 2009

- € 544 billion
- 4.6% of GDP

Alcohol in EU in 2003

- Direct cost: € 125 billion (79-220)
- Indirect cost: € 152-764 billion

EU physical inactivity in 2012:

- Direct cost: € 9.2 billion
- Indirect cost: € 71.1 billion

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Lifestyle responsibility for preventable disease is highly controversial

- Lifestyle linked to socio-economic status
- Humanitarian argument: obligation to help people who are in real need (regardless of the reason)
- Fairness argument: actual consequences of a choice partly depend on factors outside the individual's control
- Universalisation argument: only fair if applied to all self-caused ill health

Lifestyle responsibility touches upon human and patient rights

- Non-discriminatory access to healthcare
  - Right to health encompasses access to health care
  - Criteria grounded in circumstance versus individual's autonomous choice
  - Equal treatment of all unhealthy behaviour?
- Individual decision-making autonomy and the right to private law
  - Data protection: purpose limitation, data and storage minimisation

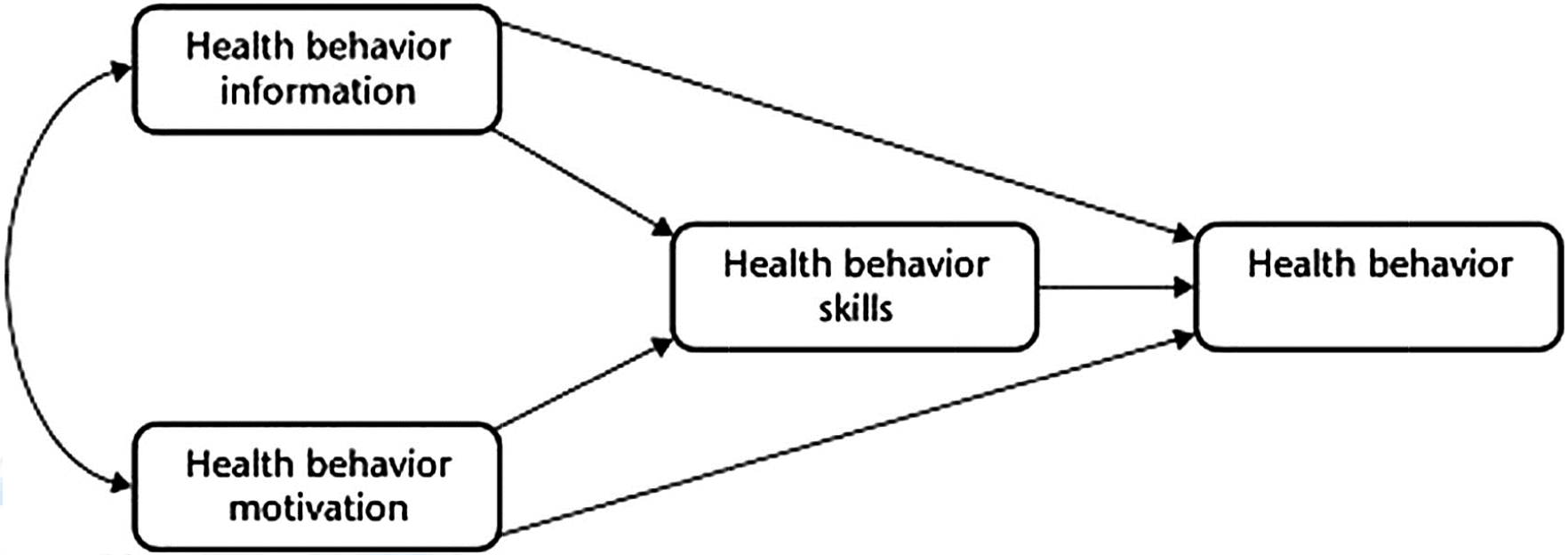
Lifestyle responsibility touches upon human and patient rights

- Access to high quality health care
  - Standard of care and medical deontology: “act in the patient’s best interest when providing medical care”
  - Responsibility to act as a good patient?
- Equitable balance of different principles of distributive justice is best found through a fair democratic procedure

An ounce of prevention is worth a pound of cure

- Directing resources from curative treatment towards prevention?
  - ⇒ Difficulty is that the call for treatment is louder than the call for prevention
- Prevention and progressive realisation of right to health?
  - Maximum health within the limits of sustainability
  - Lifestyle as a criterion to allocate means to prevention, not to divert budget away from health
  - Reduce health inequalities and lead to a higher level of health for all population groups

Complexity of behavioural changes: the information-motivation-skills model

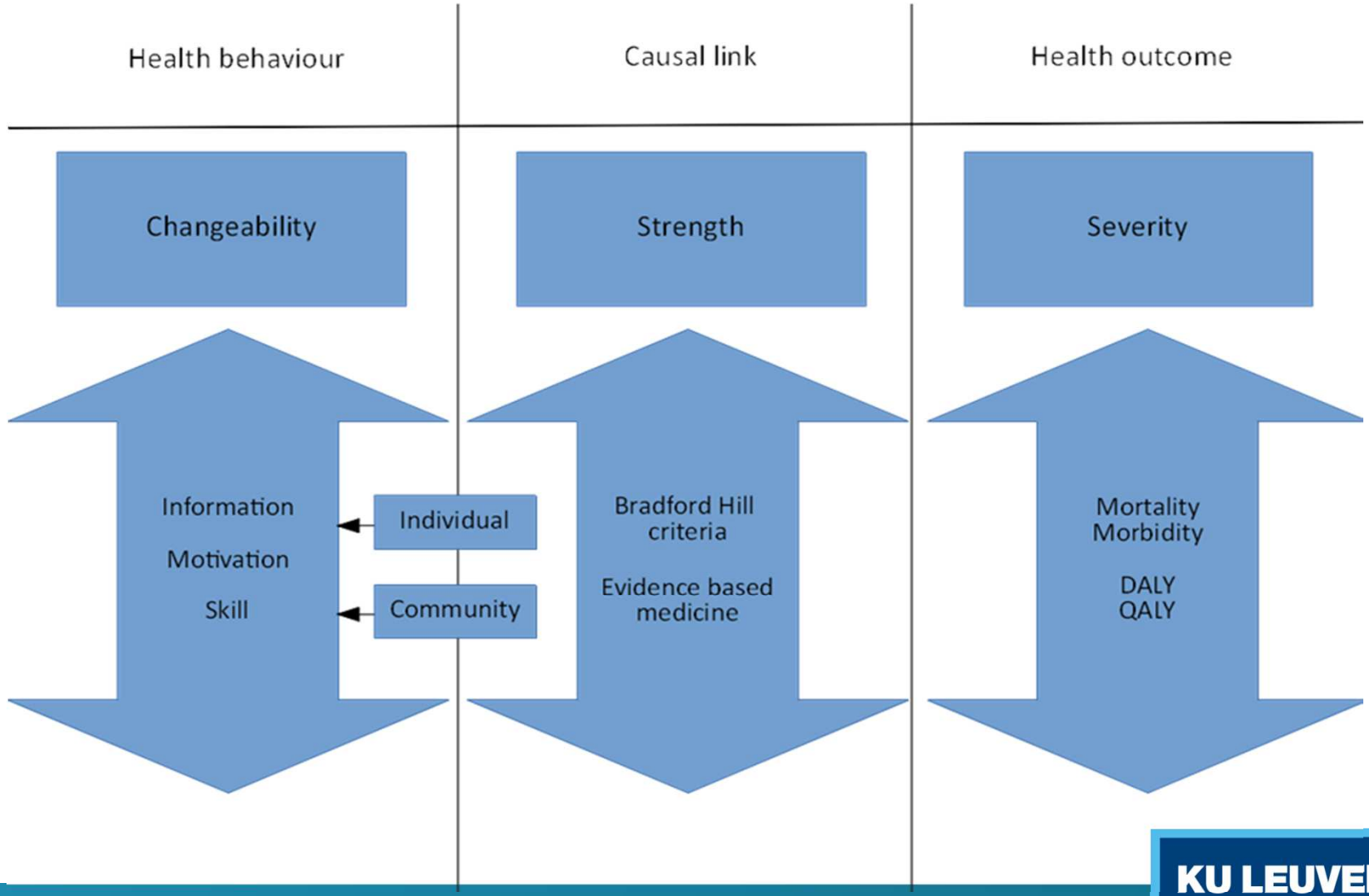


Source: W. A. Fisher, J. D. Fisher, and J. Harman, *Social Psychological Foundations of Health and Illness,* 2003. Maiden, Blackwell, 2003, p. 86.

Lifestyle as a complex criterion for healthcare allocation

- Shared rather than individual responsibility
  - Skill and self-efficacy of an individual may be limited: e.g. addictive component, ability to restrained practice
  - Significant influence of the community on behaviour
- Complexity of causation between behaviour and effect
- How to quantify health outcome?
  - Mix of severity (mortality versus morbidity) and time: DALY versus QALY
  - Health as a monetary value (quid societal values?)

Framework for using lifestyle as a criterion for allocation in healthcare



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Towards a lifestyle law & policy in the EU

- EU commitment to accelerate progress on combating unhealthy lifestyle behaviours (Council of the EU, 2011)
- Evolution towards a public health policy after the introduction of a chapter on public health in the TFEU
  - “ensure a high level of public health in all policy areas”
  - Action programmes in the field of public health
  - EU strategies in combatting alcohol abuse, obesity and smoking
- Public health is mainly promoted through other areas of EU law, especially the law of the internal market

Tobacco, alcohol, food: protecting health or protecting trade?

- EU opts for an autonomy-centred consumer-information approach
  - “harm reduction”/“nudging” with focus on young people
  - … but weak on control mechanisms (except for labelling and disclosure requirements)
- Autonomy-centred approach conflicts with reality and complexity of preventable diseases
  - Does the individual really make an autonomous choice?
  - Ignores risks to family members (passive smokers, …)
  - Ignores risks to health care systems

The ambivalence of subsidiarity

- Logic of the single market dominates the debate in EU
  - Focus on young people (no broad population approach)
  - Willingness to regulate the tobacco industry versus refusal to regulate the alcohol industry
- Autonomy-based EU policy reduces national discretion to adopt more paternalistic harm-reduction measures
  - Cassis de Dijon (C-120/78)
  - Yesmoke Tobacco (C-428/13)
  - Scotch Whisky Association (C-133/14)

EU Lifestyle policy and fundamental rights: reactive rather than proactive use

- Fundamental rights have mainly been invoked by industry operators
  - Right to property and freedom to conduct a business
  - Freedom of expression
- Room for a more proactive use of alternative fundamental rights in the general public interest
  - Right to life, to a clean environment and to information, right to (nutritious) food, right to education, …
  - Upgrade of article 35 of the EU Charter and the duty of progressive realisation of the right to health?

What difference does a court make?

- Deference of courts in assessing complex policy-decisions
  - Need for transparent & fair decision-making procedures
  - Life style policy should be evidence-based
- Can we expect more than a procedural review?
  - As the policy process becomes more evidence-based, courts may be inclined to delve deeper into the complexity of the matter at hand
  - “Semi-procedural judicial review” (Bar-Siman-Tov) or “evidence-based judicial reflex” (Alemanno)

Division of powers as an obstacle for holistic national lifestyle policies

- Division of powers in the Belgian federal state
  - Federal funding of healthcare v. Flemish Community's responsibility for prevention and quality of healthcare
- Elephant in the room in Scottish minimum pricing case (Scottish appeal Court 21 October 2016)
  - Scottish Government: no power to raise taxation on alcohol
  - But UK has little responsibility for the health of the scots
  - "*curious anomaly in the context of a legal argument that increasing tax is a viable alternative when the political reality is that is clearly not*"

Towards a *comprehensive* public health lifestyle law and policy in the EU?

- The prevention of unhealthy lifestyle is key
- Autonomy centred approach cuts both ways: accounting for impact of libertarian policy on national policies
  - EU neglects active duty to protect and fulfil social rights
  - EU autonomy centred approach prevents holistic national lifestyle policies
- Need for population-based policies grounded in sciences
  - Corresponds with reality & complexity of preventable disease
  - Complexity of (changeability of) behaviour urges decision-makers to embrace (behavioural) science


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