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Section 1: Paper 2

Genetic Discrimination, Life Insurance, and Justice as Fairness

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Abstract: In this paper, I use justice as fairness (JAF) to inquire whether any issues of liberal justice are raised by the practice of genetic discrimination in society, in particular from the standpoint of life insurance pricing in Canada. I present three ways in which JAF may apply. First and foremost, Rawls’ negative thesis can be interpreted to say that one’s genetic characteristics are morally arbitrary and therefore persons do not deserve to be advantaged or disadvantaged by the basic structure of society based on these characteristics. Second, as James W. Nickel observes, Rawls’ principle of equal basic liberties can be interpreted to include a right to privacy which is necessary, among other things, in order to protect other basic rights and liberties. Third, as Martin O’Neill maintains, life insurance is a gateway social good that allows individuals to access primary goods and to live a full human life. Therefore, securing this important good on non-discriminatory grounds is of fundamental importance for a society committed to social justice.

Introduction

With the passing of the Genetic Non-Discrimination Act in Canada, “genetic characteristics” are now added to the list of traits that the Canadian Human Rights Act prohibits as a basis for discrimination (Government of Canada 2017). In this paper, I will use Rawls’s Justice as Fairness to inquire whether any issues of liberal justice are raised by the practise of genetic discrimination in society, in particular from the standpoint of life insurance pricing. Below I list three ways justice as fairness may apply:

- Primarily, it may be used to argue that the genetic characteristics of persons is a feature that is ‘morally arbitrary’ implying that discrimination based on this feature is not justified.
- It may be used to argue that the privacy (to withhold genetic information from insurers) is a basic liberty, although Rawls does not explicitly mention it as such.
• Finally, it may be used to argue that some sort of life insurance is a primary good, due to its characteristic of being a gateway social good, meaning that it ought to be a concern for social justice. Again, Rawls does not explicitly mention life insurance as a primary good.

I will first explain the debate that surrounded the Bill prior to it becoming law, before I outline the main components of justice as fairness (its political conception) and show how it applies in the ways listed above. Throughout, I will draw conclusions on whether these arguments justify the new genetic non-discrimination law, or something like it, as it applies to life insurance.

**Genetic non-discrimination in life insurance**

On May 04, 2017, Bill S-201, *An Act to prohibit and prevent genetic discrimination*, received Royal Assent and became law in Canada (Office of the Privacy Commissioner of Canada 2017). Even though the constitutionality of the proposed Bill was questioned by some, given that it is the provincial governments that regulate (and have the right to regulate) the insurance industry, the idea behind the law is that genetic non-discrimination is a higher priority. In other words, it was deemed acceptable that limits be put on what provinces can allow insurance companies to do, if issues of unjustified discrimination were at stake. As a result of the new law, life insurance companies can no longer require individuals to undergo a genetic test or require them to disclose the results of a previous genetic test to the company prior to calculating the cost of an insurance plan (Government of Canada 2017).

Those who were opposing the Bill, such as Swedlove, claimed that if it were to become law it would unfairly allow individuals to withhold critical information from insurers (Bombard, Swedlove and Baylis 2016). As explained by Rothstein and Anderlik, this group holds that genetic information is just another factor to be evaluated, on top of, *inter alia*, age, family history, and
health status in the underwriting process (2001, 356). The argument from the side of the insurers is that life insurance is a contract whereby there is supposed to be equal knowledge of information (which reveals risk information that will impact pricing) by the involved parties (Bombard, Swedlove and Baylis 2016). If the state of equal knowledge is disturbed, as it is when individuals withhold genetic information, it is argued that these individuals can unfairly ‘bulk up’ on insurance. This is known as adverse selection which “refers to the disproportionately heavy purchase of insurance by high-risk individuals when rates are not adjusted for risk” (Rothstein and Anderlik 2001, 356). It is argued that such “information asymmetry can seriously disrupt the efficient functioning of a free marketplace” (Nowlan 2002, 195). To counter this problem and make up for the financial loss, insurance companies would then increase prices for average, future potential clients. As a further delayed outcome, increased prices could be a barrier for other individuals to purchase life insurance when it is warranted, therefore negatively impacting them and their family members (Bombard, Swedlove and Baylis 2016). For insurers, then, “the key ethical consideration is a principle that might be stated as: ‘groups with equal morbidity and mortality risk should be treated equally.’” (Rothstein and Anderlik 2001, 356). And to be able to accurately classify these groups based on risk, insurers need to have access to medical information, which includes genetic information. This position will be referred to as actuarial fairness from now on.

On the other hand, those who were supporting the legislation, such as Francoise Baylis, argued that the claim that contracting parties have equal knowledge is, in fact, false (Bombard, Swedlove and Baylis 2016). For example, insurers have access to the demographic, health, lifestyle, and family history of persons who are similarly situated which may reveal information about the potential client which the clients themselves do not know (Bombard, Swedlove and
Baylis 2016). Moreover, Baylis said that insurers can access and interpret new scientific research, and have the support of actuarial scientists who can help them assess risk in a systematic way, something that ordinary individuals cannot necessarily do or access (Bombard, Swedlove and Baylis 2016). Another commenter, Bombard, argued that due to the absence of such genetic non-discrimination laws in Canada, people were less likely to participate in genetic research and genetic testing in fear of discrimination in the future, and that this impeded knowledge generation and the ability to take preventative health measures, respectively (Bombard, Swedlove and Baylis 2016). The culmination of these supporting premises is that an unjustified inequality (of treatment) was being permitted when insurance companies treated those who are genetically disadvantaged differently from those who are not by charging more or otherwise making it more difficult for the genetically disadvantaged potential clients.

To respond to this charge of unequal treatment, those representing insurance companies attempted to make the following move: life insurance companies do not increase insurance rates if persons take a genetic test (which then, for example, reveals that they are likely to develop a genetic disease in the future) after they purchase insurance (Bombard, Swedlove and Baylis 2016). So, the representatives claimed that there was no problem since they were not forcing potential clients to take a genetic test before providing them with normally priced insurance; they could buy insurance (if they suspected that they may develop a genetic condition in the future) and then take a test if they wished to later (Bombard, Swedlove and Baylis 2016). However, this is not a satisfactory defence in my view. The representatives’ argument does not take into account the fact that, in many cases, it is the result of the genetic test which is going to direct persons to purchase insurance or not. These persons are having their liberty restricted by being forced into a position where they must either (a) take a test, reveal the result to the insurer, and, depending on the result,
have to pay more than average or (b) take a risk by purchasing insurance prior to knowing whether they would like to and then be in a position where they must pay insurance until their contract expires. If a person who anticipates that s/he may develop a genetic condition in the future is informed by a genetic test that s/he will not develop the disease (predictive tests have this ability for certain diseases), he/she would likely not purchase insurance anymore since the fear of developing the disease was the only reason this person had for wanting to purchase life insurance in the first place. This constraint of choice by insurers is not justified and the problem of unequal treatment (if it was a problem) remained in the eyes supporters before the passing of the law.

In the remainder of this paper I will examine whether this inequality in treatment (genetic discrimination) was a problem (unjustified inequality) from the perspective of justice as fairness.

**Political conception of Justice as Fairness and discrimination based on personal characteristics**

Rawls is interested in limiting the scope of justice by developing a political conception of justice (Rawls, *Political Liberalism* 2005). This desire comes from Rawls’ recognition of the fact of pluralism—that is, we live in a pluralistic society where free and equal individuals have justified conflicting interpretations of what it means to live a good life. Therefore, we must justify the use of political power to all those whom the power is meant to control by appealing to shared public values that are not tied exclusively to anyone’s own particular comprehensive doctrines (Rawls, *Political Liberalism* 2005). A political conception of justice has several important features. Primarily, justice as fairness applies only to the basic structure of society which refers to the arrangement of its “main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next” (Rawls, *Political Liberalism* 2005, 11). Secondly, a political conception of justice does not rely on a moral or
metaphysical doctrine; it is freestanding in that it can be affirmed by people who hold different comprehensive doctrines (Rawls, *Political Liberalism* 2005, 12). Thirdly, a political conception of justice is expressed “in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society” (Rawls, *Political Liberalism* 2005, 14).

Rawls’ theory of justice, which arises from this political conception, is Justice as Fairness. He argues that if a group of self interested, free and equal persons were behind the veil of ignorance, they would choose the following principles of justice to govern the basic structure of society:

- First principle: Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all (principle of equal basic liberties).
- Second principle: Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society (difference principle) (Rawls, *A Theory of Justice* (Revised Edition) 1999, 53).

The principle of equal basic liberties is to be used in designing the political constitution and affirms for all citizens basic rights and liberties: liberty of conscience and freedom of association, freedom of speech and liberty of the person, freedom of movement, the rights to vote, to hold public office, to be treated in accordance with the rule of law (Rawls, *A Theory of Justice* (Revised Edition) 1999, 53). These basic rights and liberties cannot be traded off against other social goods and they are ascribed to all citizens equally (Rawls, *A Theory of Justice* (Revised Edition) 1999,
So, a basic liberty can only be limited for the sake of another basic liberty (Rawls, *A Theory of Justice* (Revised Edition) 1999, 54).

Recall that one of the main points insurers made in supporting the state of affairs at the time was that genetic characteristics are just another factor to consider when calculating prices. Justice as fairness, on the other hand, places certain limitations on what kinds of policies the basic structure of society can permit. As Rothstein and Anderlik point out, “the Rawlsian approach to justice begins, not with custom or economics, but with the idea of a level playing field and a belief that society should not allow peoples’ prospects to be governed by ‘morally arbitrary’ differences such as genetic factors related to disease and disability” (2001, 356). Thus, “…the broader social goals and an individual's degree of control over the characteristic that serves as the basis for discrimination matter in ethical and policy analysis.” (Rothstein and Anderlik 2001, 356). Rothstein and Anderlik are aware that ‘rationality’ cannot always be used to make insurance or employment decisions (2001, 356). What they mean is that even if rationality, from the business’ perspective, points out that hiring a person from a certain group (whose members are likely to develop a genetic disease, for example) will be bad for one’s business, the business still cannot discriminate against this person because this person did not choose to be associated with that disease. Similarly, even though rationality may point out that providing insurance to a genetically disadvantaged person at the normal rate is bad for the business, the business still cannot discriminate against this person since the person did not choose to be genetically disadvantaged. The other two examples of what is rational but unacceptable, that Rothstein and Anderlik point out, are the following: excluding a person with cancer from consideration for employment based on concerns about healthcare costs, and excluding a pregnant woman from consideration for employment because she may soon go on maternity leave (2001, 55). So, the idea is that the
requirements of justice governing the basic structure of society, that indirectly affect what businesses can do, have priority. As Rawls states:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many (Rawls, *A Theory of Justice* (Revised Edition) 1999, 3).

In short, Rawls is interested in eliminating the effects of brute luck in natural lottery when devising the basic structure of society and believes that, if justice applies anywhere, it first applies to the basic structure. It must be noted that Rawls’ fairness requirements may sometimes indirectly demand just discrimination in order to rectify the unfairness resulting from differences in the morally arbitrary feature. Where anything like compensating for an impairment is required, however, Rawls understands it as achieving fair equal opportunity, not as redressing some particular trait or impairment. Applying Rawls’ idea to genetic information in this context, then, Papaioannou contends that just because someone is born with genes that predispose him/her to a disease should not lead to this person having lower life prospects (by way of being disfavoured by social institutions, for example) than other persons who are not genetically disadvantaged (2009). This idea can be understood as the negative thesis of Rawls’ theory of justice. So the intention behind the Genetic Non-Discrimination Act is, in principle, justified by justice as fairness since it seeks to stop insurers from discriminating based on a morally arbitrary reason. The arguments in the following sections will contribute to the general argument presented in this section by applying Rawls’ positive thesis.
The right to privacy as a basic liberty

In this section, I will use Rawls’ reasoning to determine whether a right to privacy can be interpreted as a basic liberty that everyone is supposed to have equally, as required by the first principle. Privacy can be understood as having control over how one’s personal information is used (Moore 2005). So, if a person has privacy it means that this person is the one who determines what, to whom and how much information about the subject is revealed to others (Velasquez 2002). A right to privacy, then, can be interpreted as a negative and a positive right. It is a negative right in the sense that it asks others not to interfere with how one uses one’s personal information. In the positive sense, a right to privacy demands that the government, for example, makes rules to prohibit others from interfering with how one uses one’s personal information. In the case of protecting one’s privacy to one’s genetic test results, this right requires insurance companies not to interfere with the use of potential clients’ personal information and asks governments to implement laws like the Genetic Non-Discrimination Act so that insurance companies cannot.

Once we know what Rawls defines a basic right or liberty to be, we can see if and how a right to privacy can be included. As described above, basic rights and liberties are a component of what Rawls calls “primary goods”. Primary goods are those goods that all rational persons are likely to want more of as they are “social conditions and all-purpose means that people generally must have in order successfully to form, revise, and pursue their conceptions of the good [rational] and to develop and exercise a sense of justice [reasonable]” (Nickel 1994, 765).

James Nickel is a philosopher who has worked on interpreting Rawls’ first principle. In his article, Rethinking Rawls's Theory of Liberty and Rights, he seeks to add other basic rights and liberties to the list that Rawls explicitly states (Nickel 1994, 763). He says that Rawls' first step in
justifying a basic liberty or right is usually to show that it is a primary good (Nickel 1994, 772). We know what primary goods are “…by asking what social and institutional conditions are necessary for people to be able to develop these capacities and to use them in the ordinary circumstances of human life.” (Nickel 1994, 773). So, a liberty could be a basic liberty in relation to (1) a sense of justice, as well as in relation to one’s (2) good/rationality. A third, indirect way to justify something as a basic right or liberty is to argue that they are a means to protect and secure other basic rights and liberties (Nickel 1994, 775).

Departing from Rawls, Nickel does not think that there can only be one justification for a basic right or liberty (1994, 777). He says that, at least at the constitutional stage, many of the core liberties and rights can be justified by more than one of these approaches (Nickel 1994, 778). For example, according to Nickel the right to privacy can be justified as a basic liberty in all of the three ways. Considering the right to privacy in this context, one argument is that it is a necessary part of a person’s conception of the good. Given that there are negative consequences if privacy is infringed, persons would not risk not having privacy. The comparison Nickel makes here is to show how persons would not “…risk letting the majority decide whether one could follow one's deeply held religious beliefs…” (1994, 778). The point in this way of justifying a right as a basic liberty is to show how it is likely to be something that is ‘nonnegotiable’ (Nickel 1994, 778).

Another argument for why privacy should be included as a basic liberty is that without privacy, it would be difficult to develop or exercise a capacity for a sense of justice. Developing this moral capacity requires political liberties as well as personal liberties, in which a right to privacy can be found (Nickel 1994, 770). A society in which one must reveal genetic test results (something that one has no control over) to insurers who will then discriminate against this person does not adequately form the social bases for realizing self respect, as this will likely damage one’s
self worth and confidence to carry out one’s plans. This will then impact one’s capacity to cooperate with others in society.

A lot of what has been said so far depends on the value of life insurance. In the next section, I will examine Martin O’Neill’s argument for why life insurance is an important social good. In the meantime, however, what is the significance of conceiving privacy as a basic liberty?

First of all, all people would have this right equally, with the exception of children who, as Rawls says, excusably have lesser liberties given the natural features of the human situation (A Theory of Justice (Revised Edition) 1999, 215). If we considered all relevant things, however, perhaps we would find out, during the legislative and application stages, that another basic liberty is in conflict with this one and one of them would have to be limited such that, in the end, it would be possible for all of the basic rights and liberties to be held by everyone equally. As Rawls says, “the precedence of liberty means that liberty can be restricted only for the sake of liberty itself.” (Rawls, A Theory of Justice (Revised Edition) 1999, 214).

Secondly, it would mean that this right cannot be infringed by appeals to greater economic success, or other goods that are likely to result from the violation of this right. As stated in the previous section, the first principle is lexically prior to the second principle. This means that if privacy is a basic right, it has to be guaranteed to all before the second principle is satisfied. So in this context, appeals to the undesirability of higher pricing of insurance for all other insured people and potential clients, or appeals to how this is not actuarially fair since it would allow potential clients to “bulk up”, do not justify privacy infringement. To emphasize, this does not mean that rights cannot weighed against each other based on circumstances. In doing so, however, there are two rules that have to be satisfied:

(a) a less extensive liberty must strengthen the total system of liberty shared by all, and
(b) a less than equal liberty must be acceptable to those citizens with the lesser liberty

I will not go into the details of this here but, as Rawls suggests and Nickel also mentions, the idea that basic rights ought to enable the moral powers of reasonableness and rationality should not only be used in justifying basic rights and liberties but also in interpreting and applying them (1994, 780).

What I have shown here is that if either of the arguments I presented in this section are successful, then privacy of genetic information could be seen as a basic liberty under Rawls’ first principle. Whether the establishment of this right as a basic liberty could be defended against all criticisms is beyond the scope of this paper. The value in what I have said, then, is in showing how the arguments defending privacy as a basic liberty would have to be made. It is true that genetic information makes up only a part of what a right to privacy could entail and I have not shown anything other than why a single component (genetic information) of the right to privacy ought to be protected due to its value as a primary good. Other personal information may not have such a dramatic impact on life chances and these could be identified during the legislative and application stages. So, I am not saying that all personal information should be subject to the person’s control. Although the new law does not frame the issue directly in relation to a right to privacy, I have suggested that justice as fairness could justify the law, at least in its effect.

**Life insurance as a primary good**

In also examining the issue of genetic discrimination, Martin O’Neill attempts to make a case for why the insurance of life is an important social good. His view is that life insurance is best seen as a *gateway social good* (O’Neill 2006, 567). By this term he means that it is a social good
because of its ability to ensure access to a wide range of primary goods (O'Neill 2006, 578-579).

He identifies the following as things that life insurance can provide:

- “It facilitates certain forms of economic and social activity, such as the kind of entrepreneurial activity in which individuals can engage if they have access to large and reasonably-priced bank loans” (O'Neill 2006, 578-579);

- “It allows access to the housing market” (O'Neill 2006, 578-579);

- “It facilitates stable family life” (O'Neill 2006, 578-579);

- “It provides for long-term planning of a kind that would be impossible under uncontrolled levels of risk” (O'Neill 2006, 578-579).

He then explains why these abilities are good. For example, he says that

- “Access to a full range of financial products, including the mortgage needed to buy a house, is a very basic precondition of full economic citizenship in a society such as ours” (O'Neill 2006, 578-579);

- “The opportunity to create and sustain a stable family life seems also to be a very basic and fundamental social entitlement” (O'Neill 2006, 579).

Most importantly, O’Neill says that “Access to life insurance is an important pre-requisite for certain kinds of long-term planning—with regard to both economic and family life— which are absolutely central aspects of living a full and successful human life” (O'Neill 2006, 579).

The benefits O’Neill lists here are things that the moral powers allow citizens to do—that is, to live as free and equal citizens in society. Recall that two of the ways Rawls justifies whether something is a basic right or liberty is to show that it is required to exercise the two moral powers.
According to O'Neill, access to insurance is seen as a gateway social good which permits us to live as free and equal citizens by allowing us to exercise our rationality and sense of justice. He says that this gateway characteristic of life insurance, thereby, “obtains under any basic structure of the same broad type as the one we currently have.” (O'Neill 2006, 579). This means the following:

… for any basic socioeconomic structure in which commercial life insurance is the dominant mechanism through which a family can secure a replacement income in the tragic event of the death of a breadwinner, and in which there is a common requirement that individuals taking out large loans have their lives insured, life insurance will be a gateway social good of great significance” (O'Neill 2006, 579).

What is the significance of this argument? O’Neill recognizes now that there are two approaches he can take: he can continue developing an ideal argument (that is, say that it is something like a basic liberty) or develop a non-ideal argument. In commenting on the possibility of continuing with an ideal argument he says the following:

… in a more fully egalitarian society, access to life insurance would be of no great significance. Perhaps a fully egalitarian society would have a social-welfare system that was sufficiently robust so as to make the income-replacement function of life insurance far less crucial than it is in societies like ours. Under such conditions, access to life insurance would be less significant, as life insurance would plausibly lack its ‘gateway’ property (O'Neill 2006, 579).

O’Neill, however, chooses to develop the non-ideal argument and says that “…given the functions of life insurance within a basic structure like ours, securing access to life insurance on non-discriminatory grounds for all citizens is a goal of tremendous importance from the standpoint of social justice.” (O'Neill 2006, 580). Since O’Neill is not willing to go so far as to say that access to this social good, although required to enjoy a full sense of citizenship in society, should be conceived of as a basic liberty, he needs to rely on Rawls’ negative thesis to show why
discrimination in accessing this good (which is provided privately) is not just. In doing so, he argues that being disadvantaged by social institutions due to traits one has no control over is an unacceptable form of discrimination (O'Neill 2006, 580). Thus, here too the Genetic Non-Discrimination Act would be justified within a society organized by justice as fairness.

It might be argued that in this context, the situation is not that the person will be denied life insurance, but that it will only be offered at a higher rate. Although being denied is something that has happened (Gold 2016), it is true that what usually happens is that limits are put on how much insurance one can take out, and/or rates are increased according to risk. This sometimes leads to persons not even applying for insurance (Gold 2016). Even an increase in prices is enough to be seen as a problem, however, because instead of supporting an already disadvantaged group, whose members are disadvantaged for reasons beyond their control, this group is being required to pay much more in order to access an important good.

The argument from actuarial fairness does have some weight but, as defended earlier, justice governing the basic structure has priority. If this is not accepted, or if one argues that justice governing the basic structure is more in line with what actuarial fairness requires, then my initial proposal, which I think carries with it the spirit of justice as fairness, would be to request public funding to financially support genetically disadvantaged persons in acquiring higher priced insurance instead of leaving it to the individuals or forcing only other insured people to pay more. What is important to note is that it is not the argument of this section that social justice can only be achieved in a basic structure where access to life insurance on non-discriminatory grounds is protected (O'Neiill 2006). In a truly just society, for example, the family members of this person would have fair opportunity to be self-supporting, and if unable to do so would have appropriate state supports. But so long as, here and now, people prefer something like what private life
insurance provides, instead of only relying on their welfare state to better safeguard against the death of a breadwinner, a society committed to justice should necessarily support genetically disadvantaged individuals in acquiring normally priced insurance, one way or another.

References

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