

Genetic Testing and Private Insurance – A Case of “Selling One’s Body”?

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Abstract

Arguments against the possible use of genetic test results in private health and life insurance predominantly refer to the problem of certain gene carriers failing to obtain affordable insurance cover. However, some moral intuitions speaking against this practice seem to be more fundamental than mere concerns about adverse distributional effects. In their perspective, the central ethical problem is not that some people might *fail* to get insurance cover because of their “bad genes”, but rather that some people would *manage* to get insurance cover because of their “good genes”. This paper tries to highlight the ethical background of these intuitions. Their guiding idea appears to be that, by pointing to his favourable test results, a customer might make an attempt to “sell his body”. The rationale of this concept is developed and its applicability to the case at issue is critically investigated. The aim is to clarify an essential objection against the use of genetic information in private insurance which has not yet been openly addressed in the academic debate of the topic.

The focus of the current debate

The possible use of predictive genetic test results by private health and life insurers has raised serious ethical concerns. Several national and international organizations have issued opinions and recommendations on this topic, and national policy-makers have initiated corresponding legislation (see e.g. Crosbie, 2000; DRZE, 2001; National Reference Center for Bioethics Literature, 2004). The main fears stimulating these reflections and activities seem to stem from the anticipation of severe economic disadvantages that the use of such tests may entail: Some persons, because of their “bad genes”, might fail in their attempts to receive private insurance, or might be offered insurance contracts on considerably worsened conditions, such as higher premiums or coverage exclusions (see e.g. Hudson et al., 1995; Kass, 1992; McGleenan and Wiesing, 2000).

Political, economic and scientific estimations to what degree such a development has to be realistically expected may vary. But if it should commence, it might indeed lead to grave individual as well as social problems which are adequately addressed under the philosophical heading of possible distributive injustice done to the neglected “bad gene” carriers.

It seems natural that the main focus of ethical reasoning with respect to new political developments is on possible essential shortcomings they may generate. This explains why the problem is generally considered to be more urgent with respect to health insurance than with respect to life insurance. For the former is usually supposed to be a part of people’s basic supply, whereas the latter constitutes a surplus financial arrangement that in most countries may be replaced by other kinds of provision and that only in some countries gains essential relevance as a

precondition for certain basic social services (cf. HGAC, 1997, Section 1.2; NIH-DOE Working Group, 1993, Task Force Recommendations; Nowlan, 2002). Thus, it comes as no surprise that most commentators have put the stress of their assessments on the threatening loss of private insurance cover for certain gene carriers. This focus is most apparent when the disclosure of adverse results is seen quite sceptically, whereas the disclosure of favourable results meets no comparable reservations (cf. House of Commons, Select Committee on Science and Technology, 2001, §§ 40, 59, 71; HGC, 2001, pp. 465 f.; Nuffield Council on Bioethics, 1993, §§ 7.28, 7.29). In this paper I want to explore a different perspective which will not necessarily share these perceptions: It will encompass health and life insurance in basically the same way, and it will consider favourable results to be actually more problematic than adverse results when being revealed to an insurer.

Possible problems of a justice approach

The idea of preventing disadvantages for “bad gene” carriers on the insurance market in the name of distributive justice has led to considerable disagreements. For it appears to be questionable whether it can be legally and ethically justified to prohibit the straightforward exclusion or the special charging of high-risk individuals in either health or life insurance – as far as the *private* and not the *public* insurance sector is concerned: Of course, there are good grounds for guaranteeing these individuals adequate governmental support. But the special stance of basically accepting or even affirming the existence of a free insurance market and nonetheless trying to force it to comply with certain desired distributional patterns might be legally inconsistent and ethically unsound.

Many international documents display a very restrictive attitude towards the use of genetic test results in private insurance (Council of Europe, Committee of Ministers, 1992, Principle 7; European Parliament, 1989, §§ 19, 20; WHO, 1998, Sect. 6). But several commentators anticipate grave difficulties when integrating such restrictive positions into national legislation devoted to the freedom of commerce. These authors maintain that the attempt to impose external distributive purposes onto the free market is fundamentally inadequate (Breyer, 2000; Burley, 1999; Taupitz, 2001).

It is generally admitted that the ethical foundations of state insurance and commercial insurance differ considerably (HGAC, 1997, Section 2.3). And it may indeed be disputed to what degree the latter can or should be expected to look after people with very adverse health characteristics. At least, there may be some tension between the social responsibility that one would like to ascribe to private insurance and the legitimate requirements that it can be exposed to in the light of contractual freedom (Council of Europe, Committee of Experts, 2000, p. 154).

I will not try to decide whether this point of view is inevitably compelling. But for sure, it can be brought forward from various political perspectives: Libertarians, regarding the free market as a private sphere of individual action, will be willing to restrict its liberties only when it collides with other people’s non-distributive rights, but not in order to satisfy anybody’s supposed distributive claims. Non-libertarians, regarding the free market as a deliberately established public sphere of coordinated transactions, may still find it inconsistent on the one hand to install this special

distributive mechanism and on the other hand to impose external distributional requirements on it. In both cases the argument runs that, once it is accepted that a free market may legitimately develop in a certain social sphere, then it should only be subjected to the principle of free commerce. Other distributive principles, which may especially require better provisions for “bad gene” carriers, should be taken account of within some additional public provision scheme. Everything else would amount to a concealed imposition of inadequate standards on the free market and its silent recruiting into a public system where arguments would actually enforce the resolute and overt taking of central measures. Requiring private insurers to accept “bad gene” carriers would mean to force alleged free commercial decisions to correspond with a desired distributional pattern, and thus to hypocritically distort commercial action into a mere pseudo-market.

As I said, I leave it open whether this position is completely conclusive. Possibly, it is theoretically puristic or even unstable by conceding distributional *supplementation* of the free market by central action and at the same time refusing distributional *influence* on it. Possibly, it is at least pragmatically irrelevant as, under given political and societal conditions, influencing the *market* may be the best approximation to the ethical ideal of providing *public* support. I will also not discuss whether it is not concrete distributive principles, but certain abstract distributional concepts, such as impartiality, non-discrimination or solidarity, that are at stake (cf. ESHG, 2000, p. 1; Gevers, 1993, p. 132; Murray, 1992, p. 16). It would have to be closely investigated, first, whether such more abstract concepts are indeed violated by genetic differentiation in private insurance and, second, whether market participants may legitimately be forced to comply to these concepts or whether it is once again governmental action that would have to guarantee their fulfilment (cf. Breyer, 2000, pp. 182-184; Taupitz, 2001, pp. 150-152).

It may be noted, however, that the most consensual suggestions for regulating the private insurance market with respect to the use of genetic data do not amount to influencing this practice with respect to its distributional impact: When you look at usual compilations of such suggestions you find that they rather represent secondary provisions, such as special restrictions and framing conditions, to be adhered to while the practice is applied and its results are achieved (see e.g. Chadwick et al., 1998, 263-271; Council of Europe, Committee of Experts, 2000; Nuffield Council on Bioethics, 1993, Chap. 7). The ethical entities that these amendments refer to are not positive distributional claims, but negative protective rights: They concern informational self-determination (under the headings of “the right not to know” and “data protection and privacy” which may both be violated by the request, collection and application of genetic data), the avoidance of psychological damage (including deterrence from tests which would be medically advisable or scientifically desirable, and despair because of tests which have brought about adverse results) and quality control (relating to both the scientific quality of the tests themselves and the sound interpretation of their results in order to prevent both insurers and customers from making unwise decisions). All these aspects are intended to safeguard non-distributive rights (informational self-determination, psychological integrity, health protection), and they are addressed by establishing corresponding restrictions on the insurance market (e.g. the enforcing of special standards of confidentiality, medical reservation, high laboratory standards). But they are neither meant nor suitable to divert the distributional impact of free commerce (which would be the only proper thing to do to correct possible injustices that genetic

differentiation may entail for “bad gene” carriers). They only accompany market forces and prevent them from conflicting with other basic rights. In this way they are analogous to corresponding regulations in other fields of economic activity which may require special attention, such as the production, transport or selling of dangerous goods: They are essential for the protection of extra-distributional rights, but they do not influence the principle of free commerce in order to make it comply with other principles of distributive justice.

Main features of a virtue approach

It will be subject to further debate whether considerations of justice must indeed restrict themselves to these secondary provisions in the name of non-distributive rights, or whether there is a justification, after all, to have distributive interests satisfied by correspondingly controlled market members. However, it is most doubtful that all moral intuitions against the use of genetic test results in private health and life insurance can be adequately taken account of by these two types of measures: At least some of these reservations appear to be too fundamental to be satisfied by mere amendments in the name of privacy protection, psychological escort or quality control. And at the same time they seem to be devoted not to the distributional results that market forces are likely to bring about, but to the very idea of using genetic information in private insurance at all. There is a strong conviction that there is something *intrinsically* wrong with the prospect of people displaying their genetic constitution to insurers, no matter what the *effects* of this practice on either safety or distribution may be. So, even when the vast majority of those alarmed by genetic testing in the private insurance sector will point to the prospective psychological and economic impacts of this practice, this might, for the main part, be so for reasons of primary perception or rhetorical power. At a deeper level concerns might well transcend the consequences and envisage the practice as such.

It is clear that in leaving aside the aspects of protective measures and distributional effects and in establishing a criticism of the practice itself a considerably altered conceptualisation of the problem must be effective. This shift can be characterized quite succinctly when contrasting the perspective in question especially with the distributive concerns about disadvantaged “bad gene” carriers. Firstly, the perception of the main ethical problem changes: The focus is no more on those *not* getting private insurance because of their “bad genes”, but rather on those *getting* private insurance because of their “good genes”. For if there is something intrinsically wrong with the practice of making somebody’s genetic constitution the basis of an insurance contract, this intrinsic wrongness is eventually realized in the action of someone successfully negotiating such a contract by pointing to his “good genes”, rather than in the fate of someone being refused such a contract on account of his “bad genes”. Secondly, the basic ethical perspective is shifted: It is not *justice* that is offended because someone did not get private insurance for unfair reasons, but it is *virtue* that is offended because someone did get private insurance for immoral reasons. For by concluding such a contract and making one’s own genetic constitution the basis of corresponding negotiations, nobody else’s rights can be violated, and so the ethical criticism of this practice must, by definition, be situated in the realm of virtue (duties with no corresponding rights), rather than in the realm of justice (duties with corresponding rights).

Note that this use of the words “virtue” and “justice”, respectively, does not derive from the distinction between “virtue ethics” as opposed to deontological ethics and teleological ethics. The question at hand is not whether ethical considerations concern dispositions of character, rather than rules of conduct or consequences of actions. The opposition of “virtue” and “justice” as I am going to use these terms is grounded in the Kantian distinction between “Tugendpflichten” and “Rechtspflichten”: “Tugendpflichten” denote obligations that do not correspond to other people’s rights (“Tugend” is the German word for “virtue”, which here, by definition, characterizes the special field of “Moralität” with no relation to rights). “Rechtspflichten” denote obligations that do originate in other people’s rights (“Recht” is the German word for “right”, and the related term “Gerechtigkeit”, in turn, means justice) (cf. Kant 1797/98, *Metaphysische Anfangsgründe der Rechtslehre*, A 47, *Metaphysische Anfangsgründe der Tugendlehre*, A 9). This distinction between “virtue” and “justice”, however, is not restricted to Kantian thinking, but is fundamental to many conceptions of moral duties, though sometimes within a different terminology. For instance, Mill distinguishes these realms of morality as well, using the terms “duties of imperfect obligation” and “duties of perfect obligation”, respectively, to denote them (cf. Mill 1861/71, Chap. 5).

The aim of the following sections is to investigate in more detail what a virtue objection against genetic testing in private insurance might amount to, to highlight its intuitive content and to reveal its philosophical background. Let me announce in advance that, in the final balance, it will remain questionable whether the perspective examined is compelling and whether its distinctions are consistent. Nevertheless, the virtue approach deserves and needs some deeper exploration as it captures essential moral concerns about the use of genetic testing in private insurance that are not properly respected by common considerations of justice and that seem to have been generally overlooked in the current debate of the topic. The following remarks are meant to be a tentative and critical exposition of this neglected standpoint. They will neither provide a complete assessment nor an affirmative apology.

A possible present example

Imagine the following example. Two individuals, A and B, decide to consult a private insurer, hoping to negotiate an affordable and comprehensive health or life insurance scheme. However, because of their bad physical condition – say: serious obesity – the insurer refuses to accept them, or, alternatively, offers them insurance cover on considerably worsened conditions – raising the premium well above the average level or excluding coverage for certain diseases – so that both refrain from their intention.

One year later both individuals once more contact the insurer. Meanwhile, a great difference between them has come about: Individual A has intensively engaged in sports and stuck to an effective diet so that he managed to reduce his weight and the corresponding risks for his health considerably. Individual B has more or less remained in his former bodily condition. Not surprisingly, the insurer now offers his services to individual A on agreeable terms, whereas individual B is rejected as before.

Presumably, the insurer acted on good economic grounds when making his decision with respect to A's and B's diverging physical constitutions. Still, B may criticize his behaviour for reasons of justice, appealing to one or several distributive principles. It is of no concern here which of these principles one might actually find appropriate and effective in the case at issue, or that these principles frequently conflict with each other when assessing other situations. It is only important to get some impression of how the situation might be assessed from the point of view of distributive justice.

Certainly, the insurer has violated the principle of *equality* in offering his services to A and not to B. For the principle of equality does not simply restate the guiding concept of justice, impartiality, that like cases should be treated alike, but affirms that, with respect to a given sphere of distribution, all individuals are like and thus should be treated alike. So, the fact that A and B are not in the same position when returning to the insurer is of no relevance when sticking to the principle of equality which simply requires that A and B should be treated alike no matter what their positions are – which has obviously not happened in the second pair of negotiations with A and B.

Possibly, the principle of *need* has been violated. Having failed to get insurance cover B or his family may be left without sufficient protection from the consequences of disease or death. So he or his family may run the danger of falling below a line of basic supply or well-being once he gets seriously ill or dies.

Possibly, the principle of *utility* has been neglected, too. For it could be that the total sum or the average of utilities of all parties affected – essentially A, B and the insurer, but perhaps several other agents, too – is lower than in the case that B had been offered an insurance as well. This calculation on the utility scale could remain true even when insuring B involves the risk that later payments to B exceed his own contributions to the company.

Finally, the principle of *merit* may have been disregarded. For this principle can be sensitive not only to the results presented by people, but also to the effort made by them, or it may at least take into account their diverging chances to engage in certain activities. In these cases B may have been improperly treated if he did sports and improved his nutrition just as A did, but without similar success, or if B did not have the corresponding opportunities, for lack of time or money.

It is beyond doubt that some or all of these aspects may be relevant in an ethical appraisal of the situation from a point of view of distributive justice. Especially the principles of equality and of need capture the common and, probably, essential concerns about injustices arising from the exclusion of people from health and life insurance schemes. Again, I leave it open whether these aspects are apt to justify regulations within the given setting of a commercial insurance negotiation or whether they can only have relevance for a state insurance system. Considerations in this non-genetic example will be basically analogous to the genetic case, and the central question will remain whether some of the external, result-oriented principles of justice (or some more abstract distributive considerations) may be imposed on market transactions, or whether these transactions should be entirely left to their own internal, process-oriented principle of justice, i.e. the principle of *freedom* (restricted merely with regard to certain non-distributive rights that might be violated in the course of commercial negotiations and transactions).

However, this does not mean that there could be no further moral reservations against the working of a free market. For besides distributive and non-distributive rights there may be certain

goods that are morally not suited for presentation on a free market for reasons of virtue – that is, for reasons that do not concern anybody’s rights being violated, but that concern some other intrinsic moral feature. What this perspective might amount to in the case at issue and which kinds of restrictions it might impose on the market will be discussed in the following sections. And here, some peculiarity of genetic situations as opposed to the current non-genetic example will eventually become apparent.

A possible future example

Let us change our example from the previous section and bring it closer to the actual topic of this paper. A and B are now different, not with respect to some more or less temporary condition like obesity, but with respect to their genetic disposition. Let A have a genetic diagnosis revealing no known risks whereas for B genetic tests display an increased susceptibility for some future disease. The result is supposed to be the same as in the example above: Individual A gets a comparatively attractive offer for private insurance, individual B does not.

Depending on the exhaustiveness and reliability of the test applied, and also on the actual course of disease to be expected for B, the insurer’s decision may be more or less wise in economic terms. But at least, there could be cases where B’s exclusion from insurance will be in accordance with financial rationality and thus provide good and relevant grounds for the decision made, provided that the commercial nature of the negotiation is basically accepted.

Seemingly, the situation is much the same like in the example before: B may consider his treatment as unjust with regard to certain structural principles of justice. And the question may be asked whether there is a justified basis to impose these principles on the action of the private insurer or whether he is free to follow his own, purely financial considerations, protected by the procedural principle of freedom.

However, there is a remarkable difference to the example in the last section. For this time the story has its end here – or, if you prefer: it has no preceding story to it. For neither A nor B can do, or could do anything to change their genetic dispositions which, this time, were the basis for the insurer’s decisions. Whereas their weight was at least partly subject to their actions, their genetic inheritance is completely out of their reach (if we neglect the future scenario of somatic gene therapy).

At first sight, this fact once more seems to allude primarily to a problem of distributive justice. Especially when appeal is made to the principle of merit, it is still clearer than in the previous example that B is subjected to an unjust disadvantaging: This time, even if effort and opportunity were neglected, A’s better genetic constitution can hardly count as a “merit”, justifying his preferential treatment. Such a line of argument is usually followed when it is claimed that people are not “responsible for their genes” (cf. Murray, 1992, p. 14). And again, there will be fundamental disagreements whether this distributive aspect of “responsibility” or “merit” can or should have any impact on private insurance negotiations.

But the difference between the two examples may draw our attention to another, and possibly much more fundamental peculiarity of the genetic situation than its mere unchangeability. This peculiarity becomes apparent when we consider not the fate of B in failing to get insurance, but

the action of A in negotiating his contract. Especially, we have to consider *who* actually buys and sells in entering health and life insurance contracts. Subsequently, we have to ask *what* exactly is bought and sold in the special transactions of the two examples.

Who sells?

It seems to be obvious that in both examples A and B act as customers in the very usual sense of the word. And when the question is asked who sells in this relation one is tempted to point immediately and solely to the insurer. The conception of A and B buying insurance cover and the insurer selling a policy is so natural that their transaction appears to be completely determined by these assignments. However, there is something special about their negotiations that makes this answer a bit too simple.

For the expected amount and duration of payments that A and B will receive later in the case of disease or death depends at least partly on their state of health. This is the simple reason why the insurer determines their respective premiums with regard to certain health features that they reveal to him. But it has a remarkable effect on the character of the commercial transaction that they take part in: The negotiations between the insurer and A and B do not rest on the classical asymmetry of a market in which various sellers offer their individual services for fixed prices and various customers decide which offer to choose. In fact, the relation is more balanced: A and B may consider individual offers by various insurers and communicate their willingness to pay certain amounts of money for certain services promised. But at the same time the insurer adapts his prices with respect to the individual qualities that A and B reveal to him, or even refrains from his offers when he finds these qualities not fulfilling his expectations. As soon as an insurance premium is not a flat rate but instead takes individual differences into account, the insurer starts selecting from among the offers of his customers. And so, the customers find themselves, to a certain degree, in the typical role of sellers: They offer their individual features to the various insurers on the market, hoping to get the cheapest premium possible, just as the insurer offers his individual insurance schemes to the various customers on the market, hoping to make the best profit.

It may be objected that there are many commercial interactions where prices are not fixed but subject to individual bargaining. Basically, the free market itself is nothing but a more or less institutionalised instrument of price regulation via bargaining. But this type of fixing prices refers exclusively to the relation of supply and demand: The quality and price of the trader's offer as compared to other traders' offers is set in proportion to the customer's and other customers' wishes and willingness to pay. All bargaining skills on the side of the trader as well as on the side of the customer are solely based on this proportion. In the case of individualized insurance, however, the fixing of prices is additionally based on distinctive features of the customers A and B. Not only the individual quality of the trader's goods opens up the opportunity for bargaining, but also the individual quality of the customer's constitution. It is important to notice that this additional aspect of bargaining is a very rare phenomenon on the free market. And whenever it appears it brings about a qualitatively new relationship between traditional customer and

traditional seller in that both parties start making their offers and both parties start selecting among offers, establishing a profound symmetry.

This symmetry is also mirrored in the services that insurer and insured promise to each other in their contract. For these services do not amount to the usual exchange of good against money. Rather, both parties effectively offer money to each other: The customer offers regular payments to the insurer and the insurer offers payments on demand to the customer. The exact shape of these payments depends, obviously, on the customer's health development with respect to which the contract is formulated and, possibly, on the insurer's economic situation for which there may be allowances in the contract. But in effect, both parties offer expected payments and both parties buy expected payments, each assessing the individual quality of the prospective partner's offer and setting it in relation to their own financial background as well as to alternative offers by others.

Thus, it seems safe to say that in the type of insurance negotiation at issue not only the insurer, but also the insured appears as a seller. Naively, the customer buys financial protection that the insurer sells, and the insurer just requires some additional information on the insured's health status. But actually, the insurer sells his expected payments on demand and the customer sells his expected regular payments, both accepting or rejecting the offer of the other.

So in any health or life insurance with individually adapted rates, not only the insurer, but also *the customer sells something*. The essential question now is *what precisely he sells* – especially in the two examples sketched in the previous sections. It can be anticipated that the moral intuition against the use of genetic data in private insurance will rest on the conviction that in the second example he sells something that should not be sold for some moral reason. The impression that there is something intrinsically wrong with the practice of displaying genetic features to a private insurer in order to bargain a favourable contract must finally be traced back to the reproach that the insured tries to sell something that should generally not be made the object of a commercial transaction.

What is sold?

People sell various kinds of goods, which can roughly be divided up in material (“products”) and immaterial (“services”). However, in order to assess the moral quality of such transactions we must generally be more precise and ask not for the physical status, but for the practical origin of these goods. The following considerations will hardly be exhaustive in this respect. But hopefully, they are sufficient for the purposes of this investigation.

The most natural and most common origin of goods on a free market are *performances*, sometimes bringing about a completely new good, sometimes transforming other goods that were acquired in advance into new goods that are sold now. Insurance companies e.g. transform the collected financial contributions of their customers into a stock of capital and a functioning mechanism of redistribution, and sell prospects of payments according to events of damage. Selling goods resulting from performances – or, short: selling performances themselves – is at the heart of trade and commerce, and this practice is generally considered legitimate: Bad performances can be sanctioned by the market itself (especially when it contains measures against fraud and

misinformation, monopolies and cartels), unjust performances may require additional control measures or alternative public provisions (in the name of external non-distributive or distributive rights, respectively). But in itself, the selling of performances is morally sound.

Other goods sold on a market have origins different from performances. Some of them simply consist in *possessions*, somehow and sometime acquired by the seller and now once more offered for sale in a basically unchanged condition. The appropriateness of selling these possessions will first and foremost depend on the way of their acquisition, e.g. whether they were bought, inherited or received as presents, or stolen, blackmailed or obtained by deception. Additionally, non-distributive considerations may lead to restrictions on holding these possessions (for reasons of safety, punishment etc.) and distributive concerns may forestall their being sold (by collecting them in form of taxes, contributions etc.). But once again, in principle there are no moral objections against selling possessions.

However, there are some goods which people are strongly convinced of that they should not be offered for sale at all, irrespective of possible injustices in their use or acquisition. Generally, it will be doubtful whether they can be described as being “acquired” in the first place and, correspondingly, whether they can count as “possessions”. Similarly, they will not originate in someone’s “performances”, but rather have an “independent” existence which is the deeper reason why they are regarded as unsuitable for commercial transactions – mind you: not only when someone else’s goods of this kind are to be sold, which would contradict (non-distributive) justice by violating his rights, but also when someone intends to sell his own goods of this kind, which would contradict (non-distributive) virtue for the strictly non-commercial status of these goods.

It would be a hard task, and it is not within the scope of this paper, to provide a complete enumeration of these goods or a thorough justification of their special status. Possibly, there are both material and immaterial goods of this kind, and possibly, their status can be explained with reference to both secular and religious convictions. At least some of them seem to stand in a very intimate relation to human personality and dignity. This intimacy finds expression in certain phrases that we apply to utter our disapproval when someone makes one of these goods the object of a commercial transaction: We use the phrases *to sell one’s soul* or *to sell one’s body* in order to express our condemnation of someone entering into a commercial relation, offering neither a performance nor a possession, but crossing the line towards offering his mental or physical integrity. The former expression could apply to someone willing to subordinate the line and results of his thinking and writing to commercial advantages. The latter expression can apply to someone perverting his body or parts of it into an immediate object of trade and money making. Both expressions would denote violations of virtue, although violations of justice could also be involved if someone had been forced into such a commercial relation or if in carrying out his transaction he infringed other people’s rights. In the following I will confine myself to the second expression as it is of paramount importance for the case at issue.

I will not go into detail on the various philosophical appreciations of the human body, its relation to personal integrity and the question of its ownership (see e.g. Cherry, 1999; ten Have and Welie, 1998). It should be mentioned, however, that even philosophical approaches that regard a person’s body as her *property* may agree to the fundamental intuition that it must not be subject to any *commercialisation* (Heinrichs, 2004): A Kantian position will consider the human body an

integral part of the person, participating in her dignity and thus never having a price (cf. Kant 1785, B 77). Correspondingly, it will definitely exclude the human body from any commercial transaction. A Lockean position may consider the person as the paradigm of property and found any legitimate possession of external goods in mixing one's labour with natural resources (cf. Locke 1690, § 27). But even such a position may well restrict commercial transactions to performances of exactly this mixing kind and to possessions resulting from them, not allowing the body itself to become a commercial object.

So the prohibition to "sell one's body" may find various ethical foundations which shall not be explored here. But it is essential to get an idea where the expression might properly apply. For this purpose it is helpful to consider occupational groups that heavily rely on the state of their bodies, such as sportsmen, models, miners or soldiers. Generally, the commercial activity of members of these groups is not properly described by the phrase "selling one's body". For what they sell are clearly performances. These performances may be based on their bodily conditions, which are, in turn, partly due to their own and others' performances, partly due to inherited traits and external contingencies. And yet, it is *these performances* of their bodies, and not the *bodies themselves*, that their customers and employers are interested in and that they are paid for: They sell goals scored in football games, clothes presented in fashion shows and photo sessions, coals and minerals digged up and military targets achieved.

However, there are circumstances when this clear-cut answer is getting less and less compelling and when we find people's professional activities getting somehow doubtful and eventually depraved, which encourages us to claim that they start selling their bodies instead. A sportsman submitting his body to detrimental measures of training or exercise, a model working as a pin-up girl or as a pornographic actress, a miner ruining his health by the work he does or a soldier who carries out his dangerous and deadly job as a mercenary without any personal identification with the party he is fighting for – they all are serious candidates for an application of the phrase in question. It might be an interesting task to investigate more precisely what aspects actually mark the transition from their selling the performances of their bodies to their selling their bodies themselves: the extent, the intimacy, the hardship or the alienation of the deed. But whatever the exact answer may be: Although none of the professionals mentioned ever *literally* sells his body or parts of it, we sometimes consider it appropriate to apply this phrase to them in a *metaphorical* sense. In using it we denote that they started making their bodies as such objects of commerce, displaying and exploiting them for money in a way incompatible with the dignity of the human being. At the same time, this criticism refers to the realm of virtue, not of justice, as long as the person in question has not been forced to this behaviour and as long as he does not violate other people's rights.

The paradigm example for "selling one's body" is, of course, sexual prostitution. Although some people may argue that a prostitute actually sells just a special kind of performance, the accusation of "selling one's body" may properly apply to her if one acknowledges the objective intimacy of sexuality. In this perspective, the immorality of sexual prostitution is not based on special moral conceptions of sexual behaviour, e.g. the disapproval of certain erotic practices or of extensive promiscuity. Indeed, such practices and promiscuity may be found in non-professional sexual relations as well. The special immorality of prostitution is solely grounded in the fact that the prostitute makes her body as such an object of commerce. And the intrinsic intimacy of sexual

relations provides merely the epistemological basis for properly ascribing this act to the prostitute, not the ethical standard for morally condemning it in the first place. It is not the explicit reference to normative standards of sexual decency, but the mere acknowledgement of the objective intimacy of sexuality that is needed to justify the descriptive use of the phrase “selling one’s body” and the normative accusation following from it. Once this intimacy is conceded the service of the prostitute can no more count as a mere external performance, but necessarily concerns her bodily integrity even if the service provided is only tactile or visual in nature. And once this relevance for her bodily integrity is conceded she may be said to sell her body and, in doing so, to offend against virtue. In this light, it is not surprising that sexual prostitutes often feel a deep alienation from their bodies. And it is not inappropriate that the term “prostitution” is commonly applied as a general synonym for the immoral entering into commercial relations making use of one’s bodily integrity, instead of performances based on one’s bodily features.

It may seem improbable that considerations of this kind can be of any concern in bioethical matters, too. But two classical problems of research ethics and medical ethics can be clearly understood in terms of “selling one’s body” and may constitute even more unambiguous and disturbing examples of such an immoral practice than the cases discussed so far.

Firstly, recommendations have been made that research volunteers in medical experiments should not be offered any payments exceeding their loss of earnings or possible compensations for injuries, in order to prevent people from taking part in biomedical research for financial gain. Such regulation is usually based on the requirement to avoid “undue influence”. But this requirement, in turn, must eventually rest on something like a fear of people selling their bodies. For it is brought forward even when the participants are not exposed to greater risks and it is not restricted to people belonging to specific vulnerable groups, such as inhabitants of developing countries or inmates in prisons. Then, however, it is not obvious why the offering of payments for participation should constitute a more “undue” influence than any other commercial offer people may be confronted with – unless there is something intrinsically wrong with the transaction suggested. When objective risks are absent and informed voluntariness is guaranteed the seeming justice requirement not to “buy” their bodies must eventually be based on the definite virtue judgement that they might “sell” their bodies (cf. Council of Europe, 2005, Art. 12).

Secondly, similar recommendations reject any sort of financial gain with respect to the transplantation of organs and tissues of human origin. Of course, such provisions may be partly driven by the intention to protect people against exploiting their own bodies out of “financial despair”. But in addition, these considerations may also stem from a moral conviction that the human body or parts of it should generally not be sold – now to be taken literally. This attitude becomes apparent when not only payments exceeding compensation and technical services rendered in connection with transplantation, but also advertising the need for and the availability of organs or tissues is rejected. Here, a more fundamental condemnation of any kind of commercialization of the human body is perceptible than the mere fear of people exposing themselves to medical dangers in order to solve their financial problems. And the explicit basic principle that the “human body and its parts shall not, as such, give rise to financial gain or comparable advantage” hints more clearly to a virtue requirement addressed to those seeking

“advantages” than to a justice requirement trying to protect those expecting “disadvantages” (cf. Council of Europe, 2002, Art. 21).

So the concept of “selling one’s body” can generally be relevant with respect to bioethical questions, too. What remains to be settled is whether and where it might apply in the two insurance examples given above. We did already clarify that not only the insurer, but also individual A does sell *something* in these transactions. Now we should make more explicit *what* his good consists in.

A rather superficial answer would be: “In both examples A sells his expected payments to the insurer.” This is true, as stated in the previous section. But it cannot guide our ethical assessment of the transaction, as it only classifies the physical character of the good transferred, without highlighting its practical origin.

A still poorer answer would be: “In the second example A sells his genetic information.” Apart from the fact that this statement would once more leave the origin of the good unspecified, the identification of the good is simply wrong. Of course, there are people who sell “information”: Journalists sell information to broadcasters and newspapers. Spies sell information to secret services. Commercial genetic laboratories sell information extracted from genetic substances sent in to them. But A is not a journalist or a spy, and although the insurer may pay a *laboratory* for providing A’s genetic information he does not pay *individual A* for this information. Rather, he pays A simply for his bodily constitution. This is what the insurer is interested in, and this is what A offers and sells to him – in both cases discussed. For it would be just as inadequate to claim that in the first example A sells the information that he lost weight: He is not offered a better contract for this *information* but for the *fact* that he improved his health, giving rise to the expectation that he will afford lower insurance cover in the future.

These considerations bring us closer to an appropriate answer to the question at hand – and to the fundamental difference between both examples.

For in the weight example it seems adequate to say that A sells the outcome of a *performance*: His better bodily condition in comparison with B is a result of his successful attempt to reduce his weight. Of course, following the principles of equality, of need or of utility, this performance should have no distributional impact. And possibly, following the principle of merit, it may not pass unqualified as a merit. But all this is of no concern to the observation that there are no fundamental moral objections against offering performances on an open market, governed by the principle of freedom. The point at issue is not the relevance that various perspectives of distributive justice might attach to A’s performance or the extent of its just recognition. The point is the mere fact that it *is* a performance, no matter how much it was promoted by certain circumstances beyond A’s reach, and that performances *are* basically legitimate objects of trade on a free market. This basic legitimacy is not altered by the fact that, by assumption, B has no similar performance to offer and that, depending on the circumstances, this may or may not be B’s own fault.

In the genetic example, however, it is obviously not a performance that A offers and sells. It is simply his genetic constitution. This constitution may *contribute* to future performances that A will be able to display. But by itself it *is* not a performance. At the same time, it seems neither appropriate to term this genetic fitness a possession that A has acquired in one or the other way. It is rather a basic attribute of A’s physical existence. It is, at least in a wider sense, a *part of A’s*

body. And it is probably a very fundamental one, closely related to his personal identity and integrity.

Is it too daring to suspect that A's behaviour may well fall in the critical realm of commercial transactions that is sometimes denoted and condemned by using the phrase of "selling one's body"? Of course, A does not literally sell his body. But this is neither the case in most of the other applications of the expression. Even in the standard example of sexual prostitution nobody literally sells physical parts of a body, and still the phrase appears to be appropriate to describe an undue commercialisation taking place. Additionally, A is clearly not selling performances like sportsmen, models, miners or soldiers do in the first place. It may be true that the insurer is, or at least should be, interested solely in the future course of payments between A and him. It may also be true that this course will partly depend on A's punctual performances (such as avoidance of accidents or infections) and only partly be determined by his general state of health, and that this health in turn will be partly a consequence of his long-term performances (such as his life style and nutrition) and only partly a consequence of his genetic constitution. But what we have to evaluate is *the actual negotiation taking place right now* in order to fix the basic conditions of those future payments. And this negotiation, or at least the part of it that we are about to assess, is, on assumption and in contrast to the weight example, explicitly and exclusively referring to A's *genetic constitution*. So A does not sell a performance – not even a future performance based on bodily features. For what he offers in the negotiation at issue are genetic traits. And they, by their very nature, cannot count as performances, whatever other performances they might later enable or prevent.

All in all, the case of A's exposing the structure of his genome to an insurer for commercial advantages might not be a bad candidate for "selling one's body", comparing it to other applications of the phrase. And it is quite probable that the widespread moral scepticism against this practice has its conceptual background in exactly this perception of some kind of "prostitution" taking place: The intrinsic inappropriateness felt with regard to using genetic test results in fixing insurance premiums can eventually be traced back to the indecency of making someone's bodily integrity a commercial object. Clarified in this way, the characteristic definiteness of the common criticism becomes comprehensible: It is not complaining about certain distributional results, especially with respect to some deficiency in the fate of B (not getting a similar contract, required by some distributive principle such as equality or need). Rather, it is rejecting the practice as such, observing some elementary wrongness in the behaviour of A (selling a part of his body, offering it on a market governed by the principle of free commerce). Correspondingly, this virtue perception differs in scope from the usual justice concerns: For it equally applies to health as well as to life insurance (because of the common commercial character of both arrangements). And it takes more offence at presenting favourable results than at presenting adverse results (comparing the presumed commercial intentions in both deeds).

Open Questions

The virtue approach outlined seems to capture an essential intuition against the use of genetic test results in private insurance. Yet, it entails subsequent questions concerning its consistency and its consequences. These questions might finally persuade us to abandon the intuition, even when its basic moral relevance and its proper analytic reconstruction were conceded, for lack of internal coherence or acceptable results. I will not address these questions exhaustively, but some hints towards possible answers shall be added here.

Firstly, the approach raises questions concerning the proper delimitation of the practice that it criticizes: Would the accusation of “selling one’s body” be limited to the presenting of *genetic* features in insurance negotiations, or would it embrace the disclosure of unchangeable bodily characteristics of a non-genetic origin, too (such as orthopaedic features influenced by nourishment during pregnancy which could also count neither as a performance nor as a possession)? Does it only refer to genetic *tests* in the usual sense of micro-molecular analysis, or would it also affect genetic knowledge gathered by other medical or even non-medical methods (such as the traditional diagnosis of inherited diseases via family history or the distinguishing of obvious genetic facts with the naked eye)? Questions of this kind may be considered as eventually disqualifying the proposed criticism on genetic tests in private insurance. For it may be doubtful whether corresponding delimitations can be drawn consistently and convincingly. But if this is not possible the criticism might finally extend even to features like age or gender, having to reject them as inappropriate for consideration in insurance negotiations, too. This, in turn, might appear as an unacceptable conclusion.

However, such delimitation questions are not specific to the approach investigated above, but arise from any kind of ethical opposition against the use of genetic test results in private insurance, no matter whether it originates from the field of virtue or from the field of justice. Even the widely accepted secondary provisions of the justice perspective have to clarify which types of information they precisely refer to and whether genetic information requires their protection more urgently or more specifically than other medical data. Of course, it is fairly possible that the delimitations finally endorsed might vary between the two perspectives, virtue and justice, due to the different focal points of their evaluations: The virtue concept of “selling one’s body” might favour delimitations different from the concepts of informational self-determination, psychological integrity and health protection that are usually put forward within justice approaches. But it is not obvious that the virtue perspective should display a lesser ability to draw a convincing line between acceptable and unacceptable practices. And the task of drawing such a line has to be faced even by those who confine themselves to the common and consensual restrictions of genetic tests in the name of non-distributive justice.

For sure, considerations of this kind might finally reveal that the standard case of invisible genetic features ascertained via micro-molecular analysis is indeed not so much different from the case of other bodily features or other methods of detection to allow either perspective to move consistently along these distinctions. But even this would not necessarily speak against the restrictions that they favour: A well-founded rejection of the application of genetic test results in private insurance might give us reason to revise our acceptance of other information or examinations in this field even if they have been supposed to be unproblematic up to now. Thus,

presently increasing reservations against *any* medical examinations preceding private insurance may be driven, at least partly, by concrete concerns about the use of *genetic* information (see e.g. Council of Europe, Committee of Experts, 2000, pp. 165 f.). Alternatively, when e.g. family medical histories provide genetic information of comparable character and significance as molecular tests, they may consistently be included in a definition of genetic *testing* and consequently be subjected to the *same* moral restrictions (see e.g. EGE, 2003, Sect. 1.1.3.). Generally, an unbiased attitude towards these questions requires the basic willingness not only to give up our new intuitions about the use of genetic tests if they should conflict with our former intuitions about private insurance. We may also be well-advised to alter our former assessments concerning the inclusion of e.g. age or gender in insurance negotiations if the new problems should cast a different light on their rationale.

Secondly, the question arises whether a virtue approach could ever legitimate any kind of *legal intervention* into the negotiating of private insurance contracts with respect to genetic information. Even if the moral intuition against this practice was properly characterized as the reproach of “selling one’s body” and even if this reproach was sufficiently founded, it is far from clear that such an assessment could provide any justification for prohibiting the contracts at issue. Of course, for an ethical point of view it remains relevant whether there is a reason for moral criticism even if it gives no reason for legal interference. However, the political significance of the virtue perspective would be severely reduced if it could not support any kind of governmental action.

For sure, it must be taken as a central, or even defining characteristic of a liberal state that its legal regulations are implemented only to protect people’s rights (constituting the realm of justice), not to guide people’s overall morality (including the realm of virtue). But selling one’s own body, as such, can only constitute a violation of virtue, not of justice, as it does not intrude in someone else’s rights. So a complete legal ban on it appears to be hard to justify. Consequently, the possibility to prohibit sexual prostitution in a liberal state cannot refer to the immorality of the practice as such, but only to the anticipation that after all it does endanger the rights of certain people: Prostitution may be forbidden to prevent involuntary prostitution, the involvement of minors, the spreading of epidemics or the social targeting of special vulnerable groups (see e.g. Anderson, 2002). But it cannot be prohibited in order to suppress its inherent violation of virtue.

However, even when a liberal perspective gives no justification for legally *forbidding* an act if it violates nobody’s rights, there may still be a justification for *denying it full legal protection* when it contradicts morality. For instance, even though in liberal countries sexual prostitution as such may not be justly forbidden it may still lack the governmental support that other commercial activities enjoy. This may find expression e.g. in the official status that contracts in this field carry or in the possibility of suing for the recovery of payments in court. Similarly, if private insurance contracts based on genetic information were seriously regarded as immoral the state, while not forbidding them, could legitimately refuse to acknowledge these contracts as legally binding and to protect any claims resulting from them. This would be an attitude which might severely discourage people from making such contracts and thus hinder the factual spreading of the practice at issue considerably without violating the principles of a liberal society.

Conclusion

Once we acknowledge that the existence of a private market of health and life insurance does not contradict any basic considerations of justice it is a difficult question what further justice requirements, apart from its basic principle of free commerce, it may legitimately be subjected to. Surely, secondary regulations with respect to non-distributive rights may justly be imposed. But it is disputed whether distributive demands can be addressed to the private sector or whether these should exclusively be taken account of by some supplementary public provision.

However, the thought of genetic test results being considered in the making of private insurance contracts meets an intuitive disapproval that is not satisfied by mere framing provisions in the name of non-distributive rights. At the same time, such disapproval is not concerned with distributional issues either, but rather focuses on the envisaged practice as such. This paper has tried to identify the ethical rationale of these reservations. It has suggested that the underlying intuition is concerned with an undue commercialisation of human integrity, finding expression in the core reproach of “selling one’s body”. It was argued that this metaphor, when being assessed from its use in other contexts, is not inadequate for an insurance customer displaying genetic information in order to obtain an advantageous rate. For the insured definitely sells *something* in making the contract, and he clearly sells *neither* a performance *nor* a possession but a fundamental part of his bodily integrity.

It will be subject to further discussion whether the concept of “selling one’s body” can be regarded as basically adequate with respect to the case considered and whether the implications of this metaphor can be accepted as eventually appropriate. Anyway, it is very probable that this concept represents the core of some very fundamental intuitions against the use of genetic information in private insurance. If we want to decide whether these intuitions can or should guide our individual and public actions we have to be aware of their substance and structure. This paper was meant to contribute to such a clarification.

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