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Discrimination and insurance

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Discrimination and insurance

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Abstract

Is it fair and just to charge men and women identical life insurance premiums despite their different actuarial risk? What about charging the old and the young different premiums? As entities whose core business is to classify people based on their actuarial risk, should private insurance companies not be allowed to discriminate between various groups? To answer these and various other questions, I start this chapter by revealing the complete confusion that exists in the legal terrain with respect to antidiscrimination norms in insurance. I then show how philosophers writing about discrimination mostly have been writing at a level of abstraction so high that it comfortably ignores relevant nuances, thus making the entire literature largely useless for any insurance-related policy-making purposes. I conclude by proposing a theoretical framework that can help policy makers apply a fair and just anti-discrimination policy.

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Introduction.

Private insurance is everywhere. As the primary device to reduce risk of loss and uncertainty, insurance is one of the most important institutions around us. It provides financial support in business and human life, it encourages safety and saving behaviors, and it provides security from catastrophic losses as well as peace of mind when aging. Insurance even promotes economic growth and international trade. And yet, very little is known about the requirements of justice and specifically of equality and fair non-discrimination norms from private insurance providers. As entities that offer services to the public, are they subject to the same norms as public entities? As entities whose core business is to classify people based on their actuarial risk, are they not allowed to discriminate between various groups?

Indeed, what is unique about insurance is that even statistical discrimination (the act by which an insurer uses a characteristic of an insured or potential insured as a statistic for the risk it poses to an insurer), which by definition is absent any malicious intentions, poses significant moral and legal challenges. Why? Because on the one hand, policy makers would like insurers to treat their insureds equally, without discriminating based on race, gender, age, or other characteristics, even if it makes statistical sense to discriminate. Indeed, the US Supreme Court has expressed this aim of policy makers regarding insurance: "[e]ven a true generalization about [a] class cannot justify class-based treatment" (*Norris 1983*). On the other hand, at the *core* of insurance business lies discrimination between risky and non-risky insureds. But riskiness often statistically correlates with the same characteristics policy makers would like to prohibit insurers from taking into account. In fact, historically, courts in the EU and the US have permitted insurers to account for these characteristics; some because such a practice is required to maintain healthy insurance

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markets, and others because in their view the practice (in the absence of malicious intentions) is a *manifestation* of the equality principle. As one American court wrote: "[r]isk discrimination is not race discrimination" *(Nat'l Assoc. For The Advancement Of Colored People, 1992*).

The picture is further complicated by the fact that insurance is both a social and a private enterprise. While social, government-provided insurance reflects ideals of solidarity and cross-subsidization of risk among the citizens, private insurance is profit-driven, thus requiring different risk pricing. But even private insurance requires a license from the state and states often require their citizens to purchase various types of insurance. The protection from competition and the guaranteed demand for their products can justify imposing antidiscrimination norms on private actors. Indeed, states have struggled to find a middle ground between complete prohibition and complete permission, by prohibiting risk differentiation if it amounts to "unfair discrimination." The problem, however, remained because "unfair discrimination" remained undefined. Indeed, states' constitutions and the main human rights documents only provide a list of prohibited grounds for discrimination, without ever defining discrimination.

The goal of this chapter is to try to reimagine private insurance as an institution complying with the fundamental requirements of justice, and specifically with fairness and non-discrimination norms. My first goal is to highlight the unique features required for the understanding of the seeming oxymoron *fair* discrimination in insurance. My second goal is to introduce a nuanced way to understand how costs matter in the determination of whether insurance discrimination is overall *just*. (I use the word "fair" for the deontological, cost-blind requirement to not discriminate, as

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discrimination is prima facie wrong, and the word “just” for the consequentialist, costs-conscious requirement to not wrongfully discriminate, all things -including costs - considered.)

Given the scope here, I do not attempt to develop an original and robust account of the wrongfulness of discrimination, which would capture all our intuitions and be resistant to all philosophical objections. Others have already brilliantly failed at this undertaking before. Instead, I draw on other philosophers’ work on discrimination, most of which is not directly on insurance, in order to extract insights relevant to fair insurance practice. Then, because I believe that justice cannot be blind to costs, I also build on the literature on the social costs of prohibition on discrimination in insurance markets in my attempt to draw a skeleton for a theoretical framework for a just discrimination in insurance. Ultimately, I argue that there is no one-size-fits-all answer to the questions of what a fair and just insurance policy is. Rather, the answer varies from one line of insurance to another and from one characteristic to another, as well as from one type of discriminatory treatment to another. To illustrate this point, consider the following two examples:

> Example 1: In a landmark case in 2011, the European Court of Justice entirely forbade charging women *le*ss than men for their life insurance, even though on average, women live longer than men and therefore are less likely to die in any given year (*Test-Achats 2011*). By contrast, this practice is not entirely forbidden in many US states.
>
> Example 2: In a couple of landmark cases in late 1970s and early 1980s, the US Supreme Court entirely forbade charging women *more* than men for their employer-provided pension insurance funds or providing them with smaller monthly benefits, even though on average, women live longer than men and therefore require pension benefits for a longer

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period of time (*Manhart 1978, Norris 1983*). By contrast, this practice is not entirely forbidden in the EU.

Which approach does equality support? What can and should explain the differences between the EU and US? Besides the cross-continental difference, an internal inconsistency exists as well. Life insurance provides coverage for dying too early, whereas pension insurance provides coverage for dying too late, so to speak. It seems that norms of antidiscrimination should have the same impact in both types of insurance; yet each legal system reverses its own treatment of gender discrimination between pension insurance and life insurance.

The puzzle is not limited to any one line of insurance or insurer characteristic; rather, it pervades the entire institution. It might be obvious that people should not be denied insurance or charged a higher premium because of their race, but what about people who are overweight (cf. chapters 16 and 22)? Is this class protected? And even if it is protected, is it protected no matter what the costs to the rest of the pool or society are?

The Existing Approach for Statistical Discrimination by Insurers

With some notable exceptions, in most of the cases both the EU and the US require insurers to balance equality and efficient business practices by refraining from "unfair discrimination." However, how they should strike that balance remains a normative mystery. Below, I scan the legal landscape in both the EU and the US. My goal is to expose in more detail the inconsistency already revealed in the examples above. It remains an open question whether this inconsistency reflects substantive disagreements about moral first principles, about the proper implementation

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of (otherwise consensual) first principles, or about second-order considerations such as market conditions or path dependency. This question can only be answered once philosophers provide a robust theoretical framework for unfair discrimination in insurance and economists provide evidence about the social cost of the prohibition on unfair discrimination.

The EU Legal Landscape

Article 5(1) of Council Directive 2004/113/EC of 13 December 2004 implemented the principle of equal treatment between men and women in the access to and supply of goods and services.[1] It provides that "the use of sex as an actuarial factor in the calculation of premiums and benefits must not result in differences in individuals' premiums and benefits." Article 5(2), however, allowed deviation from the prohibition if the use of sex is "based on relevant and accurate actuarial and statistical data." In the above mentioned landmark case (the 2011 *Test-Achats* ruling), the Court of Justice of the European Union declared article 5(2) invalid, meaning that gender can no longer be taken into account, even if makes actuarial sense.

Despite its seeming applicability to all lines of insurance, the *Test-Achats* ruling did not create a reliable bright line. As the European Commission has subsequently clarified, it remains possible for insurers to offer gender-specific insurance products to cover gender-specific conditions such as prostate cancer or breast cancer.[2] On the other hand, and to further complicate matters, this option is prohibited when it comes to pregnancy and maternity, in light of the specific solidarity mechanism created by Article 5(3). But that is not all. The line continues to blur because the use of risk factors that might be correlated with gender remains permissible as long as they comprise real risk factors in their own right. For example, in the field of auto insurance, price differentiation

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based on the size of a car engine is acceptable, even if statistically, men drive cars with engines that are more powerful. In other words, while direct statistical discrimination was prohibited, indirect statistical discrimination was not (cf. chapters 1 and 2).

Certain other inconsistencies remain in the wake of the *Test-Achats* ruling. For example, Article 9[1][h] of Directive 2006/54/EC, which applies to pension plans, allows for the setting of different levels of benefits between males and females when justified by actuarial factors. One would expect that because pension and life insurance cover similar risk (the risk of not knowing when one would die) the *Test-Achats* ruling will apply to pension plans as well. And yet, according to the European Commission, *Test-Achats* has no impact on this provision. Lastly, the European Commission also explained that the *Test-Achats* ruling does not affect the use of other in many ways similar risk-rating factors, such as age or disability.

The US Legal Landscape

In the US, the situation is somewhat different, though equally inconsistent. To date, most states in the US have adopted some form of a baseline prohibition against "unfair discrimination between individuals of the same class and essentially the same hazard." Typically, this prohibition does not apply: "where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience." (See e.g. NY Code - Section 4224). What are those "sound actuarial principles" or "reasonably anticipated experience[s]" that justify discrimination? No one really knows. Indeed, a great deal of inconsistency exists in the treatment of anti-discrimination norms in the U.S. This inconsistency exists in federal laws and state laws,

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across coverage lines andpolicyholder characteristics, and in both the substance and the intensity of regulation.

Inconsistent Treatment of Discrimination across States' Statutes. In the US, insurance law is primarily governed by the states, not the federal government. The variation of the specific laws governing discrimination practices exists not only across states, but also internally, across lines of insurance and policyholder characteristics. Whereas Montana flatly forbids gender discrimination, California requires it—comprising an example of *cross-state variation* (Avraham et al. 2014). State regulation of discrimination in the automobile and property lines of insurance is more robust than in the cases of health, life, or disability insurance—comprising *cross-line variations*. One particular example of cross-line variation is that many states prohibited insurers' use of genetic information in health insurance. However, states hardly regulate the use of such information for other lines of insurance, including life or disability insurance where genetic information matters. An example of a *cross-characteristics variation* is that before Obamacare, insurers were allowed to use gender in health insurance underwriting decisions, but were not allowed to use race for the same purpose. The *cross-state, cross-line, and cross-characteristics* variations of states' specific laws remain normatively unexplained (but see Avraham et al. 2015).

Inconsistent Treatment of Discrimination by Courts. The inconsistent treatment of discrimination by states' legislatures is further reflected in courts' interpretation of the statutory term, "unfair discrimination." In the context of auto insurance, for example, courts found that automobile insurance rates based upon sex and age are fair unless those sex-and-age-based rating factors are found to be actuarially unsound.[3] Yet, other courts have forbidden auto insurers from

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discriminating based on age, sex, or zip code.[4] A similar dynamic exists with respect to race. Some courts permitted life insurers[5] or homeowner insurers[6] to charge African Americans higher premiums than Caucasians since the difference was based on statistical risk, while other courts prohibited such practices.

Inconsistent Treatment of Discrimination by Legal Commentators. The vast majority of legal and philosophy scholars writing on discrimination did not write about it in the context of insurance; the vast majority of scholars writing on insurance have not considered questions of discrimination. An important exception happened in the US around the years when the Supreme Court delivered the aforementioned cases of *Norris* and *Manhart* decisions, when a lively debate on the permissibility of gender discrimination in pension insurance emerged between lawyers and economists. Some scholars argue that actuarial fairness *is* fair (Gerber 1975; Kimball 1979; Benston 1982; Bailey et al. 1976) or can be *made* fair (Gaulding 1995; Wortham 1985). Other scholars consider "rational" discrimination to be repugnant (Sydlaske 1975; Laycock and Sullivan 1981; Brilmayer et al. 1984).

Interestingly, neither camp can justify the tremendous variation that exists in the law. For example, neither camp can explain why race discrimination is considered repugnant, while gender discrimination is so often deemed acceptable in the insurance context. Commentators on both sides of the debate have noted this inconsistency and have argued that the laws should be changed to eliminate it where one camp argues that both race and sex discrimination should be allowed because both race and sex are statistically correlated with risk, whereas the other camp, by contrast, argues that neither form of discrimination should be allowed because both race and sex are

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categories over which individuals have no control or are historically invidious classifiers, or because using such classifications perpetuates undesirable stereotypes about race and gender—or some combination of these arguments.

With a few important exceptions (Wortham 1986; Gaulding 1985), commentary has focused on whether *particular* classifications should be forbidden from an antidiscrimination perspective. The commentary usually focuses on one or two insurance lines, such as life insurance and pensions (Brilmayer et al. 1984; Hoffman 2003). Developing a general normative framework, however, comprises a different challenge, requiring legal, economic, and philosophical foundations in order to determine the appropriate contours of discrimination in the entire universe of insurance. Such an undertaking also requires empirical investigation to account for the costs of implementing those norms in light of the market conditions. I now turn to highlighting the unique features of insurance that require philosophers to think deeper about what unfair discrimination is in the insurance context.

Unique Features of a Theoretical Framework

For egalitarians, "fair" practices means "just" or "equal" practices, meaning that insurers should drop from their analysis and calculations any characteristics whose use is normatively repugnant, such as race or gender. For actuaries and economists, "fair" practices means "actuarially fair," which also means "efficient." Accordingly, each insured pays a premium that reflects his or her risk. Risk is proxied by any classifier that substantially correlates with risk, including race and gender, even when the particular classification characterizes socially salient groups that might deserve constitutional protection. Proponents of this approach thus believe that the use of such

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proxies surmounts to rational actuarial discrimination; namely, permissible discrimination founded in business necessity (cf. chapter 3). So how should we reconcile the competing anti-discrimination norms and fundamental insurance practices?

Philosophers seem to agree that any conception of unfair discrimination must include some disadvantageous (and not merely differential) treatment of people based on their perceived membership in a socially salient group. However, philosophers disagree on what such discrimination exactly means and what makes it unfair. In recent insurance practices the issue is complicated further as insurers usually no longer intentionally attempt to disadvantage insureds for belonging to a certain group (the so-called disparate *treatment*), but rather evaluate in good faith insureds' individual risk based on the readily available statistical data for that group (for the so-called disparate *impact*). In short, discrimination in insurance no longer deals with the problem of intentional discrimination, but rather with the problem of *statistical* discrimination. Moreover, even the limited discussion of statistical discrimination that exists deals with direct statistical discrimination and almost completely ignores the hard problem of indirect statistical discrimination, such as when insurers discriminate based on a characteristic (such as the size of the car engine) that correlates with a protected class (such as gender).

Moreau's view is that discrimination is wrong because it violates our deliberative freedoms, which are our "freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender" (Moreau 2010 pp147; chapter 13). It is unclear, however, whether Moreau would consider actuary risks, such as different mortality risks men and women face, as normatively extraneous features. Another view is that discrimination

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is wrong when it treats people disadvantageously based on immutable traits (Kahlenberg 1996; cf. chapter 18). Sometimes, however, protection from discrimination is given even to mutable traits such as religion, while in other instances protection from discrimination is not given to immutable traits, such as denying blind people car insurance (Boxill 1992). Dworkin has argued that discriminatory acts are those that could be justified only if a certain prejudiced belief were correct. The absence of a "prejudice-free justification" thus makes a law or policy discriminatory (Dworkin 1985). Suppose, however, that there are bad ways of treating women that are unjustifiable no matter which prejudiced beliefs may be true, such as preventing women from undertaking physical jobs because on average they are shorter than men. Surely, treating women in that way while treating men much better could be discriminatory even though the stereotype might be correct. Indeed, Fred Schauer has argued that discrimination is wrong even when it relies on somewhat accurate stereotypes, which may apply to many but not all members of the group (Schauer 2003). A related view is that discrimination is wrong because it fails to treat people based on their individual merit (Hook 1995). The problem with this approach, however, is that it cannot explain what is distinctively wrong about failing to treat people based on merit (Cavanagh 2002). Does any disrespectful treatment of members of disadvantaged group constitute discrimination?

Hellman holds that direct discrimination is wrong because it demeans those against whom it is directed, treating them as morally inferior rather than morally equal (Hellman 2008; chapter 7). A related view argues that people are entitled to as much respect or concern as the dominant group not merely from the state but also in their daily relationships with other individuals or corporations (cf. chapters 6 and 35). To be in a "just relationship" with others, participants must interact with each other in a way that respects the individuality of each (Dagan and Dorfman 2015). Of course,

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what counts as *demeaning* and what the idea of "just relationship" requires in the context of insurance remains to be worked out. Is charging women a lower life insurance premium demeaning? What about charging a higher pension contribution? Lippert-Rasmussen disagrees with the broad school of thought under which Hellman's approach falls, which he calls "[t]he disrespect-based account of the badness of discrimination" (Lippert-Rasmussen 2013). Lippert-Rasmussen argues that discrimination is wrong primarily because of its *harmful effects* (cf. chapter 12). But harmful compared to what? His view is that it should be harmful compared to the counterfactual situation whereby such discrimination does not exist. But what if prohibition on discrimination harms the disadvantaged group in the short run, yet advantages it in the long run? Scholars have argued that the EU's recent prohibition on gender discrimination in insurance raised premiums for both genders, allegedly making them both worse off. But what if such a prohibition would benefit women in the long run? Lippert-Rasmussen's approach seems to enable such a forward-looking costs and benefits analysis.

Obviously, in this chapter I cannot fully discuss all or even the few previously noted conceptions of discrimination. Still, my reading of the philosophical literature leaves me with the impression that very rarely does it apply neatly to insurance, where factors such as the relevant line of insurance, the characteristic, as well as the type of discrimination, are extremely important for the determination of what fair discrimination really is. For example, charging the elderly a higher premium for life insurance based on their higher actuarial risk is probably not as bad, if it is bad at all, as completely refusing to sell life insurance to old people, which in turn is probably also not as bad, if it is bad at all, as refusing to sell life insurance to black people even if their actuary risk is as high as that of the elderly. Nor is refusing to sell the elderly life insurance as bad as refusing

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to sell the elderly health insurance. But most of the approaches noted above do not seem to advance the conceptualization much in these nuanced contexts.

Moreover, most of the previous conceptions do not place adequate emphasis on costs. But costs also matter. If forbidding discrimination will unravel an entire insurance market or kill hundreds of people a year because bad drivers no longer take caution on the roads because they are insured, policy makers need to pause before they require such insurance practices.

The Moral Requirements From a Theoretical Framework

To start filling in the gaps in the existing literature, in what follows I offer a two-stage process policy makers must undertake in order to determine what a *fair* and *just* insurance regime is. I provide a pragmatic sketch of how a more nuanced analysis can help determine whether a specific regime is *fair*. I then show how costs need to be integrated in order to determine whether a specific regime is also *just*.

At the first stage, policy makers must determine whether specific discrimination is *fair*; namely, that it is not prima fascia wrong. The answer to this deontological question depends on at least three factors: the characteristic in question, the line of insurance, and the nature of the discriminatory treatment. Once one concludes that some specific insurance practice is *fair* (or unfair), the second stage becomes relevant. In the second stage, one examines whether a specific discrimination (whether fair or unfair) is also *just*, as the social costs of allowing or prohibiting discrimination are taken into account. Such costs might come in three forms: First, a higher premium to the same group the prohibition on discrimination purported to protect; second,

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potentially in the form of what economists call adverse selection, or third, even worse, in the form of adverse primary behavior. In other words, whereas the first stage examines the deontological fairness-related commitments private insurers have to their customers, the second stage engages in the tradeoff between equality and its consequences. I now describe these two stages in more detail.

Stage One: The Relevant Factors for Fair Discrimination

A. The First Factor: The Characteristics

Not all characteristics are the same. Both race and age are immutable, and yet in life insurance, we accept age discrimination but usually do not accept discrimination for race (cf. chapters 16 and 20). Indeed, the literature highlights several features that are relevant for the analysis, which is why the analysis is so complicated. First, we must determine whether a characteristic is controllable or immutable. There is some intuitive appeal to prohibiting discrimination that is based on immutable traits, as one should not be disadvantaged for things one has no control over. Indeed, people tend to tolerate discrimination more when choice is perceived to be involved, such as in the contexts of sexual orientation, obesity, and parenthood (Kricheli-Katz 2014). Of course, that does not mean that choice must be a factor, from a normative perspective. Indeed, as the previous example shows, not all immutable characteristics are treated the same. In fact, for discrimination to be wrong, mutability is probably neither a necessary condition (i.e., religion is mutable yet a protected trait) nor a sufficient condition (i.e., blind people are prevented from driving).

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The second relevant feature for the analysis is whether the characteristic changes over one's lifetime (such as age) or stays fixed (Lipert-Rasmussen 2013). It is possible that age discrimination is more tolerable because we all get the same chance to be on the winning side and the losing side of it over the course of our lifetime. Third, we must determine whether a characteristic constitutes a *cause* of the risk, rather than merely *correlating* with it (Zarsky 200?). Legal commentators usually demand a causal relationship between the classifier and the risk for the classifier to be taken into account, whereas actuaries often believe that correlation is sufficient. Fourth, the characteristics' predictive value (of the underlying risk) must be considered; that is, to what extent is the characteristic a good predictor for the risk? The better predictor of risk the characteristic is, the more tolerable such discrimination becomes (cf. chapter 3). Fifth, we should determine whether discrimination on the basis of the characteristic perpetuates negative stereotypes, or otherwise subordinates disadvantaged groups (Hasnas 2002). Sixth, the historical use of the characteristic as a method of discrimination is relevant; that is, whether the characteristic defies a socially salient group that has been disadvantaged in the past. In that sense, discriminating based on skin color is more problematic than based on eye color. Whether a characteristic is socially suspect, of course, is context-dependent. For example, religion might be a more sensitive category in Catholic countries such as Italy, whereas race might be more sensitive in the US. In this context, it is interesting to reflect on the normative classification of 'new' socially-suspect classes such as the obese, HIV-positive individuals, or parents.

B. The Second Factor: The Line of Insurance

The importance of each insurance line varies. By importance, I refer to the importance of the insurance to the insured's autonomy and participation in the polity. For example, health insurance

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is more determinative of citizens' ability to participate in the polity than are some other forms of insurance, such as traveler's insurance. When considering the disparate importance of these two lines of insurance to society at large, arguments for or against discrimination in the healthcare context have greater moral, economic, (and constitutional) implications than those in the context of traveler's insurance. While health insurance is more like a social good, or what Rawls called a "primary good," and many other will consider a basic human right, traveler's insurance is more like an economic commodity. If a good is an economic commodity, no moral duty necessarily exists to ensure equitable access. But where do life insurance or disability insurance, for example, fall on this spectrum? And what about homeowner's insurance, car insurance, or mortgage insurance?

C. The Third Factor: The Nature of the Discriminatory Treatment

Insurance companies might discriminate against insureds or potential insureds in various ways. I focus here on discrimination in the underwriting process, and not in the coverage decisions they make after an occurrence. The harshest type of discrimination is to never issue a policy because of some characteristic, such as a blanket refusal to insure blacks. A somewhat similar type of discrimination happens when insurers refuse to renew or when they cancel policies based on some characteristic. Indeed, many states have statutes that limit and others have statutes that prohibit the use of a particular characteristic in either issuance, renewal, or cancellation. Another form of discrimination involves restricting coverage in ways that might harm disadvantaged groups. For example, insurance companies might limit disability coverage to disabilities that do not stem from having HIV. But even with statutes limiting such discrimination, insurance companies can still discriminate against their insureds by simply charging a higher premium. Indeed, some states have

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statutes that limit but do not completely prohibit the use of a particular characteristic in rate-setting. Other states have statues that expressly prohibit insurers from taking into account a specific characteristic, even in setting rates. These discrepancies call for a more nuanced fairness-based analysis of discrimination in insurance. For example, it is possible that fairness requires insurance companies to admit people with various diseases and disabilities to their pool, and yet fairness might still allow insurers to charge these people a higher premium.

The philosophical literature does not provide a nuanced analysis of the three factors described above as applied to insurance. Indeed, this literature rarely expressly relates to insurance at all, as rarely can its general insights directly be applied to insurance. Resultantly, and as we just saw, crucial legal nuances such as the nature of the insured's characteristics, the specific line of insurance, and the exact nature of discrimination remain unanalyzed. In what follows, I focus on another issue that the literature on discrimination overlooks: the role of costs in the analysis.

Stage Two: The Tradeoff between Equality and its Consequences

Whether discrimination is just overall, even when it is not fair, depends on the social costs involved. Therefore, policy makers should attempt to account for the actual cost related to discrimination. In this context, three types of costs must be considered. The first is the impact of the prohibition on discrimination on the disadvantaged group it purports to help. For example, imagine a prohibition on a comprehensive auto insurance policy providing *free* roadside assistance to women (but not to men). Such a prohibition can be justified in Stage 1 as fair on the ground that the policy demeans women (Hellman 2008; chapter 7) because it assumes they cannot or do not want to change a flat tire themselves, thus perpetuating a stereotype that women are physically

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weaker, are deterred from physical tasks, or cannot handle a car—stereotypes that might hurt them in other markets such as the employment one. (Of course, a policy of free roadside assistance to women might be deemed fair in Stage 1 on the ground that society should be able to entertain the thought that women on average are less good than men at car maintenance and at the same time that women are morally equals to men. But let us assume for now that a Stage 1 analysis determined the policy to be unfair and therefore upheld the prohibition).

Such a prohibition, however, might increase the premium to women, potentially causing some of them—the poorer ones— not to buy comprehensive coverage, thus making them worse off. Oxera (2011) found that after the *Test Achats* case, which required insurance companies in the EU to have unisex premiums, life insurance premiums increased for women. Similarly, Aseervatham and colleagues (2014) found that following the *Test Achats* case auto insurance premium increased for young females. Is it self-evident that a policy that boosts fairness (Stage 1) but harms the very same group it purported to help is just? Does the magnitude of the harm to that group not matter?

Policy makers should also consider a second type of losses—efficiency losses in the insurance markets stemming from the fact that due to prohibition on discrimination, one group cross-subsidizes another, which might lead to a problem known to economists as adverse selection. If the insurer prices both races equally, all else being the same, blacks, for example, might pay less than the risk they pose. Insurers fear that certain whites cross-subsidizing blacks will drop out of the insurance pool. The absence of those less risky people will then raise the average riskiness of the pool, raising the cost of premiums for the entire pool and reducing the net benefit that participating in the insurance pool provides to the remaining members of both races. This situation

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in and of itself is an efficiency loss. But that might not be all. The reduction in the net benefit might further lead to whites that were previously on the cusp of dropping their participation in the pool to reconsider, causing them to leave the pool as well. Insurers argue that these events happening repeatedly comprise a chain reaction they call a *death spiral*, which might not end until the entire insurance pool unravels. A similar phenomenon can occur if insurers are banned from using genetic information. People who know they have defective genes will opt into the pool, driving out people without such genes. The end result might be that in the name of equality for everyone, we provide insurance to no one.

Another possibility is that a prohibition on discrimination might lead insurers to conduct a more detailed investigation of each applicant, and that in turn will raise premiums for everyone, dropping the poorer would-be insureds outside of the pool. The outcome would be that equality between the races comes at the expense of the poor of both races. The bottom line is this: can one seriously argue that costs associated with adverse selection never matter for the normative analysis?

Notably, while higher adverse selection costs and costs associated with death spirals are theories well accepted by economists, the empirical evidence of the extent to which they accurately describe the real world is mixed. Cutler and Reber (1998) conducted a detailed analysis of health insurance plans. They show that when Harvard University increased the premium of the most generous health plans for its policyholders regardless of the risk they imposed, the best risks in the pool (the ones with lower medical expenses) left this plan for a less generous one with a lower premium. Other evidence for adverse selection in health insurance markets exist (Cutler

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and Zeckhauser (2000). However, in line with my claim in this chapter, in surveying the literature Cohen and Siegleman (2010) found that the significance of the adverse selection effect may vary by line of insurance, the characteristic discriminated against, and the nature of the discrimination. The upshot from all this is that in this regard as well, the analysis must be specific and cannot remain at the general level at which the literature in philosophy comfortably remains.

The third type of costs policy makers need to incorporate is the impact of allowing and prohibiting discrimination on insureds' *primary behavior*. Let us start with impact of *allowing* discrimination. Suppose we conclude in Stage one that discriminating on the basis of genetics is fair, for example because it is not conceptually different from discrimination based on health conditions, which was allowed in the U.S. until Obamacare. Our support of such discrimination may increase once we do our stage-two analysis and consider the risk of adverse selection discussed above. And yet, we must also consider the impact of such policy on insureds' primary behavior. In our case, if insurers were allowed to discriminate based on clients' genetics, people might be deterred from having genetic tests. This, in turn, might prevent them from getting preemptive help, as well as prevent society from improving the science of genetic diseases (Hellman 2003). These costs might justify prohibiting genetic discrimination, at least in lines of insurance where people might be deterred from taking the tests, despite such discrimination being fair and despite the costs associated with the risk of adverse selection.

A similar analysis can be conducted for the case when discrimination is *prohibited*. Let us assume that in the first stage, one concludes that credit score discrimination (which scholars believe to be

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an alternative insurance companies found to race discrimination, once the latter was prohibited) should be prohibited in auto insurance. Still, policy makers should be hesitant to forbid credit score discrimination before they understand the empirical picture. In states that prohibit such discrimination in auto insurance, premiums may be lower for drivers with a low credit score. But if low credit score is correlated with substance abuse, such a policy might cause more risky drivers to drive, potentially decreasing overall safety. Is it not crucial to know whether car accident rates rise? What about the number of fatalities and severe injuries? Avraham, Cohen and Shurtz (2016) found that states that prohibited discrimination based on credit score faced an increase of about 3% in fatalities. This extrapolates to about one thousand fatalities a year nationwide. One must pause here and reflect on whether the prohibition on credit discrimination is at all just.

To be sure, it might still be the case that a prohibition on credit score discrimination is not only *fair* (stage one) but also *just*, even once the costs in terms of lost human lives are taken into account (stage two). My point, however, is that the impact on primary behavior involves important empirical questions that policy makers should not ignore.

More generally, I argued in this section that for pragmatic reasons a two-stage analysis is desirable. In the first stage, policy makers should focus on the deontological requirements a fair insurance regime necessitates. My main point there was that a more nuanced analysis, one that takes into account the specific characteristic, the specific line of insurance, and the specific nature of discrimination, is required. In the second stage, policy makers should focus on the costs associated with a fair anti-discrimination regime in order to determine whether it is also just. My main point there was again that a nuanced analysis is extremely important: one that takes into account the

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impact on the protected groups' welfare, the impact on insurance markets, and the impact on the primary behavior.

Conclusion

In this chapter, I sketched a contemporary mapping of antidiscrimination insurance laws (statutes, courts decisions, and directives) in both the EU and the US. Of course, inconsistency in legal treatment across and within jurisdictions is rampant in countless areas. Here, I conjectured that the complete legal mess might imply that policy makers still lack the necessary nuanced normative framework regarding optimal insurance anti-discrimination policy. I attempted to start filling in this gap with my two-stage analysis hereby offered.

One question left unanswered is why private insurance companies need to be subject to norms, such as anti-discrimination norm, usually applicable to the government. We never think about asking a grocery store to sell milk or bread to minorities below its costs, and yet we do ask insurance companies to do so when pricing policies. The answer might be that modern life makes insurance companies so large, in terms of their political, economic, and legal influence, that the same rationales originally applied to the relationship between citizens and governments are also relevant to citizens and insurance companies. Insurance companies sell services and spread risks across millions of people, thus serving a large chunk of the polity. Insurance companies are often protected from competition, especially from abroad, thanks to government regulation. Governments routinely mandate and encourage their citizens to buy coverage—a benefit no other private industry enjoys. Insurance companies manage trillions of our dollars, for example our pension funds, which comprise a large proportion of the public's wealth. Insurance companies are

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often too big to fail, which grants them important influence with governments. And yet, it is not entirely clear that costs of equality should not be spread across all citizens rather than just the insurance company's customers. For example, if a minority neighborhood suffers from a high crime rate due to the government's neglect, which would naturally result in higher property insurance premiums in that neighborhood, it is not clear that insurance companies (and their customers) should bear the costs for such neglect by being prohibited from charging higher premiums in that neighborhood. Rather, perhaps a sounder regime will be one where the government reimburses insurers for the various costs associated with requiring them to charge an equal premium. This example highlights possible interesting intersections between markets, anti-discrimination norms, and mechanisms of distributive justice. However, adequately addressing these issues lies well beyond the scope of this chapter.

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