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Genetic Discrimination

Torben Spaak*

1. INTRODUCTION

Scientists have been quite successful in their attempts to map the human genome, the genetic information stored in the approximately 20,000-25,000 genes that humans are said to possess.¹ Stephen Scherer describes the ramifications of the Human Genome Project (HGP):

With the success of the HGP, we have overcome the psychological barrier of cracking nature's code and now face the more daunting responsibility of having power over the genetic destiny of our own species. As such, the HGP joins the ranks of the other massive undertakings of the 20th century — splitting of the atom and the conquest of space — in transforming civilization. And, just as Galileo's work was foundational to proving the Copernican theory which debunked the notion that the earth was the centre of the universe, the HGP proves there are human-to-animal DNA sequence links, thus substantiating Darwin's theory that we are not a unique life form. With this information, the HGP promises to give us profound knowledge as the basis to understanding how our minds work, to be able to quantitate nature and nurture, and increasingly, to be able to alter our genetic constitution.²

Information about a person's genetic make-up will make it

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* Associate Professor in Jurisprudence, Department of Law, Uppsala University, Sweden. I would like to thank Ludvig Beckman, Niclas Berggren, Jes Bjarup, Christian Dahlman, Åke Frändberg, and Elisabeth Rynning, as well as the participants in the philosophy seminar at The Philosophy Unit at The Royal Institute of Technology (KTH), Stockholm, for helpful comments and suggestions. I would also like to thank the participants at the Third Swedish "minisymposium" in jurisprudence in Uppsala, October 16-17, 2003, for helpful comments. Finally, I would like to thank Robert Carroll for checking my English. As always, the author alone is responsible for any remaining mistakes and imperfections.

1. See, e.g., Human Genome Project Information, How Many Genes Are in the Human Genome?, http://www.ornl.gov/sci/techresources/Human_Genome/faq/genenumber.shtml (last modified Oct. 27, 2004).

2. Stephen Scherer, *The Human Genome Project*, 2 CAN. J. POL'Y 11, 18-19 (2001).

possible to predict his or her health and perhaps even his or her behavior to some extent.³ Employers and insurance companies may want to base their decisions on genetic information, and, in some cases, they might even require employees or policyholders to undergo genetic testing.⁴

Some commentators argue, however, that access to genetic information may give rise to discrimination, and that individuals need legal protection against such discrimination.⁵ I argue, to the contrary, that although individuals may need legal protection against access to genetic information, this is not because such access may give rise to discrimination, but because it may give rise to stigmatization or other harmful consequences. For example, a person with a genetic condition may be denied employment or health or life insurance precisely because of his or her genetic condition.

This article begins with a discussion of the important possibilities and risks stemming from access to genetic information. I then present a case study said to show that genetic discrimination is manifested in many social institutions in the United States. I argue that the study does not really identify discrimination, but rather “immoral incompetence” by those institutions. I then analyze the concept of discrimination and its relation to the principles of the *Rechtsstaat*, arguing that discrimination violates these principles. I proceed to consider and reject the idea that access to genetic information

3. For more on the impact of a person's genes on his behavior, see BEHAVIORAL GENETICS (Ronald A. Carson & Mark A. Rothstein eds., 1999).

4. See, e.g., Nancy E. Kass, *The Implications of Genetic Testing for Health and Life Insurance*, in GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 299 (Mark A. Rothstein ed., 1997); Mark A. Rothstein, *The Law of Medical and Genetic Privacy in the Workplace*, in GENETIC SECRETS, *supra*, at 281.

5. See, e.g., Paul R. Billings et al., *Discrimination as a Consequence of Genetic Testing*, 50 AM. J. HUM. GENETICS 476 (1992); Lisa N. Geller et al., *Individual, Family, and Societal Dimensions of Genetic Discrimination: A Case Study Analysis*, 2 SCI. & ENG'G ETHICS 71 (1996); Wendy Lovejoy, Note, *Ending the Genetic Discrimination Barrier: Regaining Confidence in Preconception, Prenatal, and Neonatal Genetic Testing*, 74 S. CAL. L. REV. 873 (2001); Tara L. Rachinsky, Comment, *Genetic Testing: Toward a Comprehensive Policy to Prevent Genetic Discrimination in the Workplace*, 2 U. PA. J. LAB. & EMP. L. 575 (2000); Kimberly A. Steinforth, Note, *Bringing Your DNA to Work: Employers' Use of Genetic Testing Under the Americans with Disabilities Act*, 43 ARIZ. L. REV. 965, 968 (2001); Statens Offentliga Utredningar [SOU] 2000:103 Att spränga gränser. Bioteknikens möjligheter och risker [government report series] (Swed.).

on the part of said actors may give rise to the broader harm of “geneticism” understood as “the use of genetic notions to privilege some individuals and subordinate others.”⁶ The article ends with a brief discussion of the harmful consequences that may result from access to genetic information by employers, insurance companies, and others. Among other things, I point out that the absence of discrimination does not mean that, morally speaking, everything is all right.

2. GENETIC INFORMATION

What is a gene? Stephen Scherer offers the following explanation:

Genes are instructions that give organisms their characteristics. The instructions are stored in each cell of every living organism in a long string-like molecule called Deoxyribonucleic Acid (DNA). DNA molecules are subdivided into finite structures called chromosomes . . . Each organism has a characteristic number of chromosomes. For humans the number is 46 (23 pairs) and this complete set of genetic information is called the genome.⁷

Thus genetic information is information about the biological material (the DNA), not the biological material itself.⁸ This conception of genetic information is consistent with the ordinary meaning of information, and it is also interesting from a moral or legal point of view.

Much of the debate about the risks stemming from access to genetic information is premised on the assumption that genetic information is different from other health information and that access to it is likely to create unique problems. Lawrence Gostin, for example, maintains that genetic information is special in the following ways:

The sheer breadth of information discoverable; the potential to unlock secrets that are currently unknown about the person; the unique quality of the information enabling certain identification of the individual; the stability of the DNA rendering distant future applications possible; and the generalizability of the data to families, genetically related communities and ethnic and racial populations.⁹

But not everyone agrees. Rejecting arguments that

6. Susan M. Wolf, *Beyond “Genetic Discrimination”: Toward the Broader Harm of Geneticism*, 23 J.L. MED. & ETHICS 345, 345 (1995).

7. Scherer, *supra* note 2, at 12.

8. See Sonia Le Bris, *Give Me Your DNA, and I’ll Tell You Who You Are . . . or Who You’ll Become*, 2 CAN. J. POL’Y 90, 92 (2001).

9. Lawrence O. Gostin, *Genetic Privacy*, 23 J.L. MED. & ETHICS 320, 326 (1995).

describe genetic information as “distinctive and especially sensitive,” Thomas Murray concludes that genetic information is not so special because genetic information is “neither unique nor distinctive in its ability to offer probabilistic peeks into our future health.”¹⁰ He further argues that concerns for kin are unconvincing because even though these concerns may “amplify the sensitivity of genetic information, it does not render that information unique.”¹¹ And the concern about genetic discrimination is not persuasive, he explains, as genetic information is not unique in this respect either.¹² According to Murray:

Genetic information is special because we are inclined to treat it as mysterious, as having exceptional potency or significance, not because it differs in some fundamental way from all other sorts of information about us. Portions of that mystery and power come from the opaqueness of genetic information, the possibility that others will know things about the individual that he or she does not know, and how genetic information connects the individuals to immediate family and more distant kin. The more genetic information is treated as special, the more special treatment will be necessary. Yet none of these factors is unique to genetic information.¹³

Murray is right. While access to genetic information by various social institutions may constitute a threat to the individual, the same could be said about all forms of medical information. Nevertheless, we need not hold that genetic information is special, let alone unique, in order to worry about the consequences of access to such information by various social institutions. It suffices to observe that genetic information is difficult to handle.

3. GENETIC DISCRIMINATION: A CASE STUDY

Paul Billings and his coauthors have conducted a series of tests to determine whether access to genetic information may give rise to genetic discrimination.¹⁴ More specifically, the 1992 study aimed “to discover whether incidents which may reflect genetic discrimination are occurring in the workplace, in

10. Thomas H. Murray, *Genetic Exceptionalism and “Future Diaries”: Is Genetic Information Different from Other Medical Information?*, in GENETIC SECRETS, *supra* note 4, at 60, 64.

11. *Id.* at 65.

12. *Id.* at 65-67.

13. *Id.* at 71.

14. Billings et al., *supra* note 5, at 477.

access to social services, in insurance underwriting, and in the delivery of health care.”¹⁵

The authors contacted 1,119 New England professionals working in “clinical genetics, genetic counseling, disability medicine, pediatrics, and social services” and asked about incidents of “possible genetic discrimination.”¹⁶ They received forty-two responses. They excluded thirteen of these responses because the incidents reported did not meet the authors’ criteria for genetic discrimination or were insufficiently informative. The remaining responses described forty-one incidents of possible genetic discrimination. Thirty-two of the incidents involved insurance, seven involved employment issues, and two concerned other matters.¹⁷ The authors concluded that discrimination is manifested in many social institutions, especially in the fields of health and life insurance. Specifically they stated:

Problems with insurance companies arose when individuals altered existing policies because of relocations or changes of employers. New, renewed, or upgraded policies were frequently unobtainable even if individuals labeled with genetic conditions were asymptomatic. Assessment of the natural history of the genetic condition or evaluation of the fitness of the individual by physicians had little or no influence on the adverse outcomes presented by the respondents.¹⁸

However, this important study is marred by the authors’ insufficient attention to the analysis and definition of concepts. In particular, they failed to define the concept of discrimination. To be sure, they defined the concept of genetic discrimination as “discrimination against an individual or against members of that individual’s family solely because of real or perceived differences from the ‘normal’ genome of that individual.”¹⁹ Furthermore, they distinguished genetic discrimination from “discrimination based on disabilities caused by altered genes” by excluding from the aforementioned category “those instances of discrimination against an individual who at the time of the discriminatory act was affected by the genetic disease.”²⁰ They did not, however, define

15. *Id.*

16. *Id.*

17. *Id.* at 477-78.

18. *Id.* at 478.

19. *Id.* at 477. Essentially the same understanding of “genetic discrimination” is adopted in Geller et al., *supra* note 5, at 72, and Lovejoy, *supra* note 5, at 874 n.8.

20. Billings et al., *supra* note 5, at 477.

the concept of discrimination *simpliciter*.

The authors' failure to define the concept of discrimination allowed them to include under the rubric "discrimination" acts based on real or perceived differences from what is considered to be normal—in this case the normal human genome. I therefore assume that they defined "discrimination" as an action that (i) is based on real or perceived *differences* from a certain standard, and (ii) is *unfavorable* to the person who deviates from that standard. But such behavior is *not* necessarily discrimination, and it should not be portrayed as such.

4. DISCRIMINATION

I propose the following definition of the concept of discrimination: one person, *A*, discriminates against another person, *B*, if, and only if, *A* intentionally treats *B* worse than *A* treats, or would treat, others in similar circumstances.²¹ On this analysis, discrimination involves an *intentional breach of the principle of formal justice*, which asks us to treat like cases alike (and different cases differently).²²

This definition captures the widely shared idea that discrimination involves basing one's decision on morally irrelevant reasons, as the cases must be alike in morally relevant respects. Discrimination thus conceived is *morally wrong*, as we expect it to be. More specifically, if an action (or action-type) is discriminatory in this sense, one has a *pro tanto* moral duty not to perform it.²³

I think of the proposed definition as an *explication* of the concept of discrimination as understood in ordinary usage.²⁴ To

21. When I say that *A* treats *B* worse than he treats others in similar circumstances, I mean that *A* causes *B* harm over and above the unfairness that consists in breaching the principle of formal justice. On my analysis, the alleged harm is harm if, and only if, it would be considered harm by most people. For more on this topic, see Lena Halldenius, *Discrimination: What Is It and How Is It Bad?* 1-3, 11-2 (unpublished paper, on file with the author).

22. See H. L. A. HART, *THE CONCEPT OF LAW* 155-56 (1961); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 73-99 (1st ed. 1978) (explaining the concept of formal justice); see also Kenneth I. Winston, *Treating Like Cases Alike*, 62 CAL. L. REV. 1, 5-6 (1974).

23. As Shelley Kagan explains, "[a] *pro tanto* reason has genuine weight, but nonetheless may be outweighed by other considerations." SHELLEY KAGAN, *THE LIMITS OF MORALITY* 17 (1989).

24. See, e.g., OXFORD AMERICAN DICTIONARY 183 (1980) (defining

explicate a concept is to transform a vague and/or ambiguous “pre-theoretical” concept, *explicandum*, into one that is more exact, *explicatum*, while retaining its intuitive content. Explication makes the concept more functional for a certain purpose—in this case to transform “discrimination” into a useful tool in moral, political, or legal thinking generally. Such a reconstruction is of course partly prescriptive.²⁵ Nevertheless, I believe that on the whole my definition is in keeping with ordinary usage.

*Shelley v. Kraemer*²⁶ presents us with a clear case of discrimination thus conceived. The case concerns the constitutional validity of judicial decisions enforcing so-called restrictive covenants, that is, private agreements between property owners to exclude members of a designated race from the ownership or occupancy of real estate. In 1911, a number of property owners in St. Louis signed an agreement not to sell their property “for resident or other purpose [to] people of the Negro or Mongolian Race.”²⁷ In August 1945, a black couple, Mr. and Mrs. Shelley, unaware of the covenant, bought property in the restricted neighborhood.²⁸ In October 1945, a group of property owners brought suit, requesting that Mr. and Mrs. Shelley be restrained from taking possession and divested of title.²⁹ The Shelleys objected that judicial enforcement of a restrictive covenant would violate their rights under the Fourteenth Amendment, which provides, *inter alia*, that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”³⁰ The Supreme Court held that judicial enforcement of restrictive covenants does violate the equal protection clause.³¹

“discriminate” as “to make a distinction, to give unfair treatment, especially because of prejudice”); CONCISE OXFORD DICTIONARY 430 (11th ed. 2004) (defining “discriminate” as to “make an unjust distinction in the treatment of different categories of people, especially on the grounds of race, sex, or age”); SVENSKA AKADEMIENS ORDLISTA (11th ed. 1986) (Swed.) (defining “discrimination” as “unfavorable special treatment,” in Swedish: *ogynnsam särbehandling*).

25. See TORBEN SPAAK, THE CONCEPT OF LEGAL COMPETENCE: AN ESSAY IN CONCEPTUAL ANALYSIS 26-48 (1994).

26. 334 U.S. 1 (1948).

27. *Id.* at 5.

28. *Id.*

29. *Id.* at 6.

30. U.S. CONST. amend XIV, § 1.

31. Shelley, 334 U.S. at 23.

Clearly, the very idea of a restrictive covenant is discriminatory. Such an agreement is designed to exclude certain people from the ownership of property on the basis of their race, although race must surely be considered an irrelevant characteristic in regard to property transactions.

Under the proposed definition of discrimination, affirmative action plans necessarily discriminate against applicants who are *not* accorded preferential treatment under the plan in question.³² Such plans are designed to favor the members of one group, *A*, over the members of another group, *B*, even though the members of *A* are less qualified in the relevant respect than the members of *B*.³³ Defenders of affirmative action often argue that “diversity” on campus or in the workforce is so important that we are justified in according preferential treatment to members of a minority group.³⁴ But even if—incredibly—“diversity” were important,³⁵ applicants who are not accorded preferential treatment under the plan would still be discriminated against.

This article’s concept of discrimination differs significantly from the concept of discrimination used by Billings and his colleagues. Whereas they maintain that the decisionmaker must not take into account any facts about a person’s genetic make-up, I argue that discrimination does not occur if such facts are *relevant* to the decision.

My definition is preferable for two reasons. First, if the

32. One would expect those who speak of *reverse* or *compensatory* discrimination to share this view. See, e.g., Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348 (1973); George Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159 (1975). But see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223 (2d. ed. 1978).

33. Lena Halldenius maintains that affirmative action does not qualify as discrimination under this definition, as it does not involve an intent to harm. Specifically, she maintains that the harm done to those who lose out under an affirmative action plan is just an “unintended side effect.” See Halldenius, *supra* note 21, at 13. But that cannot be right. To benefit one person under an affirmative action plan *is* to harm another person. This is a *conceptual necessity*, not an empirical contingency. Hence it is not an “unintended side effect.”

34. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-19 (1977); see also RONALD DWORKIN, *SOVEREIGN VIRTUE* 386-426 (2000).

35. See *Grutter*, 539 U.S. at 349 (Thomas, J., dissenting) (criticizing the notion of “diversity” and its use to justify affirmative action measures).

facts considered are relevant to a decision, the decisionmaker is not necessarily guilty of moral wrongdoing. Second, under Billings's understanding of discrimination, a movie director who casts a white man in the role of, say, Abraham Lincoln discriminates against nonwhites and women. But in that case race and sex would be *relevant!*

The concept of discrimination that I present also differs from the concept used by Ronald Dworkin and others. I have defined the concept of discrimination, in part, in terms of an *intention* to breach the principle of formal justice. I have not addressed the discriminating party's *motivation*, the reason(s) why an actor intends his or her action. In particular, I have not argued that discrimination presupposes *invidious* intent. But Ronald Dworkin adopts precisely that stance. He maintains that the term discrimination is commonly used to designate classifications that are invidious, in that they are arbitrary, or reflect prejudice or favoritism:

Against the background of centuries of malign racial discrimination, phrases like "discriminate against someone because of race" or "deprive someone of an opportunity because of race" may be used in a neutral . . . sense, so that *any* racial classification whatsoever is included. Or they may be used (and I think are commonly used) in an evaluative way, to mark off racial classifications that are invidious, because they reflect a desire to put one race at a disadvantage against another, or arbitrary, because they serve no legitimate purpose, or reflect favoritism, or because they treat members of one race with more concern than members of another.³⁶

The difference between my understanding of the concept of discrimination and Dworkin's understanding is important. On my understanding, affirmative action plans necessarily discriminate against applicants who are not accorded preferential treatment. On Dworkin's analysis, such plans do not necessarily discriminate as the element of prejudice, contempt, or favoritism is typically lacking.³⁷

Dworkin's concept of discrimination is neither more consistent with ordinary usage nor otherwise preferable to my understanding of that concept. I maintain that the intentional

36. RONALD DWORKIN, A MATTER OF PRINCIPLE 316, 318 (1985); *see also* Joe R. Feagin & Douglas Lee Eckberg, *Discrimination: Motivation, Action, Effects, and Context*, 6 AM. REV. SOC. 1 (1980) (analyzing such prejudice-motivated discrimination).

37. Not surprisingly, on Dworkin's analysis, *supra* note 36, few of the instances of "discrimination" identified by Billings et al., *supra* note 5, would count as discrimination, as the element of prejudice, contempt, or favoritism is typically lacking in such cases.

breach of the principle of formal justice, not the reason for the breach, is the important point. Being told that this principle was breached not for reasons of prejudice, contempt, or favoritism, but for “diversity” or some other reason, will not placate anyone who has been rejected because somebody else was accorded preferential treatment.³⁸ The person who was rejected is most concerned that he or she lost out in competition with someone less qualified, that he or she was just a pawn in the game, as it were.

I would like to address the *requirement of intent* and the *relevance requirement* in my proposed definition of discrimination. As I have said, discrimination involves an *intentional* breach of the principle of formal justice. But why not allow a *negligent* breach of the principle to qualify as discrimination? Consider a case in which an employer hires a less qualified male engineer instead of a better qualified female engineer because he believes that women simply should not be employed outside the home. On the employer’s analysis, a person’s sex is a relevant consideration with respect to employment outside the home, and a male and a female applicant can never be in similar circumstances with regard to such employment. Since we can safely say that the employer is mistaken about what factors are relevant and what factors are irrelevant in this case, the employer does not intentionally breach the principle of formal justice. But we may say that the employer is negligent, as the employer fails to realize that there is no solid basis for the assumption that women should not be employed outside the home. However, a negligent breach of the principle of formal justice will not qualify as discrimination under the proposed definition of discrimination. But, one might object, surely the employer has discriminated against the female applicant!

I do not agree. The distinction between intentional and negligent action is morally relevant, as is clear from common sense morality and the differential punishment that all governments attach to intentional and negligent crimes. Since discrimination is a fairly grave form of moral wrongdoing,

38. See Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 763 (1974) (“[T]he unfairness to the excluded individual is perhaps no different from the unfairness of ‘traditional’ discrimination”); see also DWORKIN, *supra* note 32, at 231.

negligent discrimination does not seem to be sufficiently harmful to qualify as discrimination. I also doubt whether a wider definition of discrimination would be in keeping with ordinary usage.

I now turn to the *relevance requirement*. Discrimination, as I have said, involves an intentional breach of the principle of formal justice, and the relevance requirement ensures that the parties involved are alike in relevant respects. But the relevance requirement is not without its problems.

Consider, for example, the case of a grossly immoral practice, such as the persecution of Jews in the Third Reich, apartheid in South Africa, or “land reform” in Zimbabwe. While race or ethnic origin is clearly relevant to these practices, one could not reasonably maintain that no discrimination has occurred. However, when I maintain that a person’s genetic make-up, sex, race, or ethnic origin might be relevant, I have in mind activities that are *morally legitimate*, such as running a business, a university, or a sports team, or shooting a movie. Admittedly, I have done nothing to explain *which* practices are legitimate and *why* they are legitimate. There is a good deal of agreement about which practices are legitimate and which are not. While there will no doubt be borderline cases, they will be rather few and insignificant.

Consider also the less dramatic case of a shop owner who prefers to hire white staff because he correctly predicts that his customers would stop frequenting his shop if he hired black staff. Running a shop is obviously a perfectly moral activity, and although the owner correctly judges the likely consequences of hiring staff of the “wrong” color, many people would nevertheless maintain that the owner is guilty of discrimination. I do not agree. The owner is simply adjusting to the situation and acting accordingly. In this case race *is* a morally relevant factor, which means that the shop owner’s behavior does not qualify as discrimination under my proposed definition of discrimination.

One might, however, object that race is one of a limited number of factors that are generally considered to be morally irrelevant in most circumstances, and therefore race *cannot* be a morally relevant factor in this case. At some point we must allow moral considerations about relevance to trump considerations about relevance based on *self-interest*. But at what point? The answer will depend on whether we are concerned with an activity in the private sector or with an

activity in the public sector. Crudely put, the idea would be that a business operating in the private sector may “adjust to the situation,” whereas an organization operating in the public sector may not.

Consider furthermore the case of homosexual marriages. In most countries, the law does not recognize homosexual marriages. Does this mean that homosexuals are discriminated against in regard to marriage? On my analysis, the answer depends on whether lawmakers are morally justified in insisting that only a man and a woman can marry each other. If they are, a homosexual and a heterosexual couple are not alike in relevant respects; therefore homosexuals are not discriminated against. If lawmakers are not morally justified, then a homosexual and a heterosexual couple are alike in relevant respects, and homosexuals are discriminated against.³⁹ Of course, the moral relevance of a person’s sex in regard to marriage is, and is likely to remain, a controversial moral question in many countries. Since this is so, it will be difficult to decide whether this is a case of discrimination.

Consider, finally, a Swedish case—*Skattefjällsmålet*—that demonstrates how difficult it can be to determine who belongs to the relevant reference group.⁴⁰ In this case, the members of a certain minority population claimed the government discriminated against them in violation of the Swedish Constitution with respect to the granting of hunting and fishing rights. On my analysis, the government discriminates against the members of this minority population if, and only if, it intentionally treats them worse than it treats others in similar circumstances. But who are those “others” in this case? Members of another minority population, members of the general public, or perhaps members of some other group? The Swedish Supreme Court seized the first option and declared that the government was *not* guilty of discrimination because there was no alternative minority population available. But it

39. I thank Niclas Berggren for drawing my attention to the case of homosexual marriages.

40. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1981 p.1 (Swed.). The relevant provision in the Swedish Constitution (Regeringsformen 2:15) reads as follows: “No Act or law or other statutory instrument may entail the discrimination of any citizen because he belongs to a minority on grounds of race, skin color, or ethnic origin.” Regeringsformen 2:15 (author’s translation), available at http://www.oefre.unibe.ch/law/icl/sw00000_.html.

is not clear why the Court compared the appellant minority population with another minority population and not with the situation of the general public.⁴¹

5. DISCRIMINATION AND THE *RECHTSSTAAT*

I have argued that discrimination amounts to an intentional breach of the principle of *formal justice*. I shall now argue that discrimination thus conceived violates an important value of the *Rechtsstaat*, or the rule of law. Let me elaborate on this.

The Swedish legal theorist Åke Frändberg finds the core value of what he calls the ideology of the *Rechtsstaat* in the idea of *protecting the individual against the coercive power of the state*.⁴² He explains that individuals need protection from particularly grave infractions perpetrated by state organs, such as discrimination, caprice, violence, and the absence of legal appeal mechanisms. On Frändberg's analysis, each type of infraction violates a distinct value, namely legal equality, legal certainty, legal security, and access to law, respectively.

Frändberg makes a distinction between *equality before the law*, which means the uniform application of the relevant legal norm, and *equality in the law*, which means that the application of the relevant legal norms will not unduly discriminate against anyone.⁴³ He further explains that legal equality, understood as a *Rechtsstaat* value, covers both types of equality. *Equality before the law* is closely related to the principle of formal justice. To apply a legal norm uniformly is to apply it precisely to those cases to which, properly understood, the norm applies. Accordingly, violation of the value *equality before the law* necessarily amounts to discrimination. But because Frändberg does not explain "undue" discrimination, we do not know what constitutes *equality in the law*. Hence we do not know whether the violation of *equality in the law* necessarily amounts to discrimination.

Discriminatory action therefore violates an important

41. See Thomas Bull, *Diskriminering och dekonstruktion: om positiv faderskapstalan*, 3-4 TIDSSKRIFT FÖR RETTSVITENSKAP 693, 713, 718-19 (2000) (Swed.).

42. Åke Frändberg, *Begreppet rättsstat*, RÄTTSSTATEN – RÄTT, POLITIK OCH MORAL 21, 24 (Fredrik Sterzel ed., 1996).

43. *Id.* at 29.

Rechtsstaat value, namely legal equality, if and to the extent that it occurs in the application, or administration—as distinguished from the creation—of law. In other words, discriminatory action necessarily violates the *Rechtsstaat* value that Frändberg calls equality *before* the law, but not necessarily the *Rechtsstaat* value that he calls equality *in* the law. Accordingly, the very existence of, say, an affirmative action plan does not violate the value equality *in* the law, though its inconsistent administration might violate the value of equality *before* the law. Though European writers speak of the *Rechtsstaat*⁴⁴ and English-speaking writers speak of the *rule of law*,⁴⁵ the terms designate very similar ideas.⁴⁶

6. “GENETICISM”

Susan Wolf maintains that the rubric “genetic discrimination”—which she understands in the broader sense accepted by Billings and his colleagues—is “woefully inadequate” to deal with what she calls *genetic disadvantage*.⁴⁷ She argues that we ought instead to conceive of the harm done to people with genetic “defects” as something broader than discrimination, “as rather the *use of genetic notions to privilege some individuals and subordinate others*.”⁴⁸ This, she explains, is “geneticism.”

The problem with “current antidiscrimination theory,” Wolf argues, is that it supports the idea that those who do not suffer genetic disadvantage are “normal,” and that the goal is to ensure that everyone is treated in the same way as the members of the “normal” group. She interprets prevailing theory as prescribing an antidiscrimination approach that “counsels that people of color should be treated like whites and that women should be treated like men.”⁴⁹ Such an approach,

44. See, e.g., HANS Kelsen, PURE THEORY OF LAW 313-14 (Max Knight trans., Univ. of California Press 1967) (2d. ed. 1960); Frändberg, *supra* note 42.

45. DAVID LYONS, ETHICS AND THE RULE OF LAW (1984); JOHN RAWLS, A THEORY OF JUSTICE 235-43 (1971); JOSEPH RAZ, THE AUTHORITY OF LAW 210-19 (1979).

46. See Neil MacCormick, *Der Rechtsstaat und die Rule of Law*, 2 JURISTENZEITUNG 65 (1984).

47. Wolf, *supra* note 6, at 45.

48. *Id.* at 346 (emphasis added).

49. *Id.* at 347.

she continues, “bifurcates the world into those who nonproblematically fit the norm (whites, men) and those who are problematically different (people of color, women). In genetic terms, this means bifurcating the world into those with nonproblematically ‘normal’ genotypes and those with problematically ‘abnormal’ ones.”⁵⁰

I doubt whether anyone “makes use of genetic notions to privilege some individuals and subordinate others.” Rather, employers, insurance companies, and others make business decisions on the basis of genetic information, decisions that may negatively affect people with genetic “defects.” On the understanding of discrimination adopted by Billings and his colleagues, such behavior tends to qualify as discrimination. On my understanding and that of Dworkin, this behavior does not qualify as discrimination.

If I understand Wolf correctly, she objects to calling this discrimination since doing that would involve “bifurcating” the world in a way that harms people with genetic “defects.” But even if it would, which I doubt, I cannot see how introducing the concept of “geneticism” would be likely to improve the situation for those harmed. For whereas “geneticism” seems to presuppose *intent* to harm on the part of the actor, discrimination as the concept is understood by Billings and his colleagues does not. It will therefore be easier to prove the occurrence of discrimination as understood by Billings and his colleagues than the occurrence of “geneticism.” Of course, this would not neutralize the harm identified by Wolf, a harm which I doubt exists, but it would do *something* for those harmed.

As Wolf points out, she is inspired by the literature on race and gender.⁵¹ But a problem with this literature, at least as interpreted by Wolf, is that it consistently and mistakenly attributes to antidiscrimination legislation the purpose of producing a higher ratio of female or colored professors, members of Congress, or CEOs.⁵² That is to say, it endorses a *result-oriented*—as distinguished from a process-oriented—conception of antidiscrimination laws. As Owen Fiss explains:

Antidiscrimination laws are capable of two basic interpretations. One interpretation—call it process-oriented—emphasizes the purification of the decisional process. The prohibition against discrimination is interpreted as a ban against basing a decision on certain forbidden

50. *Id.* at 347-48 (emphasis added).

51. *Id.* at 345.

52. *Id.* at 348.

criteria, for example, an individual's race. A second interpretation—call it result-oriented—emphasizes the achievement of a certain result, improvement of the economic and social position of the protected group. For example, under the result-oriented approach, the obligation imposed by the antidiscrimination laws in public education and housing is not to refrain from racial assignment but rather to achieve racial integration. Under a fair employment law the obligation is not to refrain from taking an applicant's race into consideration but rather to eliminate Black unemployment and under-employment.⁵³

The problem with the result-oriented conception of antidiscrimination laws is that it presupposes that the attainment of a certain result can be understood as a claim of *justice*.⁵⁴ But if the *process* is fair, which is what the process-oriented conception of antidiscrimination laws is meant to ensure, why is the *result* not fair? The idea seems to be that job applicants who are members of certain “protected” groups can claim as a matter of justice that they be hired even though they are less qualified than other applicants. Jobs seem to be considered *goods* that ought to be distributed equally, or perhaps according to need, among the members of different groups. But that is absurd! Whereas one *might* argue that basic education, health care, and perhaps life insurance are goods in the relevant sense, one cannot reasonably argue that *jobs* are such goods. Instead, jobs should be “distributed” according to the principles of a free market.

7. HARMFUL CONSEQUENCES

I have argued that one person, *A*, discriminates against another person, *B*, if, and only if, *A* intentionally treats *B* worse than *A* treats, or would treat, others in similar circumstances as *B*, and that therefore much of what passes for genetic discrimination is not discrimination at all. Nonetheless, decisionmaking based on genetic information is not without its problems. As I see it, the main moral problem is simply that such decisionmaking may give rise to harmful consequences for those affected. For example, they may not be able to get health or life insurance, or they may not be able to get a job (at least not the job they want). We have ample reason to provide legal protection for the “genetically disadvantaged” just as we have

53. Fiss, *supra* note 38, at 764.

54. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150-55 (1974) (discussing the relation between process and result).

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reason to provide legal protection for those who are unable to compete on the job market, fall ill, or simply get old. The exact nature of the consequences will of course depend on the system of social security in force at the time, among other things. Since this is so, problems of “genetic disadvantage” may be less urgent in Sweden, say, than in the United States.