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## Protecting Privacy to Prevent Discrimination

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## PROTECTING PRIVACY TO PREVENT DISCRIMINATION

JESSICA L. ROBERTS\*

### ABSTRACT

*A person cannot consider information that she does not have. Unlawful discrimination, therefore, frequently requires discriminators to have knowledge about protected status. This Article exploits that simple reality, arguing that protecting privacy can prevent discrimination by restricting access to the very information discriminators use to discriminate. Although information related to many antidiscrimination categories, like race and sex, may be immediately apparent upon meeting a person, privacy law can still do significant work to prevent discrimination on the basis of less visible traits such as genetic information, age, national origin, ethnicity, and religion, as well as in cases of racial or gender ambiguity. To that end, this Article explores the advantages and disadvantages of enacting privacy protections to thwart discrimination. It concludes that the weaknesses endemic to privacy law might be addressed by adopting an explicit antidiscrimination purpose. Hence, just as privacy law may further antidiscrimination, so may antidiscrimination enhance privacy law.*

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\* Assistant Professor of Law, University of Houston Law Center. Thank you to Brad Areheart, Emily Berman, Zack Bray, Aaron Bruhl, Jessica Clarke, Dave Fagundes, Joey Fishkin, Pauline Kim, Theodore Rave, Mark Rothstein, Ron Turner, and the participants of the National Conference on Genetics, Ethics & the Law and the 2013 ASU Legal Scholars Conference. Thanks also go to Chelsea Averill and Zachary White for research assistance, Emily Lawson for library help, and Elaine Gildea for administrative aid. Finally, I am also indebted to my outstanding editors at the *William & Mary Law Review*.

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## INTRODUCTION

A young woman working at a sporting goods store was demoted following her boss's discovery that she self-identified as black.<sup>1</sup> A bank terminated a recent hire, whom it had recruited aggressively, when human resources found out she was over sixty-five years old.<sup>2</sup> A man was fired from a financial institution after his supervisor learned he was of Iranian descent.<sup>3</sup> A medical clinic withdrew a woman's job offer when personnel documents revealed she had been born a man.<sup>4</sup> And a married couple teaching in a public school system faced discrimination after the district discovered they were Jehovah's Witnesses.<sup>5</sup> These cases share a common theme. In each of them, the employer obtained previously unknown information about the employee, which opened the door for subsequent discrimination.

These examples reveal that in certain circumstances, discriminators need information to discriminate. To discriminate on the basis of national origin or religion, an employer must first have some knowledge of an employee's roots or beliefs. Now imagine a world in which employers could not ask about the protected statuses of their employees. It would be markedly more challenging—perhaps even impossible—for an employer to base conscious or unconscious decisions on the employee's national origin or religion, simply because the employer has less information. The same holds true for other antidiscrimination categories such as genetic information, age, ethnicity, disability, and, at times, even race and sex. Restricting

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1. *Mitchell v. Champ Sports*, 42 F. Supp. 2d 642, 645 (E.D. Tex. 1998).

2. *Rubel v. Century Bancshares, Inc.*, No. Civ.02-482(MJD/JGL), 2004 WL 114942, at \*1-2 (D. Minn. Jan. 8, 2004).

3. See Entry of Final Judgment, *Zojaji v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 1:07-cv-22134-ASG (S.D. Fla. Nov. 27, 2007); Kevin Burke, *Ex-Merrill Broker Wins \$1.6 Million in Rare Arbitration Award*, WEALTHMANAGEMENT.COM (July 23, 2007), <http://wealthmanagement.com/securities-law/ex-merrill-broker-wins-16-million-rare-arbitration-award> [<http://perma.cc/SJ2R-C792>]; Trita Parsi, *EEOC: Merrill Lynch Hired Iranian for His Brains, Fired Him for His Nationality*, NAT'L IRANIAN AM. COUNCIL (July 3, 2007), <http://www.niacouncil.org/eoc-merrill-lynch-hired-iranian-for-his-brains-fired-him-for-his-nationality/> [<http://perma.cc/CS8Q-J7X8>].

4. *Lopez v. River Oaks Diagnostic & Imaging Grp.*, 542 F. Supp. 2d 653, 655-56 (S.D. Tex. 2008).

5. *Rosales v. Sch. Dist. of Lee Cnty.*, No. 2:12-CV-00454-JES-DNF (M.D. Fla. 2012).

potential discriminators' access to information about protected status can significantly reduce the chances of subsequent discrimination. In addition to supporting ordinary bans on adverse differential conduct, antidiscrimination advocates could also endorse privacy protections crafted to limit access to information about protected statuses.<sup>6</sup>

Yet despite this connection between information and action, lawmakers and commentators often treat privacy and antidiscrimination as separate, unrelated spheres of law. Privacy/antidiscrimination essentialism proceeds as follows: Laws governing privacy seek to protect individuals from unwanted invasions into their personal lives. Those legal safeguards usually operate either by restricting the circumstances of valid disclosures or by prohibiting inquiries by certain kinds of third parties.<sup>7</sup> Because decisions related to who may obtain private information and under what circumstances should be a matter of individual control, the underlying norm behind these protections has frequently been identified as autonomy—the ability to make choices about one's self and well-being free from the intrusions of others.<sup>8</sup> By contrast, antidiscrimination laws attempt to stop disadvantage on the basis of protected status, frequently through prohibiting the covered decision makers from considering that status when making particular types of determinations.<sup>9</sup> Antidiscrimination legislation is thus animated by distinct concerns of equality and fairness.<sup>10</sup> The apparent differences in the underlying norms, legislative purposes, and structures of these protections have frequently led lawmakers, commentators, and scholars to regard statutes designed to protect privacy and

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6. I use the term "protected status" broadly to encompass all antidiscrimination criteria. For example, sex and race are protected statuses under Title VII, disability is a protected status under the Americans with Disabilities Act (ADA), age is a protected status under the Age Discrimination in Employment Act (ADEA), and so forth.

7. See *infra* Part I.A.1 (explaining the legislative purpose and structure of legal protections associated with privacy law).

8. See *infra* Part I.A.1 (identifying autonomy as the underlying norm at stake within privacy law).

9. See *infra* Part I.A.2 (explaining the legislative purpose and structure of legal protections associated with antidiscrimination law).

10. See *infra* Part I.A.2 (identifying equality and fairness as the underlying norms at stake within antidiscrimination law).

statutes designed to stop discrimination as occupying different domains.

This Article rejects that view, and instead shows that these fields operate symbiotically rather than separately. In particular, it argues that privacy law can do the work of antidiscrimination. Conceptually, the norms of privacy and antidiscrimination are inextricably related as both deal with restrictions on certain kinds of information.<sup>11</sup> By consequence, legal protections that at first blush appear geared solely to further the purpose and norms more readily associated with privacy can likewise further the purpose and norms of antidiscrimination. Privacy protections can prevent access to the very information that discriminators may use to discriminate, acting as a bulwark against harmful differential conduct. Privacy constitutes an exciting yet largely unexplored means to combat discrimination in cases in which the potential discriminator lacks knowledge related to a given protected status.

The Genetic Information Nondiscrimination Act (GINA) provides a useful example of the privacy/antidiscrimination symbiosis.<sup>12</sup> The statute prohibits employers from requesting, requiring, or purchasing genetic information, in addition to its proscription on discriminatory conduct.<sup>13</sup> Instead of accepting the view that GINA's privacy and antidiscrimination protections are separate, I assert that violations of genetic privacy can be understood in explicitly antidiscrimination terms.<sup>14</sup> Viewed from this vantage, GINA's privacy provision is not separate from, but rather part of GINA's antidiscrimination mandate. This observation not only illuminates Congress's intent in passing GINA but also provides champions of civil rights with a real-world example of how privacy protections have the power to stop discrimination. Taking a cue from GINA, this Article then explores how privacy law might create an added level of protection against discrimination in contexts beyond genetic information when the potential discriminator does not have access to the relevant information.

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11. See discussion *infra* Part II.A.

12. See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, and 42 U.S.C.).

13. *Id.*

14. See *infra* Part II.B.

Privacy law offers some clear benefits as a mechanism for undermining discrimination. Whereas claims of discrimination may require claimants to meet the challenging burden of establishing the mental state of their alleged discriminators, privacy law requires only a showing that the covered entity inappropriately obtained, or attempted to obtain, the protected information.<sup>15</sup> Protecting privacy is also advantageous because it operates at an earlier stage in the process of discrimination.<sup>16</sup> Antidiscrimination law prohibits discriminatory actions by outlawing certain types of conduct, but privacy law renders the offensive conduct practically impossible by impeding access to the information necessary for the unfavorable differentiation. Hence, privacy law could at times be a more effective tool for combating discrimination than typical antidiscrimination protections.

Despite its clear advantages, privacy law also presents notable drawbacks as a vehicle for stopping discriminators. First, strong privacy protections or norms may impede useful disclosures.<sup>17</sup> Robust privacy protections or their accompanying values could encourage individuals to conceal information related to protected status, even in cases when disclosure could be beneficial personally (for example, necessary for affirmative action or accommodation) or socially (for example, consciousness raising). Beyond silencing potentially beneficial disclosures, privacy law faces other practical impediments as an antidiscrimination instrument. In particular, because invasions of privacy constitute a dignitary harm, legislators and judges may hesitate to provide relief for those violations absent some other bad effect.<sup>18</sup> Yet in these circumstances, antidiscrimination can also assist privacy.

Recognizing that privacy law can preempt future wrongdoing could make lawmakers, who are reluctant to protect against purely dignitary harms, more amenable to safeguarding sensitive information. Consequently, legislators may be more likely to draft, and judges more likely to enforce, a privacy protection when it is tethered to an antidiscrimination initiative, as in the case of GINA.

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15. *See infra* Part III.B.1.

16. *See infra* Part III.B.2.

17. *See infra* Part III.C.1.

18. *See infra* Part III.C.2.

Antidiscrimination could thus further privacy by creating incentives to share protected information when it could have a beneficial impact, and by providing an additional justification for legal intervention. Antidiscrimination could, as a result, mitigate concerns associated with privacy law, such as undesirable silencing and the absence of a tangible harm.

Although other scholars have touched upon the privacy/antidiscrimination symbiosis to prevent genetic-information discrimination, relatively little has been written on this potentially powerful synergy in other areas. This Article is the first to systematically apply the concept of protecting privacy to prevent discrimination outside the contexts of genetic information and disability. It makes three central contributions. Part I identifies and dismantles privacy/antidiscrimination essentialism by introducing the privacy/antidiscrimination symbiosis. Part II identifies GINA as a real-world example of the privacy/antidiscrimination symbiosis, asserting that Congress intended to invoke privacy law to further antidiscrimination goals when it drafted the statute. Finally, Part III weighs the benefits and drawbacks of using privacy law to preempt discrimination, not only for genetic information, but also for other antidiscrimination categories when information related to protected status is unknown to the discriminator.

This Article demonstrates that the symbiosis between privacy and antidiscrimination works both ways. Just as privacy can promote antidiscrimination, antidiscrimination can promote privacy, leading to more comprehensive overall protection. Lawmakers could thus use privacy law as a novel, additional tool in the antidiscrimination toolbox—and vice versa.

## I. INTRODUCTION TO THE PRIVACY/ANTIDISCRIMINATION SYMBIOSIS

Privacy law and antidiscrimination law are frequently construed as distinct kinds of legal protections: one meant to protect sensitive information, and the other meant to prevent disadvantage on the basis of protected status. But that perspective is not the only way to view the relationship between privacy and antidiscrimination. This Part outlines the essentialist view that privacy law and antidiscrimination law are distinct. It then follows with a deeper



exploration of the normative connection between privacy and anti-discrimination. Lastly, Part I proposes that privacy laws can be understood in decidedly antidiscrimination terms, a phenomenon I call the privacy/antidiscrimination symbiosis.

### A. *Privacy/Antidiscrimination Essentialism*

When drafting statutes, legislatures have distinguished between the goal of promoting privacy and the goal of preventing discrimination. To understand privacy/antidiscrimination essentialism, one must first be familiar with three concepts related to law making: (1) underlying norms, (2) legislative purpose, and (3) types of legal protection. Because privacy law and antidiscrimination law are typically understood to differ across every one of these three metrics, lawmakers may regard them as separate and distinct types of legislation.<sup>19</sup>

#### 1. *Privacy*

Let us begin with privacy. Privacy can mean many things.<sup>20</sup> People may allege that any number of diverse actions or events violate their privacy, including releasing personal information to unauthorized third parties or the press, breaking into a person's home to observe and record her actions, or using technologies such as thermal imaging or X-ray without previous consent.<sup>21</sup> In fact, some scholars have argued that privacy is such an amorphous and unwieldy concept that it is effectively devoid of meaning.<sup>22</sup> Although a

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19. See, e.g., William R. Corbett, *What Is in GINA's Genes? The Curious Case of the Mutant-Hybrid Employment Law*, 64 OKLA. L. REV. 1, 8-10 (2011); Pauline Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1543 (2002).

20. See, e.g., Mark A. Rothstein & Mary R. Anderlik, *What is Genetic Discrimination, and When and How Can It Be Prevented?*, 3 GENETICS MED. 354, 355 (2001); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 485-86 (2006) [hereinafter Solove, *A Taxonomy of Privacy*]; Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088-89 (2002) [hereinafter Solove, *Conceptualizing Privacy*].

21. I based this list on the examples from Daniel Solove's outstanding article. See Solove, *A Taxonomy of Privacy*, *supra* note 20, at 481.

22. See Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001); see also Solove, *A Taxonomy of Privacy*, *supra* note 20, at 479-80 (cataloging scholarly frustration with the ambiguity surrounding privacy); Solove, *Conceptualizing Privacy*, *supra* note 20,

unified concept of privacy may remain elusive, certain situations nonetheless are widely assumed to implicate the thing we call “privacy.”<sup>23</sup>

As a general matter, privacy centers on the notion that we are entitled to a certain amount of control over our bodies, our environments, and—most importantly for the purposes of this Article—information about ourselves. In general, privacy can be thought of as “the condition of being protected from unwanted access by others.”<sup>24</sup> More specifically, one can understand informational privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,”<sup>25</sup> or simply “control over knowledge about oneself.”<sup>26</sup> Although this definition does not capture all possible iterations of privacy as a concept, it is useful in the context of this Article, which deals exclusively with access to personal information, namely information related to antidiscrimination categories.

Insofar as privacy is construed as a matter of control, its primary underlying norm is autonomy.<sup>27</sup> Autonomy holds that a person

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at 1088-90 (presenting an inventory of scholarly unease with respect to the meaning of privacy).

23. Daniel Solove identifies four types of harmful activities associated with privacy violations: “(1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.” Solove, *A Taxonomy of Privacy*, *supra* note 20, at 489.

24. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10-11 (1982).

25. ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967); *see also* Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY* 56, 65 (J. Roland Pennock & John W. Chapman eds., 1971). These definitions deal with information. The value of privacy can be further broken down into a variety of categories, including informational, physical, decisional, and proprietary aspects. Anita L. Allen, *Genetic Privacy: Emerging Concepts and Values*, in *GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA* 31, 33-34 (Mark A. Rothstein ed., 1997). Although informational privacy will also cover the use of private information, mere information collection, regardless if it is ever processed or disseminated, can violate privacy and thus be harmful. Solove, *A Taxonomy of Privacy*, *supra* note 20, at 489.

26. Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 483 (1968); *see also* Hyman Gross, *Privacy and Autonomy*, in *PRIVACY*, *supra* note 25, at 169, 171; Andrei Marmor, *What Is the Right to Privacy?* (USC Gould Sch. of Law Ctr. for Law & Soc. Sci., Legal Studies Research Papers Series No. 14-13, 2014), *available at* <http://perma.cc/2T8Z-TCMG>.

27. *See, e.g.*, 1 L. CAMILLE HÉBERT, *EMPLOYEE PRIVACY LAW* § 1:4 (2007 & Supp. 2013) (“The right to privacy is about autonomy—allowing individuals to make their own choices about fundamental aspects of their lives.”); WESTIN, *supra* note 25, at 20 (identifying attempts

should have the freedom and the capacity to make decisions that impact her life, unconstrained by the preferences or idiosyncrasies of others.<sup>28</sup> Privacy, therefore, advances autonomy by allowing us to maintain primary decision-making authority across the varying spheres of our lives.<sup>29</sup> Informational privacy is not so much about the nature of the information itself, but rather how third parties acquire that information.<sup>30</sup>

Protecting privacy allows us to more freely construct our identities and negotiate our social interactions. Being able to keep some things private is essential to living communally.<sup>31</sup> To allow free access to everything about our lives would erode our sense of self and undermine our differentiation from those around us.<sup>32</sup> In the context of communal living, personal autonomy is compromised not only when an individual feels compelled to answer an intrusive question, but also when she fears that the response could be

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to guard and control autonomy as one of the central efforts of privacy law); Beardsley, *supra* note 25, at 70 (identifying selective disclosure as “the conceptual core of the norm of privacy” and autonomy as the foundation for the moral obligation of selective disclosure); Gross, *supra* note 26, at 181 (explaining that “while an offense to privacy is an offense to autonomy, not every curtailment of autonomy is a compromise of privacy”); Marmor, *supra* note 26, at 7 (describing privacy as “an autonomy-based interest”); *see also* Corbett, *supra* note 19, at 9 (asserting that “[p]rivacy is a complicated concept and includes interests such as secrecy of information and autonomy”); Kim, *supra* note 19, at 1537 (identifying autonomy as the norm behind legal protections of privacy). *But see* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423, 426 (1980) (asserting that the privacy interest is related to “our accessibility to others” but rejecting “privacy as a form of control”); Marmor, *supra* note 26, at 18 (“If you equate the right to privacy with the right to personal autonomy, you just admit that there is no particular interest in privacy that is worthy of protection, distinct from the much broader and, admittedly, more important, right to personal autonomy.”). *See generally* Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 616 (2011); David Orentlicher, *Genetic Privacy in the Patient-Physician Relationship*, in GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA, *supra* note 25, at 77.

28. *See* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “autonomy” as “liberty to follow one’s will, personal freedom”); *see also* BLACK’S LAW DICTIONARY 154 (9th ed. 2009) (defining “autonomy” as “[a]n individual’s capacity for self-determination”).

29. BOK, *supra* note 24, at 20. Reciprocally, autonomy supports privacy by allowing individuals to make choices about disclosure. Being forced to disclose thus violates an individual’s privacy by undermining her autonomy. One kind of harmful act associated with information collection is interrogation. For a discussion of interrogation as a privacy-related harmful act, *see* Solove, *A Taxonomy of Privacy*, *supra* note 20, at 499-505.

30. Marmor, *supra* note 26, at 1.

31. BOK, *supra* note 24, at 20; Marmor, *supra* note 26, at 17.

32. BOK, *supra* note 24, at 20.

disseminated without her consent.<sup>33</sup> Thus, perhaps counter-intuitively, privacy is essential to our relationships.<sup>34</sup> What we reveal to an employer will differ from what we reveal to a family member, which will likewise differ from what we reveal to a lover.<sup>35</sup> Privacy is consequently viewed as an indispensable aspect of our most fundamental liberties and worthy of protection.<sup>36</sup>

Laws designed to safeguard informational privacy prevent unauthorized access to the protected information, restricting the circumstances under which third parties may either seek or disclose private information. The legal protections associated with informational privacy law can thereby be further subdivided into two kinds of protections: (1) source-based, and (2) recipient-based.

The Privacy Act of 1974, which applies to federal agencies, governs the proper collection, maintenance, usage, and disclosure of records containing personally identifiable information.<sup>37</sup> The relevant subsection provides: “No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.”<sup>38</sup> The Privacy Act exemplifies a source-based privacy protection. It restricts the ability of the information holder (federal agencies) to share or disseminate the protected information.

Conversely, the Employer Use of Social Media Act, a California state law that went into effect at the beginning of 2012, governs an employer’s ability to obtain information related to its employees’ activities on social media.<sup>39</sup> The law states:

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33. For a discussion of the harms associated with dissemination, see Solove, *A Taxonomy of Privacy*, *supra* note 20, at 525-52.

34. Fried, *supra* note 26, at 477; Marmor, *supra* note 26, at 5.

35. See Fried, *supra* note 26, at 490; Marmor, *supra* note 26, at 5; Orentlicher, *supra* note 27, at 79.

36. Anita Silvers & Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 VAND. L. REV. 1341, 1353 (2002). As some scholars have explained, “Although we live in a world of noisy self-confession, privacy allows us to keep certain facts to ourselves if we so choose. The right to privacy, it seems, is what makes us civilized.” ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY*, at xiii (1995).

37. Privacy Act of 1974, 5 U.S.C. § 552a (2012).

38. *Id.* § 552a(b).

39. CAL. LAB. CODE § 980 (West 2014).

An employer shall not require or request an employee or applicant for employment to do any of the following:

- (1) Disclose a username or password for the purpose of accessing personal social media.
- (2) Access personal social media in the presence of the employer.
- (3) Divulge any personal social media, except as provided in subdivision (c).<sup>40</sup>

Eleven states have passed legislation restricting an employer's ability to access its employees' social media accounts.<sup>41</sup> These laws are recipient-based because they prohibit certain kinds of third parties (employers) who wish to receive the protected information from attempting to acquire it. In other words, they prevent the privacy harm of interrogation.<sup>42</sup>

In addition to forbidding violations by information holders or potential recipients, privacy laws also frequently outline the appropriate conditions or processes for information sharing, such as confidentiality policies and disclosure agreements. For instance, the Privacy Act forbids the disclosure of protected information absent the written consent of the subject unless the disclosure falls within the statute's twelve enumerated exceptions.<sup>43</sup> Likewise, the Employer Use of Social Media Act allows an employer to seek information related to an employee's personal social media when that

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40. *Id.* § 980(b).

41. Among the states that regulate employer access to social media are Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah, and Washington. Philip L. Gordon & Joon Hwang, *Making Sense of the Complex Patchwork Created by Nearly One Dozen New Social Media Password Protection Laws*, 51 Gov't Emp. Rel. Rep. (BNA) No. 2511, at 1030 (July 30, 2013); see also Joseph J. Lazzarotti, *More States Limit Employer Access to Employee Social Media Accounts*, JACKSONLEWIS (May 23, 2013), <http://www.workplaceprivacyreport.com/2013/05/articles/workplace-investigations/more-states-limit-employer-access-to-employee-social-media-accounts> [<http://perma.cc/B9BA-YJ2V>].

42. The harm of interrogation occurs when a person feels obligated to answer an invasive or offensive question out of the fear that her failure to respond will raise negative inferences. I will discuss the possibility that the failure to respond results in an inference that the person has done something shameful. See *infra* notes 320-28 and accompanying text.

43. See 5 U.S.C. § 552a(b)(1)-(12).

information pertains to misconduct.<sup>44</sup> Privacy laws thus contain both negative and positive constraints.

## 2. *Antidiscrimination*

Now let us proceed to antidiscrimination. In contrast to privacy, what constitutes an antidiscrimination harm is more easily identifiable. On a basic level, to discriminate simply means to differentiate.<sup>45</sup> Consequently, a person theoretically discriminates whenever she treats one individual differently from another. That is the value-neutral definition of discrimination. But discrimination also has a non-neutral, normative definition, which is how the term is most often used in law.<sup>46</sup> In this context, discrimination is the subset of differentiation that has been judged morally “wrong.”<sup>47</sup> Significantly, this wrongful differentiation need not be intentional, such as in the case of disparate impact actions or barriers to access for people with disabilities.<sup>48</sup> For example, although no one may have explicitly intended that height requirements or stairs would disproportionately exclude women or people with disabilities, respectively, these structural barriers lead to differentiation that contributes to social disadvantage. There is nothing inherently unjust about height requirements or stairs; however, because these policies and structures produce unwanted differentiation, we can understand them as agents of discrimination. Regardless of intent, when given a normative overlay, discrimination refers to *socially undesirable* differentiation. Discrimination is then by its very definition (at least in the legal context) unfair.

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44. CAL. LAB. CODE § 980(c) (“Nothing in this section shall affect an employer’s existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.”).

45. See ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* 11 (1980) (stating that the dictionary meaning of “discrimination” is “morally neutral”).

46. *Id.* (explaining the political meaning of “discrimination” is “non-neutral, pejorative” and that simply calling a practice “discriminatory” may be sufficient for some people “to judge it wrong”).

47. *Id.*

48. See *id.*

Although the wrong at stake with discrimination (that is, the deprivation of social benefits, such as employment, through harmful differentiation) may be clearer than the intangible wrongs associated with privacy, exactly what makes one type of differentiation problematic and another permissible is not always clear. For example, if an employer chooses only to promote graduates of the University of Southern California (USC), that employer is differentiating on the basis of educational institution. Even though many people, including UCLA graduates, might find such a practice arbitrary or even irrational, it would nonetheless be socially acceptable, at least to some degree. But why? To start, employers almost always consider the education of their employees. Additionally, non-USC graduates have not faced widespread systematic disadvantage, so one employer's policy, though idiosyncratic, would not be socially damaging. Hence, it may not be enough for even irrational differentiation to be considered "discriminatory."

So if the arbitrary, irrational, or idiosyncratic nature of the differentiation is not enough to make it discriminatory, which kinds of differentiation are so problematic that the law intervenes to stop them? Often the determination of whether a practice is discriminatory in the pejorative sense turns on whether the conduct in question leads to disadvantage on the basis of a characteristic that either has personal or social relevance, or has been the basis for systematic social subjugation in the past.<sup>49</sup> Traditional antidiscrimination categories include race and ethnicity, sex, religion, age, and disability.<sup>50</sup> Antidiscrimination laws communicate the message that society does not wish to distribute its benefits and burdens on the basis of a particular protected status because of the significance of that status.

The unwillingness to allow decision makers to consider certain information, as expressed in laws prohibiting discrimination, can be traced to the norms of fairness and equality, respectively. The relationship between fairness and antidiscrimination is so intuitive it

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49. As discussed in further detail in Part I.C, one vision of antidiscrimination focuses on protected traits (anticlassification) and the other focuses on past disadvantage (antisubordination).

50. See, e.g., Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2012); Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (2012); Age Discrimination in Employment Act of 1967 § 4(a), 29 U.S.C. § 623(a) (2012).

almost escapes notice. As described, the legal definition of discrimination implies the unfairness of the underlying differentiation. That is, to be deemed discriminatory, a decision must turn on a status that society has already agreed is inappropriate. Fairness is in many ways the touchstone of antidiscrimination law.

Antidiscrimination law's connection to equality, however, is more complex. Although antidiscrimination protections may prevent individual instances of unfair treatment, they can also be understood as policy instruments, the ultimate goal of which is to promote social equality by eradicating systemic disadvantage on the basis of a particular trait or membership in a certain group.<sup>51</sup> Perhaps somewhat counterintuitively, treating people equally (that is, ensuring they do not face systematic social disadvantage) may in fact require us to treat them differently, as in the case of reasonable accommodations for people with disabilities.<sup>52</sup>

Given its underlying norms of fairness and equality, the purpose of antidiscrimination legislation is to prevent unfair, society-wide disadvantage on the basis of the protected status. To accomplish that purpose, antidiscrimination statutes restrict the criteria a covered entity can consider when making certain kinds of socially relevant decisions. Title VII of the Civil Rights Act is an example of a prototypical antidiscrimination provision:

It shall be an unlawful employment practice for an employer—  
 (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or  
 (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities

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51. Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839 (2003) (asserting that "[a]ntidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination" and explaining that the wrongness of actionable discrimination stems from "harmful effects in continuing the systematic subordination of socially salient groups"); see also Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 388-91 (2007) (stating that antidiscrimination laws "are, at their foundation, public policy").

52. See generally Bagenstos, *supra* note 51, at 860-63.



or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>53</sup>

The law forbids the covered entity (employers) from considering a designated protected status (race, color, religion, sex, or national origin) when making certain kinds of specific determinations (employment-related decisions).<sup>54</sup> Antidiscrimination statutes tend to impose primarily negative constraints.<sup>55</sup>

Because privacy law and antidiscrimination law are regarded as having different underlying norms, legislative purposes, and structures, they are typically understood and analyzed as separate and distinct areas of law. I call this common understanding privacy/antidiscrimination essentialism:

*Figure 1. Privacy/Antidiscrimination Essentialism*

	Underlying Norms	Legislative Purpose	Legal Protection	Examples
Privacy (Informational)	Autonomy	Prevent unauthorized third party access to protected information	Restrictions on valid access to protected information and disclosure requirements	Privacy Act (source-based) Cal. Social Media Act (recipient-based)
Antidiscrimination	Equality Fairness	Prevent disadvantage on the basis of protected status	Restrictions on considerations of protected status	Title VII

Yet although an essentialist construction may in many cases be accurate, another perspective is also available. Although privacy law and antidiscrimination law may operate separately, they can also operate symbiotically. The following Sections explore the conceptual similarities between privacy and antidiscrimination and introduce the privacy/antidiscrimination symbiosis.

53. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2.

54. *Id.*

55. See Roberts, *supra* note 27, at 619.

### *B. Privacy and Antidiscrimination as Related Concepts*

As concepts, privacy and antidiscrimination are linked. Informational privacy deals with our ability to control access to information about ourselves. Antidiscrimination protects against disadvantage on the basis of particular statuses. As demonstrated by the examples in the Introduction, in many cases, discriminators require access to knowledge about protected status before they are able to discriminate. If the law cuts off information access, it can likewise undermine the ability to discriminate. This Section takes a step back, looking at the theories and processes behind privacy and antidiscrimination.

#### *1. Privacy*

Before exploring the practical work privacy can do for antidiscrimination, it is useful to examine the connection between these two concepts on a theoretical level. Although what constitutes an invasion of privacy is notoriously muddled, we can classify the harms associated with those activities as either *intrinsic*<sup>56</sup> or *extrinsic*.<sup>57</sup> As explained in the preceding Section, this Article focuses on privacy's informational aspects. Protecting certain information indicates that this particular information is intimate or personal and should remain within the individual's control. In the context of informational privacy, an intrinsic privacy harm occurs when an unauthorized third party acquires private information.<sup>58</sup> An extrinsic privacy harm occurs when that third party acts on it.<sup>59</sup>

Because privacy harms are traditionally dignitary in nature, or as Samuel Warren and Louis Brandeis famously wrote, an "injury

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56. Ryan Calo has referred to such harms as "subjective" privacy harms, describing them as being "internal to the person harmed" and "flow[ing] from the perception of unwanted observation." M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1142 (2011); see also Roberts, *supra* note 27, at 616; Solove, *A Taxonomy of Privacy*, *supra* note 20, at 487.

57. Calo calls this category "objective" privacy harms and describes them as "external to the person harmed" and "involv[ing] the forced or unanticipated use of information about a person against that person." Calo, *supra* note 56, at 1143; see also Orentlicher, *supra* note 27, at 78 (discussing the possible negative consequences of sharing private medical information); Solove, *A Taxonomy of Privacy*, *supra* note 20, at 489.

58. See Calo, *supra* note 56, at 1143.

59. See *id.*

to the feelings,”<sup>60</sup> intrinsic harms are those most readily associated with violations of privacy. An intrinsic privacy violation occurs when an entity simply gains unauthorized access to private information, even if that entity never actually uses the information to the affected person’s detriment.<sup>61</sup> So what is the harm?

Acknowledging intrinsic harms goes back to privacy’s focus on autonomy. The individual experiencing the privacy violation has lost control over information about herself. She is no longer able to decide who knows what about her, at least in reference to the privacy that has been breached. The harm is the loss of control and its accompanying psychological effects, which may include any number of nonphysical injuries, such as “incivility, lack of respect, or causing emotional angst.”<sup>62</sup> Importantly, these intangible harms not only negatively impact the individual herself, but they may also have widespread negative social implications by undermining communally desirable norms like trust and respect.<sup>63</sup> Intrinsic privacy violations thereby generate both personal and social harm. Importantly, intrinsic privacy harms are self-contained. The privacy violation and the resultant harm converge, occurring simultaneously as the injury. Put differently, the violation of the privacy *is* the associated harm.

By contrast, extrinsic privacy harms are distinct from, yet related to, the underlying privacy violation. Effectively, they are the harms *made possible* by violating privacy.<sup>64</sup> Daniel Solove calls the potential for these nondignitary harms “architectural.”<sup>65</sup> He explains that “[t]hey involve less the overt insult or reputational harm to a person

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60. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

61. See Calo, *supra* note 56, at 1147-48.

62. Solove, *A Taxonomy of Privacy*, *supra* note 20, at 487.

63. *Id.* at 488-89 (“[P]rivacy harms affect the nature of society and impede individual activities that contribute to the greater social good.”).

64. Not all scholars agree that such concerns are truly issues related to privacy. See Marmor, *supra* note 26, at 12 (“[T]he concern here is not directly about privacy, it is a concern about abuse of power that might follow from the fact that some particular kind of entity knows too much about you. The concern is that the entity in question may *do things* that it should not be doing with the information it has, in ways which would be detrimental to your interests.”); see also *id.* (“Most of these concerns ... are not directly about matters of privacy; the interest they protect is an additional concern that is specific to the kinds of abuse of information that particular entities are suspected of.”).

65. Solove, *A Taxonomy of Privacy*, *supra* note 20, at 487-88.

and more the creation of the risk that a person might be harmed in the future.”<sup>66</sup> The intrusion produces the information that will serve as the basis of another harmful act. While intrinsic privacy harms are purely dignitary, extrinsic privacy harms may be tangible, such as identity theft or a decision to discriminate. Additionally, whereas a privacy violation always holds the potential to produce a concurrent intrinsic harm, not every privacy violation will necessarily produce an extrinsic effect. That said, the possibility of an extrinsic harm might constitute part of the intrinsic injury. For instance, one reason that the autonomy loss resulting from unauthorized disclosure is harmful could be that it leads to anxiety about the future discriminatory use of that information, regardless of whether that use ever takes place.<sup>67</sup> Further, extrinsic privacy harms have a but-for relationship to the intrinsic privacy violation: but for my employer gaining access to my private information (intrinsic privacy violation), my employer would not have decided to fire me (extrinsic harm). Consequently, extrinsic privacy harms must always happen *after* the intrinsic privacy violation has already occurred, if they ever happen at all.

More often than not, laws associated with privacy tend to focus on the intrinsic harms that could result from a violation. As previously described with respect to informational privacy, privacy statutes safeguard autonomy by outlawing nonconsensual, third-party access.<sup>68</sup> Consequently, privacy protections either restrict the entities that may lawfully access certain information, outline how those entities must handle that information once it is obtained, or some combination of the two. Privacy laws therefore regulate whether or how the information is obtained, not the possible negative consequences that could flow from the protected information’s acquisition. This focus on intrinsic privacy harms in part explains privacy/antidiscrimination essentialism. Because the primary conceptualization of privacy harms is dignitary, lawmakers and commentators may fail to appreciate how privacy law can likewise protect against the extrinsic harm of discrimination.

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66. *Id.*

67. *See id.* at 520-22.

68. *See supra* note 26 and accompanying text.

However, as will be discussed below, certain forms of discrimination can be recast as extrinsic privacy harms.

## 2. *Antidiscrimination*

As discussed above, equality and fairness are the underlying norms most frequently associated with antidiscrimination. Importantly, like privacy, antidiscrimination also implicates the availability of particular kinds of information. Depending on whether the information related to protected status is readily ascertainable, antidiscrimination laws can be understood as prohibitions on certain *extrinsic* privacy harms because those laws prevent decision makers from using certain kinds of information to an individual's detriment. To make this connection more clear, it is worth unpacking how discrimination takes place.

As noted, the value-neutral meaning of discrimination is simply differentiation. Regardless of its normative implications, discrimination connotes a distinction or a difference. To discriminate in favor of group A during hiring, an employer must first recognize that some of its applicants are members of group A and some are not. Acknowledging difference is the first step in the process of discrimination. That is not to say, however, that differentiation is socially undesirable in and of itself. Human difference is a universal and inescapable reality. No two people are exactly alike,<sup>69</sup> and to ignore our differences would be to deny our individuality. In fact, the acknowledgment of difference may at times be essential to the antidiscrimination project.<sup>70</sup>

Once we differentiate, we tend to categorize. In fact, proponents of social cognition theory have postulated that human beings are hardwired to group like things together to process information efficiently and to function within the world.<sup>71</sup> Categorization then leads to the assessment of the things inside and outside those categories.<sup>72</sup>

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69. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 3 (1990).

70. See *infra* Part I.C (discussing the antisubordination principle).

71. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1164 (1995); see also MINOW, *supra* note 69, at 7.

72. See MINOW, *supra* note 69, at 3.

In other words, categorization leads to stereotyping.<sup>73</sup> Like the word “discrimination,” “stereotyping” also has neutral and pejorative meanings. In its neutral sense, stereotyping means simply to group together like things and make generalizations about their characteristics.<sup>74</sup> People stereotype all kinds of things as a matter of everyday life. As Linda Hamilton Krieger points out, we cannot read without stereotyping because any variation in fonts or handwriting would be perceived as a different letter.<sup>75</sup> Because human beings live in such complex perceptual environments, we must simplify them in order to function.<sup>76</sup> To that end, Krieger asserts that stereotyping is “nothing special.”<sup>77</sup> It is merely an aspect of normal human cognitive functioning.<sup>78</sup> Differentiating and stereotyping are therefore not intrinsically problematic. To lead to discrimination, the presence of difference and its associated categorization must somehow cause differential treatment; the discriminator must attach some salience to the observed difference and its associated categorization within the relevant domain. The employer must have positive associations with members of group A (or negative associations with nonmembers) in the context of work. This type of value assignment is the second step in the process of many instances of discrimination.

Value assignment occurs when the difference goes from a neutral observation (A is *different* than B) to a preference-related judgment (A is *better* than B). When people differentiate and categorize, they likewise adhere meaning to those distinctions, paving the way for the construction of social hierarchies and creating a basis for differential treatment.<sup>79</sup> Only when a categorization is affiliated with a

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73. *Id.*

74. *See* Krieger, *supra* note 71, at 1164.

75. *See id.*

76. *See id.* at 1188-89.

77. *Id.* at 1187-88.

78. *Id.* (“It is simply a form of categorization, similar in structure and function to the categorization of natural objects. According to this view, stereotypes, like other categorical structures, are cognitive mechanisms that *all* people, not just ‘prejudiced’ ones, use to simplify the task of perceiving, processing, and retaining information about people in memory. They are central, and indeed essential to normal cognitive functioning.”).

79. Martha Minow has written quite eloquently on this point:

When we identify one thing as like the others, we are not merely classifying the world; we are investing particular classifications with consequences and positioning ourselves in relation to those meanings. When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude,

negative attribute does it become a “stereotype” in the unfavorable sense. Thus, acknowledging and grouping difference gives way to the creation of cognitive biases, and it is those biases that ultimately lead to discriminatory conduct.<sup>80</sup> Discrimination can be understood as a multistage process that requires at least two preceding steps: (1) differentiation (categorization) and (2) value assignment:

*Figure 2. Process of Discrimination*

Differentiation (Categorization) → Value Assignment → Discriminatory Act(s)

This three-part process captures both intentional and certain unintentional varieties of discrimination.

In the case of intentional discrimination, the process of differentiation, value assignment, and discriminatory conduct is quite clear. A discriminator observes a difference, consciously attaches a value to that difference, and then acts with a clear intent to discriminate. There are at least two ways to discriminate intentionally—by animus or by proxy—and both involve conscious reliance on an acknowledged difference. Animus-based intentional discrimination is the garden-variety form of discrimination. A discriminator has a negative association with a particular attribute and acts on that negative association. In such cases, the discriminator has stigmatized the relevant difference.<sup>81</sup> Negative affect is, therefore, the value linked to the difference in the second step.

Discriminators may also consciously consider difference not out of dislike, but out of perceived utility. For example, an employer may opt not to hire or promote women of child-bearing age based on

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to distinguish, to discriminate.

MINOW, *supra* note 69, at 3.

80. Krieger, *supra* note 71, at 1190, 1199.

81. Difference is thus also a prerequisite for stigma formation. See Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363 (2001) (describing stigma formation in four stages: (1) acknowledging and labeling difference, (2) generating negative stereotypes based on those labels, (3) categorizing people based on labels, (4) diminishing social status based on labels); see also MINOW, *supra* note 69, at 50 (“Buried in the questions about difference are assumptions that difference is linked to stigma and that sameness is a prerequisite for equality.”).

the belief that they are more likely to leave or take time off to raise a family, making them a riskier investment of the employer's resources.<sup>82</sup> In such a case, the employer actively takes difference into account, but the value attached to the relevant difference is based on its approximation of some other quality or tendency rather than dislike.

Likewise, unconscious biases may also lead to discrimination, but absent any explicit intent to discriminate or even the knowledge of the bias itself. Social cognition research reveals that normal cognitive function can result in social stereotyping.<sup>83</sup> These stereotypes, complete with their assigned values, then shape perception. Krieger explains:

Social cognition theory provides a fundamentally different explanation of how stereotypes cause discrimination. Stereotypes are viewed as social schemas or person prototypes. They operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.<sup>84</sup>

The stereotype distorts the information.<sup>85</sup> Perhaps frustratingly then, people are frequently unaware of their own cognitive processes, making the discrimination not just unintentional but also unconscious.<sup>86</sup> Hence, some discriminators may hold the good faith belief that they are acting without bias.<sup>87</sup> They do not realize that they have engaged in the value assignment necessary to produce a discriminatory outcome. Normal cognitive function related to processing and understanding human difference—not outright animus or discriminatory intent—can, therefore, lead to discrimination.<sup>88</sup>

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82. Krieger uses a similar example to construct a syllogism for describing proxy discrimination. Krieger, *supra* note 71, at 1182-83.

83. *Id.* at 1198.

84. *Id.* at 1199.

85. *Id.* at 1198 (“[T]he stereotype, acting as an associative construct, biases the way we see the evidence.”).

86. *See id.*

87. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 974-75 (2006); *see also* Krieger, *supra* note 71, at 1209.

88. According to Krieger, this observation is a “central premise of social cognition theo-



Moreover, social cognition theory also reveals that discrimination is not necessarily the result of a single moment of decision, but rather the culmination of various experiences or interactions.<sup>89</sup> Over time, small differences in attitude or treatment can accumulate to create disparities. Discrimination could thereby be the result of a series of small—perhaps unconscious—decisions.<sup>90</sup> Yet the unintentional and amorphous nature of this form of discriminatory conduct does not mean it is not harmful. Even subtle and unconscious forms of discrimination can violate the antidiscrimination principle by undermining fairness and equality.<sup>91</sup>

Although the three-part process described above captures how many types of discrimination occur, it fails to describe one very important class of unintended discrimination: discrimination caused by various administrative or structural barriers, such as height, educational requirements, or inaccessible spaces. In such cases, the employer does not intend to discriminate but adopts a policy or occupies a building that has the practical effect of excluding individuals with a certain protected status. For example, an employer that adopts a minimum height requirement to ensure its employees can safely operate machinery will ultimately exclude more women than men from eligibility.<sup>92</sup> Likewise, a degree requirement may exclude more people of color than whites.<sup>93</sup> Finally, an employer that imposes a lifting requirement will likely hire fewer individuals with disabilities.<sup>94</sup> These kinds of situations are collectively known as

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ry—that cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes.” Krieger, *supra* note 71, at 1187.

89. *Id.* at 1190-91.

90. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001) (noting that “behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns”).

91. Jolls & Sunstein, *supra* note 87, at 972 (“If people are treated differently, and worse, because of their race or another protected trait, then the principle of antidiscrimination has been violated, even if the source of the differential treatment is implicit rather than conscious bias.”).

92. See generally LEX K. LARSON ET AL., LARSON ON EMPLOYMENT DISCRIMINATION § 42.03 (2013) (describing the disparate impact effects of height and weight requirements).

93. See *id.* § 26.04 (describing the disparate impact effects of educational requirements).

94. See, e.g., *Chi. Reg'l Council of Carpenters v. Thorne Assocs. Inc.*, 893 F. Supp. 2d 952 (N.D. Ill. 2012); *Stinson v. W. Suburban Hosp. Med. Ctr.*, No. 97 C 3701, 1998 WL 188938

cases of “disparate impact” and are legally actionable.<sup>95</sup> Although the process above describes both intentional and unintentional “disparate treatment,”<sup>96</sup> it does not apply to every variety of unlawful discrimination.

Ordinary antidiscrimination laws intervene at the last stage of the discrimination process: the discriminatory conduct itself.<sup>97</sup> Because they simply prohibit decisions based on protected status, they do not seek to prevent the preceding differentiation or value assignment that makes those decisions possible.<sup>98</sup> As will be discussed at greater length, invoking privacy protections intervenes at the first step of the discrimination process, rendering the subsequent valuation and discrimination impossible as a practical matter.<sup>99</sup> Privacy law has the power to cut the process of discrimination short.

### *C. Privacy/Antidiscrimination Symbiosis*

The previous Section explored how privacy relates to antidiscrimination on a conceptual level. This Section takes the resulting observations and uses them to develop a strategy for legal protection that uses privacy law to prevent discrimination. Specifically, it argues that certain violations of privacy can also be understood as antidiscrimination harms, and vice versa. Consequently, protections generally considered to be “privacy laws” can also be construed as antidiscrimination protections.

Because discrimination frequently requires the presence of acknowledged difference, access to information related to protected

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(N.D. Ill. Jan. 21, 1998).

95. BLACK’S LAW DICTIONARY, *supra* note 28, at 538 (defining “disparate impact”).

96. *Id.*

97. *See* Jolls & Sunstein, *supra* note 87, at 977-78.

98. *See id.* at 978.

99. Of course, some scholars advocate the second step as the proper place for intervention. *See, e.g.,* MINOW, *supra* note 69 (advocating the abandonment of majoritarian norms that distinguish one group from another and a reexamination of the way we draw distinctions); Jolls & Sunstein, *supra* note 87, at 977 (proposing that “[t]he law might engage in ... debiasing ... seeking to reduce people’s level of bias rather than to insulate outcomes from its effects”); Krieger, *supra* note 71, at 1166 (“[T]he nondiscrimination principle, currently interpreted as a proscriptive duty ‘not to discriminate,’ must evolve to encompass a prescriptive duty of care to identify and control for category-based judgment errors and other forms of cognitive bias in intergroup settings”).

status gives employers the opportunity to discriminate. Privacy protections can prevent entities from discriminating by obscuring their knowledge of the protected status. Although ultimately arguing in favor of increasing the availability of personal information to reduce discrimination, Lior Jacob Strahilevitz acknowledges this position:

One way to protect African Americans and other disadvantaged groups would be to make them appear indistinguishable from whites. Indeed, some efforts to reform antidiscrimination law have suggested that statistical discrimination can be mitigated if the relevant decision makers are deprived of information about a candidate's race, religion, and gender. With less information, decision makers presumably will focus more on the black and white of a job applicant's resume and less on the black or white of an applicant's skin.<sup>100</sup>

If an employer cannot access a particular kind of information, she cannot discriminate on the basis of that information. However, once an employer acquires the ability to discriminate, the knowledge of an employee's protected status may influence the employer's decisions in conscious, as well as unconscious, ways. Capitalizing on the insight that information access may be a prerequisite for discrimination in certain circumstances, lawmakers could adopt privacy protections with the explicit purpose of preempting discriminatory conduct.

*Figure 3. Privacy/Antidiscrimination Symbiosis*

	Underlying Norms	Legislative Purpose	Legal Protection
Privacy law as antidiscrimination law	Equality Fairness	Prevent disadvantage on the basis of protected status	Restrictions on valid access to information related to protected status

Unlike ordinary antidiscrimination laws, which attack the discriminatory conduct itself, privacy law as an antidiscrimination instrument acts earlier, intervening at the differentiation stage of

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100. Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 371 (2008).

the process. However, whether discrimination constitutes an extrinsic privacy violation, and by consequence an appropriate target for privacy law, depends upon the antidiscrimination perspective that lawmakers adopt.

When debating how the law should protect against systematic social disadvantage, scholars employ two differing constructions of the meaning of antidiscrimination: antisubordination and anticlassification.<sup>101</sup> Antisubordination holds that the goal of the antidiscrimination project should be elevating the social status of historically disadvantaged groups, for example, people of color and women.<sup>102</sup> Anticlassification, however, maintains that individuals should not face intentional discrimination on the basis of certain protected traits, such as race and sex, regardless of a history of social subjugation.<sup>103</sup> An antisubordination approach advocates ending both intended and unintended disparities faced by racial minorities and women, including through positive differential treatment like affirmative action or diversity initiatives. In contrast, anticlassification would support outlawing any intentional consideration, positive or negative, of race or sex generally. These two visions of antidiscrimination implicate privacy differently.

On one hand, anticlassification—with its ban on all differentiation on the basis of a protected trait—favors strong privacy protection. In fact, anticlassification norms are often referred to in terms of “blindness.”<sup>104</sup> Because anticlassification holds that employers should behave as though they cannot see the individual’s protected status, that construction of the antidiscrimination principle renders them “blind” to the protected status. The logic behind blindness policies is even more straightforward when the protected status is *unknown*. If we can prevent access to the protected information

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101. See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

102. Siegel, *supra* note 101, at 1472-73 (defining the antisubordination principle).

103. Balkin & Siegel, *supra* note 101, at 10 (defining the anticlassification principle).

104. The most culturally pervasive example of the trait blindness approach to antidiscrimination law is, of course, “colorblindness.” As a disability studies scholar, I do not personally advocate the language of blindness to describe antidiscrimination norms; however, I acknowledge it here because of its pervasiveness and relevance to the subject matter of this Article.

(intrinsic privacy harm), we can safeguard against discrimination on the basis of that information further down the line (extrinsic privacy harm). Strong privacy protections take the blindness trope a step further: There is no need to feign blindness if the relevant status is never “seen.” Privacy protections for information related to protected status thus safeguard against both intrinsic privacy harms and the extrinsic privacy harm of violating the anticlassification principle.

On the other hand, antisubordination sometimes may require the relinquishing of privacy to realize its objectives. As explained, this iteration of the antidiscrimination principle seeks to elevate the social status of historically subjugated groups. Instead of merely outlawing all considerations of race or sex, antisubordination attempts to raise the social standing of people of color and women. In so doing, the antisubordination principle targets both intentional and unintentional discrimination and advocates affirmative action to promote equality, integration, and access. Consequently, antisubordination embraces disparate impact actions, as well as positive differential treatment for members of the protected group.<sup>105</sup> Its support for both disparate impact actions and positive differential treatment distinguishes antisubordination from anticlassification.<sup>106</sup> These two qualities also place antisubordination at odds with privacy in certain circumstances. Specifically, to assess whether a policy disproportionately impacts a particular group, or to allow affirmative action, the covered entity must have some knowledge of the relevant information. A robust privacy protection may be ideally suited for anticlassification,<sup>107</sup> but may actually function to undermine certain goals of antisubordination. In this way, privacy and antisubordination may at times be in tension.<sup>108</sup>

In sum, the ability for privacy to prevent discrimination depends upon the approach taken. An anticlassification approach to antidiscrimination favors “blindness”; that is, acting as though a protected

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105. See Balkin & Siegel, *supra* note 101, at 9.

106. *Id.* at 12.

107. From a practical perspective, complete ignorance of protected status may not be desirable, even for those favoring anticlassification. For example, disclosures to the EEOC of employees' race and sex might allow employers to uncover disparate treatment of their employees. See *infra* notes 283-87 and accompanying text.

108. I explore the tension between robust privacy protections and the antidiscrimination principle at greater length below in Part III.B.

status is imperceptible.<sup>109</sup> Privacy law is, therefore, a powerful tool for anticlassification because it can deny potential discriminators access to the information in the first place. However, the antisubordination approach requires access to information related to protected status to facilitate disparate impact actions and positive differential treatment. Antisubordination may be at odds with privacy law in some circumstances.

It is worth pausing for a moment here to acknowledge a significant weakness of privacy law as antidiscrimination law, as well as anticlassification in general. An individual's protected status, such as her race, her religion, or her disability often constitutes an important aspect of her personal identity, making it something she may want to celebrate rather than obscure. To the extent that anticlassification and privacy pressure an individual to conform, pass, cover, assimilate, or stifle her ability to freely express a meaningful identity, they can be understood as socially damaging and counter to many goals of the greater antidiscrimination project. In other words, we might be effectively preventing negative differential treatment on the basis of a protected status, while at the same time denying the social relevance and cultural richness of the status itself, as well as the benefits of diversity writ large. Furthermore, privacy does nothing to undo the existence of negative social stereotypes. Thus, using privacy to prevent discrimination could eliminate the symptom without addressing the cause. Part III.D.2 attempts to address these concerns by discussing socially beneficial disclosures. This Article takes the position that the individual herself—rather than potential discriminators like employers—should decide when and how to disclose information related to protected status. Using privacy protections to thwart discrimination prohibits unwanted inquiries by third parties, yet does not obligate silence by the individual.

Moreover, in many situations individuals cannot control the perception of difference, even if they wanted to. For this reason, privacy law frequently would do little work in preventing discrimination, leaving antidiscrimination law to bear the brunt of the burden. Take race as an example. If an individual's appearance provides clues to her racial identity, she cannot conceal her difference (yet if

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109. See *supra* note 104 and accompanying text.

she can pass she may at times choose to do so); however, Title VII prevents her employer from taking this particular information into account when making employment decisions.<sup>110</sup> While the individual may not be able to control who accesses information related to her race, the law can intervene to prevent entities from acting on that information.

Finally, this Article does not seek to supplant the reasons lawmakers have opted to protect privacy in the past. To be sure, preventing discrimination is neither the single nor best reason to safeguard sensitive information. Privacy protections also generate independent benefits, such as supporting individual autonomy and self-differentiation. For example, even in cases when an individual's status might be apparent upon meeting her, the act of asking itself may constitute a dignitary offense because the inquiry could be perceived as an act of prying<sup>111</sup> or because it makes the person feel self-conscious.<sup>112</sup> However, this Article primarily concerns itself with the work privacy can do with respect to preempting systematic disadvantage, not the benefits of privacy qua privacy. Going back to the distinction between norms, legislative purpose, and legal protections discussed in Part I.A, this approach demonstrates how a type of legal protection that on its face appears to align with privacy may also serve the goals and norms associated with antidiscrimination.

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Privacy law and antidiscrimination law have been understood as distinct kinds of legal protections with different underlying goals and norms. However, privacy and antidiscrimination are conceptually linked.<sup>113</sup> Privacy deals with control over one's personal information, and in many cases even unconscious discrimination requires differentiation and, as a result, knowledge.<sup>114</sup> If individuals could control the kinds of information available to potential dis-

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110. Civil Rights Act of 1967 § 703(a), 42 U.S.C. § 2000c-2 (2012).

111. See Solove, *A Taxonomy of Privacy*, *supra* note 20, at 500 (identifying “interrogation” as a harm associated with invasions of privacy).

112. Drawing attention to a protected status could actually affect performance. Thus merely asking could be harmful. See Jessica L. Roberts, *Rethinking Antidiscrimination Harms* (2015) (unpublished manuscript) (on file with author).

113. See *supra* Part I.B.

114. See discussion *supra* Part I.B.2.

criminator, they might be able to prevent discrimination from occurring. The kinds of legal protections typically associated with privacy can serve the goal of antidiscrimination by restricting access to information related to protected status, rendering the decision maker incapable of using that information to a person's detriment.

## II. THE PRIVACY/ANTIDISCRIMINATION SYMBIOSIS IN ACTION

The preceding Part dismantled privacy/antidiscrimination essentialism by demonstrating the conceptual linkage between privacy and antidiscrimination, particularly the anticlassification principle, and introduced the privacy/antidiscrimination symbiosis. This Part turns from theory to practice.

For the privacy/antidiscrimination symbiosis to operate, the information related to protected status must be unknown. Privacy is, therefore, a particularly strong weapon against genetic-information discrimination. Whereas traditional antidiscrimination categories like race and sex tend to be readily observable, most genetic information is not visible to the naked eye.<sup>115</sup> As a result, obtaining genetic information frequently requires taking a genetic test.<sup>116</sup> Accordingly, becoming the object of genetic-information discrimination can necessitate taking positive action.<sup>117</sup> This opt-in quality differentiates genetic-information discrimination from the more traditional antidiscrimination categories and, as a result, makes it a particularly good candidate for using privacy to combat discrimination.

In 2008, Congress passed the Genetic Information Nondiscrimination Act (GINA).<sup>118</sup> GINA, which prohibits genetic-information discrimination in health insurance and employment, does more than simply outlaw discriminatory conduct. It also prohibits employers from requiring—or even requesting—their employees' genetic

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115. Bradley A. Areheart, *GINA, Privacy, & Antisubordination*, 46 GA. L. REV. 705, 711 (2012); Pauline Kim, *Regulating the Use of Genetic Information: Perspectives from the U.S. Experience*, 31 COMP. LAB. L. & POL'Y J. 693, 699-700 (2010).

116. Roberts, *supra* note 27, at 624.

117. *Id.* at 624-25. However, this is not always the case. Sometimes a person's appearance will reveal an aspect of their genetic information. For example, one can deduce from visual observation that an individual has trisomy 21.

118. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, and 42 U.S.C.).



information.<sup>119</sup> It thus contains both privacy and antidiscrimination protections. This Part invokes GINA as a practical example of the blending of these two substantive legal paradigms within a single antidiscrimination law. It reads GINA's antidiscrimination and privacy provisions in concert, arguing that the statute has an anti-discrimination purpose and that Congress employed privacy law with the explicit intent of preventing discrimination when it banned attempts to obtain genetic information. GINA is best understood as a real-world example of the privacy/antidiscrimination symbiosis.

#### A. *GINA's Protections*

Title II of GINA prevents employers, and other employment-related entities, from engaging in certain kinds of conduct that implicate an individual's genetic information.<sup>120</sup> It defines "genetic information" as "(i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual."<sup>121</sup>

Title II prohibits employers from soliciting genetic information. Section 202(b) states that an employer may not "request, require, or purchase genetic information with respect to an employee or a family member of the employee."<sup>122</sup> Although the subsection is titled "Acquisition of Genetic Information," an employer need not acquire—let alone act on—an employee's genetic information to run afoul of the statute. The employer need only ask.<sup>123</sup> Because of the broad definition of genetic information described above, GINA outlaws not only inquiring into an individual's genetic test results, but also prohibits asking about her family's health history.<sup>124</sup> GINA's section 202(b) follows the structure of a recipient-based privacy law. It outlaws unwanted inquiries by forbidding a particular kind of third party, employers, from attempting to obtain the protected

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119. *Id.* § 202.

120. *See id.* §§ 202-06.

121. *Id.* § 201(4)(A)(i)-(iii).

122. *Id.* § 202(b).

123. *See id.*

124. *Id.*

information.<sup>125</sup> GINA thereby protects against the kinds of autonomy-based harms ordinarily associated with privacy violations.<sup>126</sup>

Outside of section 202, GINA also protects the genetic privacy of employees, albeit from a source-based perspective.<sup>127</sup> Section 206, Title II's confidentiality provision, mandates that covered entities treat lawfully obtained genetic information as part of an employee's confidential medical record but requires them to keep that information on separate forms and keep it in separate files.<sup>128</sup> The provision also outlines which disclosures of lawfully obtained genetic information are proper, including to the employee herself, to authorized health researchers, and when done in response to official requests such as court orders or to otherwise comply with the law.<sup>129</sup> Because section 206 is a source-based privacy protection, its target is dissemination.<sup>130</sup>

Through its privacy and confidentiality provisions, GINA seeks to safeguard genetic information from unwanted intrusions.<sup>131</sup> However, as will be discussed at length in the ensuing Section, privacy is not the only lens through which to view GINA's section 202(b).

Unlike the novel privacy provision, GINA's prohibition on employment discrimination tracks the language found in other federal antidiscrimination statutes.<sup>132</sup> Section 202(a) deems it unlawful for an employer:

- (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
- (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee

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125. *See id.*

126. *See* Roberts, *supra* note 27, at 616-17.

127. *See* Genetic Information Nondiscrimination Act § 206.

128. *Id.* § 206(a). GINA adopts the same standards for employee medical privacy as the ADA adopts. *Compare id.*, with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 331-33 (codified as amended at 42 U.S.C. § 12112 (2012)).

129. Genetic Information Nondiscrimination Act § 206(b).

130. *See id.*

131. *See id.* §§ 202-06.

132. *See, e.g.*, Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2 (2012).

of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.<sup>133</sup>

Prohibited conduct includes adverse employment actions such as failing to hire, firing, or otherwise discriminating in compensation or other privileges of employment, as well as segregating or classifying employees based on their genetic information.<sup>134</sup> GINA draws heavily from Title VII of the Civil Rights Act.<sup>135</sup> Section 202(a) represents an ordinary antidiscrimination protection, a provision that promotes fairness and equality by constraining a covered entity's ability to consider protected status when making particular choices.<sup>136</sup>

When Congress passed GINA in 2008, many agreed that it was not a typical antidiscrimination statute.<sup>137</sup> In particular, GINA's ban on requesting, requiring, or purchasing sets it apart from its predecessors.<sup>138</sup> The vast majority of federal law does not prohibit employers from seeking—or even disclosing—information related to other kinds of protected statuses, such as an employee's race, sex, national origin, religion, or age.<sup>139</sup> Instead, most employment discrimination legislation simply outlaws adverse employment actions on the basis of the protected trait.<sup>140</sup> For example, Title VII outlaws acting on—but not acquiring—the relevant information.<sup>141</sup> In most circumstances, employers may inquire into an employee's protected status without discriminating against her as a matter of law.<sup>142</sup>

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133. Genetic Information Nondiscrimination Act § 202(a).

134. *Id.*

135. See Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 452-53 (2010) (comparing Title II of GINA and Title VII of the Civil Rights Act).

136. See Roberts, *supra* note 27, at 619; see also Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439, 1445 (2001); Kim, *supra* note 115, at 697.

137. See Roberts, *supra* note 135, at 440-41; see also Areheart, *supra* note 115, at 706-08; Corbett, *supra* note 19, at 1, 2; Kim, *supra* note 115, at 697.

138. See Corbett, *supra* note 19, at 9 (asserting that GINA “is written in the language of a workplace privacy law”).

139. Corbett, *supra* note 19, at 3.

140. See *id.*

141. Mark A. Rothstein, *Genetic Secrets: A Policy Framework*, in GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA, *supra* note 25, at 459-60.

142. See *id.*; see also Corbett, *supra* note 19, at 3, 4.

GINA's additional level of protection led at least one commentator to refer to GINA as an antidiscrimination-privacy hybrid.<sup>143</sup>

Although GINA is widely regarded as atypical, it is not the first federal antidiscrimination law to incorporate a privacy protection.<sup>144</sup> The Americans with Disabilities Act (ADA) also includes a privacy-related provision.<sup>145</sup> Section 12112(d)(1) states that the definition of "discrimination" on the basis of disability includes "medical examinations and inquiries."<sup>146</sup> The statute provides that, pre-employment, it is acceptable to ask about job-related functions<sup>147</sup> but "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."<sup>148</sup> The ADA then also contains a provision that reads like a recipient-based privacy provision.<sup>149</sup> However, the ADA's protection of privacy is not absolute. Although employers cannot ask about disability status that is unrelated to job function *before* extending an offer, the statute allows employers to condition employment on post-offer medical exams, so long as those examinations are universally conducted for all entering employees, and the results are kept confidential.<sup>150</sup> Hence, the ADA protects applicants from inquiries into their disability but they lose some measure of that protection after receiving a conditional offer.<sup>151</sup> (From a practical perspective, however, many employers seem to have abandoned widespread medical inquiries for fear of running afoul of the statute.<sup>152</sup>) Once an employee

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143. See Corbett, *supra* note 19, at 3 (calling GINA "a hybrid—part antidiscrimination statute and part privacy law").

144. See Rothstein, *supra* note 141, at 460.

145. See *id.*; see also Corbett, *supra* note 19, at 3, 4.

146. Americans with Disabilities Act of 1990 § 102(c), 42 U.S.C. § 12112(d) (2012).

147. *Id.* § 12112(d)(2)(B).

148. *Id.* § 12112(d)(2)(A).

149. See generally *id.* § 12112(d).

150. *Id.* § 12112(d)(2)(A)-(3)(B). The ADA also provides that the results of the exam be used only in conjunction with the employment-related inquiry. *Id.* § 12112(d)(3)(C). Moreover, employers may not impose qualification standards, which could include passing a medical exam, unless the results are "job-related and consistent with business necessity." *Id.* § 12112(d)(4)(A).

151. Rothstein, *supra* note 141, at 460.

152. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 346 (2009); see also Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1145 (2014).

actually begins working, the employer cannot “require a medical examination” or “make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability” unless the exam or inquiry is “job-related and consistent with business necessity.”<sup>153</sup> Thus, the ADA differs from GINA in the robustness of its privacy protection.

But even in light of the ADA, GINA’s inclusion of a strong privacy protection directly alongside an antidiscrimination mandate is distinctive.<sup>154</sup> Although the ADA provides that preemployment medical exams and inquiries constitute discrimination, it does so in a separate subsection, apart from the other statutory definitions of what it means to discriminate,<sup>155</sup> and it relaxes that protection post-offer.<sup>156</sup> Conversely, GINA’s privacy and antidiscrimination provisions appear side by side and protect both applicants and employees alike.<sup>157</sup> When the law passed, it garnered significant attention for blending these two kinds of protections.<sup>158</sup> Yet understanding GINA’s privacy and antidiscrimination provisions as separate and distinct oversimplifies the relationship between these two kinds of law. GINA is in fact the product of the privacy/antidiscrimination symbiosis.

### *B. GINA as Symbiotic Legislation*

The legal protection of genetic information offers a useful example of the tension inherent in the privacy/antidiscrimination essentialism described in Part I. Although advocates of safeguarding genetic information recognized the need for both kinds of protections, the initial efforts to regulate genetic information were often split between efforts to protect privacy and efforts to prevent

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153. 42 U.S.C. § 12112(d)(4)(A).

154. See Corbett, *supra* note 19, at 4, 5, 8-10.

155. The definition of “discriminate against a qualified individual on the basis of disability” appears in 42 U.S.C. § 12112(b), and the provisions dealing with medical examinations appear in § 12112(d).

156. See *supra* notes 150-51 and accompanying text.

157. See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, §§ 201-02, 122 Stat. 881, 905-08 (codified as amended at 42 U.S.C. §§ 2000ff to 2000ff-1 (2012)).

158. See, e.g., Corbett, *supra* note 19, at 2 (describing GINA as “a mutant antidiscrimination statute, differing in significant ways from prior antidiscrimination laws”); Kim, *supra* note 115, at 697 (stating that “GINA is a strange sort of antidiscrimination law”).

discrimination.<sup>159</sup> For example, early state protections did not stop employers from obtaining that information, only from using it to discriminate.<sup>160</sup> While state laws focused on antidiscrimination measures, the first federal bill dealing with genetic information was the Human Genome Privacy Act, introduced in 1990.<sup>161</sup> The legislation, which ultimately died in committee, would have outlawed the unauthorized disclosure of genetic information generated by federal agencies or federally funded entities, offering individuals remedies as well as providing criminal penalties for intentional violations.<sup>162</sup> The next federal legislation designed to protect genetic information was the Genetic Privacy and Nondiscrimination Act of 1995.<sup>163</sup> That law sought to “protect against discrimination by an insurer or employer based upon an individual’s genetic information” by limiting the conditions under which genetic information could be lawfully disclosed, and expanding the Civil Rights Act of 1964 to cover genetic-information discrimination.<sup>164</sup> Although the Human Genome Privacy Act and the Genetic Privacy and Nondiscrimination Act included privacy protections, the majority of bills proposed to combat genetic discrimination in the workplace simply outlawed the use of genetic information, not its acquisition.<sup>165</sup> Legal scholars recognized that genetic information simultaneously required both privacy and antidiscrimination protection. Yet like the legislators described above, many academics differentiated privacy and antidiscrimination as separate grounds for protecting genetic information with different concomitant legal

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159. See, e.g., Mark A. Rothstein, *The Law of Medical and Genetic Privacy in the Workplace*, in *GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA*, *supra* note 25, at 281, 291-92.

160. *Id.* at 292. *But see* Lawrence O. Gostin & James G. Hodge, Jr., *Genetic Privacy and the Law: An End to Genetics Exceptionalism*, 40 *JURIMETRICS J.* 21, 50 (1999) (“Employment discrimination is also a focal point of state genetics legislation. Employers may be prevented from requiring genetic tests of job applicants or using genetic information for employment decisions.” (citing statutes from New Jersey, Wisconsin, Texas, and Rhode Island)); Silvers & Stein, *supra* note 36, at 1359 (“Although current state laws lean heavily on precedents of privacy, antidiscrimination provisions have been sprinkled among them.”).

161. Philip R. Reilly, *Laws to Regulate the Use of Genetic Information*, in *GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA*, *supra* note 25, at 369, 372.

162. *Id.*

163. *Id.* at 381.

164. *Id.*

165. See Rothstein, *supra* note 141, at 478 (“Most of the current proposals to prohibit genetic discrimination in employment merely prohibit employer use of genetic information.”).

safeguards. For instance, in a 1999 article, Lawrence Gostin and James Hodge differentiated between “information management” (privacy) and “harm avoidance” (antidiscrimination) as two distinct kinds of legal protections for genetic information.<sup>166</sup> In 2002, Anita Silvers and Michael Stein noted that both the actual pre-GINA protections for genetic information and the scholarly discussions of the underlying right at stake were split between privacy and equality interests.<sup>167</sup> Colin Diver and Jane Cohen put it simply in their 2001 piece, stating that privacy and antidiscrimination protections for genetic information are “analytically and morally distinct.”<sup>168</sup> Given the assertion that privacy and antidiscrimination represented different goals with different types of legal safeguards, advocates of protecting genetic information would sometimes prefer one type of provision over the other. Most notably, pre-GINA, Pauline Kim argued that antidiscrimination was not the appropriate legal vehicle to protect genetic information.<sup>169</sup> Identifying personal autonomy—and not equality—as the relevant norm at stake, she advocated privacy as the best means for shielding employees from the misuse of their genetic profiles.<sup>170</sup> Describing antidiscrimination and privacy as “alternative paradigms” that “have distinct motivations and focus on different factors,” Kim asserted that “the privacy rights model more appropriately addresses employer use of genetic information, both as a theoretical and a practical matter.”<sup>171</sup> Thus, although Kim acknowledged the conceptual relationship between privacy and antidiscrimination,<sup>172</sup> she

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166. See generally Gostin & Hodge, *supra* note 160.

167. Silvers & Stein, *supra* note 36, at 1344 (asserting that pre-GINA “statutes, orders, and guidelines have been designed either to protect against violations of individuals’ privacy or to ensure their equal treatment in obtaining social goods, services, and opportunities by prohibiting discriminatory actions” and that “[e]thicists and legal scholars divide on whether these harms are properly conceptualized as ‘discrimination’ and whether privacy or equal opportunity is the main right we need to protect”).

168. Diver & Cohen, *supra* note 136, at 1445; see also Kim, *supra* note 115, at 703 (distinguishing between “privacy rights and anti-discrimination norms”).

169. Kim, *supra* note 19, at 1543.

170. *Id.* at 1537 (“If employer use of genetic information primarily threatens individual autonomy, then privacy law likely offers a better model for addressing that concern than the traditional antidiscrimination paradigm.”).

171. *Id.* at 1532; see also Corbett, *supra* note 19, at 8-9 (“Before GINA became law, genetic information was viewed by many as a privacy issue, and it was argued that privacy law offered a more appropriate treatment than antidiscrimination law.”).

172. Kim, *supra* note 19, at 1532 (acknowledging that “the concerns that underlie

viewed their normative purposes and associated legal protections as separate and distinct, with privacy as the more desirable option. Conversely, Silvers and Stein argued in favor of antidiscrimination protection on the basis of genetic identity as an alternative to the privacy paradigm.<sup>173</sup> Post-GINA, scholars continued to differentiate between privacy and antidiscrimination as different types of legal protections. Bill Corbett has referred to GINA as “a hybrid—part antidiscrimination statute and part privacy law.”<sup>174</sup> However, commentators differ on whether privacy or antidiscrimination constitutes the proper legal framework for safeguarding genetic information.<sup>175</sup>

To be fair, while distinguishing between privacy and antidiscrimination as legal protections that are different in kind, these authors have also noted that GINA’s protection of genetic privacy may thwart discrimination on the basis of genetic information by employers. However, instead of reading sections 202(a) and 202(b) as different types of protections that serve distinct underlying norms and legislative purposes, this Article asserts that GINA’s privacy provision is explicitly designed to serve the statute’s antidiscrimination objective. It is a real-world example of the privacy/antidiscrimination symbiosis. Although section 202(b) reads like a typical privacy protection, GINA’s structure and legislative history indicate that Congress was acting with a clear antidiscrimination objective.<sup>176</sup>

For instance, the statute’s heading describes the law as an act “[t]o prohibit discrimination on the basis of genetic information with respect to health insurance and employment,” not as an effort to protect genetic privacy.<sup>177</sup> Thus, GINA’s primary legislative objective is antidiscrimination.<sup>178</sup> Not surprisingly then, the congressional

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antidiscrimination laws and privacy rights are related”).

173. See generally Silvers & Stein, *supra* note 36.

174. Corbett, *supra* note 19, at 3.

175. Kim has maintained that an antidiscrimination framework would ultimately prove inadequate, calling strong privacy protections “the key to preventing misuse of genetic information by employers,” Kim, *supra* note 115, at 693-94, whereas Areheart has explored how section 202(b) might undermine efforts to outlaw subordination on the basis of genetic information, see generally Areheart, *supra* note 115.

176. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202, 122 Stat. 881, 907-08 (codified as amended at 42 U.S.C. § 2000ff-1 (2012)).

177. *Id.* (quoting the purpose statement of the Act).

178. The same claim can be made with respect to the ADA’s prohibition on preemployment inquiries into disability. Title I of the ADA seeks to eliminate employment discrimination on



findings focus more strongly upon the need for antidiscrimination—not privacy—protection. For example, after lauding recent developments in genetic science, Congress warned that “[t]hese advances give rise to the potential misuse of genetic information to discriminate in health insurance and employment.”<sup>179</sup> The findings cite the history of forced sterilization and racially targeted sickle-cell screenings, in addition to present-day evidence of genetic-information discrimination, to demonstrate the need for a federal antidiscrimination law.<sup>180</sup> Finally, section 202(b)’s placement in the statute gives additional clues regarding its purpose. Congress included the ban on acquiring genetic information in the antidiscrimination—not the confidentiality—portion of the statute.<sup>181</sup> Interestingly, neither the text of Title II, nor the statute’s purpose, explicitly mentions privacy.<sup>182</sup> In drafting section 202, Congress was not seeking to protect against separate and distinct privacy and antidiscrimination harms, but instead was intentionally using privacy to combat discrimination.

Congress also referenced the chilling effect that the fear of discrimination had on the public’s willingness to take genetic tests to justify its legislative intervention.<sup>183</sup> Interestingly, those fears implicate both antidiscrimination and privacy concerns. Pre-GINA, over 90 percent of Americans expressed anxiety about the misuse of their genetic information should potential discriminators gain access.<sup>184</sup> When asked about her fears related to genetic testing, one person reported:

I just was worried about being viewed differently.... I don’t know if discrimination is the right word—but it’s probably the best word.... An analogy is: women who are young and probably going to have kids. Although they aren’t discriminated against, everybody knows: if you hire this person, you might be stuck

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the basis of disability, and one of its mechanisms for so doing is through prohibiting certain kinds of medical exams. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331-33 (codified as amended at 42 U.S.C. § 12112 (2012)).

179. Genetic Information Nondiscrimination Act § 2(1).

180. *Id.* § 2(2)-(4).

181. *Compare id.* § 202, *with id.* § 206.

182. *Id.* §§ 2, 202.

183. *Id.* § 2(4)

184. *See Roberts, supra* note 27, at 603.

with a huge maternity leave bill. That influences people, even good people, *indirectly*. They have reservations, want a back-up plan, and may not give these employees all the work: “I won’t give you all these projects.” It would be illegal. But I’m sure a little bit of that goes on.<sup>185</sup>

The individual was concerned that *discrimination*—including unintentional or unconscious discrimination—could quickly follow the *knowledge* of difference. In other words, when “everybody knows” about a vulnerable status, it opens the door for devaluation and unfavorable differential treatment. Another individual, who tested positive for a genetic variation associated with respiratory disease, likewise chose to keep the results private because she feared future disadvantage: “It just seemed safer to keep it to myself ... I didn’t know what somebody would do with that information in the future ... and I was very concerned about it.”<sup>186</sup>

People who have taken genetic tests understand the relationship between testing, revelation, and discrimination. Specifically, they recognize how differences can lead to devaluation and eventually discrimination. People had two related fears surrounding genetic testing: (1) that their genetic information would be disclosed without their consent (intrinsic privacy harm) and (2) that once released, third parties would use that information to discriminate (extrinsic privacy/antidiscrimination harm).<sup>187</sup> Because individuals have to opt in for genetic-information discrimination in a way they do not for more traditional antidiscrimination categories, these twin concerns led some individuals to avoid genetic tests.<sup>188</sup> Those people employed their own version of protecting privacy to prevent discrimination. Restricting access to genetic information could also safeguard against future disadvantage on the basis of that information.<sup>189</sup>

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185. Robert Klitzman, *Views of Discrimination Among Individuals Confronting Genetic Disease*, 19 J. GENETIC COUNS. 68, 72-73 (2010).

186. PRESIDENTIAL COMM’N FOR THE STUDY OF BIOETHICS, PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING 42 (2012), available at <http://perma.cc/P353-79FF> (quoting Victoria Grove, an individual with a positive genetic test for alpha-1 antitrypsin deficiency who kept her test results secret).

187. Diver & Cohen, *supra* note 136, at 1443 (stating that a “common basis for apprehension stems from a fear that information about one’s genetic profile[] will be disclosed to others without one’s consent and will then be used to one’s personal disadvantage”).

188. Roberts, *supra* note 27, at 603.

189. *See id.* at 616; *see also* Kim, *supra* note 19, at 1537.

Among the fundamental reasons for protecting *genetic privacy* is bypassing *genetic-information discrimination*.<sup>190</sup> Aware of these and similar kinds of concerns, Congress concluded, “Federal legislation establishing a national and uniform basic standard is necessary to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.”<sup>191</sup> Congress passed GINA to protect against genetic-information discrimination and to assuage anxieties regarding the potential for such discrimination.<sup>192</sup>

Because the fears related to invasions of genetic privacy simultaneously implicate the fears related to genetic-information discrimination, Congress’s incorporation of a privacy provision into GINA’s antidiscrimination protections addresses the bifurcated nature of those concerns.<sup>193</sup> Section 202(b) prohibits requesting, requiring, or purchasing genetic information, thus outlawing unauthorized disclosure, whereas section 202(a) forbids discriminatory actions on the basis of that information. Like the underlying anxieties, the associated legal protections also have dual elements. As a result, GINA’s privacy provision has a clear antidiscrimination objective beyond preventing unwelcome access to genetic information.

The relevance of Congress’s intent in drafting GINA is twofold. On a general level, the unequivocally antidiscrimination purpose of the legislation demonstrates that Congress itself understood how privacy and antidiscrimination are conceptually linked, and that privacy law may function to prevent discrimination. Otherwise, it would not have placed a provision that structurally conforms to the privacy law paradigm in a subsection devoted to outlawing discrimination. GINA’s legislative history therefore supports two of this Article’s central claims: (1) privacy and antidiscrimination are related concepts and, at times, related types of legal protections and

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190. See Diver & Cohen, *supra* note 136, at 1445.

191. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2(5), 122 Stat. 881, 882 (codified as amended at 42 U.S.C. § 2000ff (2012)).

192. I have previously argued that in passing GINA, Congress acted with both research and antidiscrimination motivations. See Roberts, *supra* note 135, at 471.

193. See Kim, *supra* note 115, at 700 (noting that “the key to preventing discrimination based on genetic traits lies in protecting the privacy of genetic information” and that “Congress recognized this reality, and therefore GINA also seeks to protect the privacy of genetic information”).

(2) GINA provides a real-world example of privacy doing the work of antidiscrimination.

In addition to Congress, legal scholars have acknowledged the potential benefits privacy law may have for antidiscrimination,<sup>194</sup> specifically with respect to genetic information.<sup>195</sup> For example, writing about GINA, Bradley Areheart has called privacy and anti-classification “natural allies” because “[i]f consideration of a trait is forbidden, there is no need to disclose information pertaining to the trait.”<sup>196</sup> Although Areheart acknowledged the linkage between these two concepts, he focused on how GINA’s robust privacy protections could actually hinder the statute’s antidiscrimination purpose.<sup>197</sup> Similarly, prior to GINA, Radhika Rao asserted that “privacy and equality are linked, at least in the genetic context, and that protecting genetic privacy may serve as a mechanism to ensure a measure of genetic equality.”<sup>198</sup> According to Rao, “[t]he only sure-fire way to prevent genetic discrimination is to safeguard genetic privacy—to construct a veil of genetic ignorance around each individual.”<sup>199</sup> Thus, she acknowledged a pre-GINA iteration of this approach. Lastly, as mentioned, Pauline Kim took the perspective that exactly complements this Article. She asserted that autonomy, the value most readily associated with privacy itself, is actually the core value behind arguments against genetic-information discrimination.<sup>200</sup> Kim did not advocate privacy/antidiscrimination symbiosis so much as a paradigm shift from antidiscrimination to privacy.<sup>201</sup> Although legal academics have acknowledged the privacy/antidis-

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194. *But see* Strahilevitz, *supra* note 100, at 364 (arguing that intrusions into personal privacy might be necessary to bypass statistical discrimination, as entities will rely on group stereotypes when individual information is not available to them).

195. *See, e.g.*, Scott Burris & Lawrence O. Gostin, *Genetic Screening from a Public Health Perspective: Some Lessons from the HIV Experience*, in *GENETIC SECRETS: PROTECTING PRIVACY & CONFIDENTIALITY IN THE GENETIC ERA*, *supra* note 25, at 137, 151 (“In both the HIV and genetic realms, privacy has been used as a proxy for antidiscrimination protection, particularly in insurance. That is, the role of the law is not to prevent the collection or proper use of the information but rather to prevent its falling into the wrong hands and being used to deprive the subject of a job, service, or insurance.”).

196. Areheart, *supra* note 115, at 710.

197. *See id.* at 712.

198. Radhika Rao, *A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality*, 51 *VILL. L. REV.* 827, 829-30 (2006).

199. *Id.* at 831.

200. Kim, *supra* note 19, at 1537.

201. *See id.*

crimination symbiosis when protecting genetic information, this Article is the first to expand this potentially powerful relationship to advocate for the better protection for other antidiscrimination categories.

Finally, it is worth again reiterating that protecting privacy to prevent discrimination favors the anticlassification principle. By using strong privacy protections as a vehicle of antidiscrimination, GINA adopts a “genome-blind” approach.<sup>202</sup> But preventing all access to information related to protected status undermines an employer’s ability to use that information for positive differential treatment, such as reasonable accommodations and diversity initiatives. Furthermore, it could create pressures for individuals to underplay their protected status and to conform to majoritarian norms. Part III will explore the full implications of using privacy to combat discrimination. It notes where the anticlassification and antisubordination perspectives diverge, and addresses the weaknesses of privacy law as antidiscrimination law in the process.

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GINA provides an excellent illustration of the practical breakdown of privacy/antidiscrimination essentialism. Section 202 contains both a typical antidiscrimination protection, modeled on Title VII, and a largely unprecedented prohibition on requesting, requiring, or purchasing genetic information.<sup>203</sup> These subparts could be understood as distinct and offering protections that are different in kind; instead, this Article asserts that GINA’s privacy provision is not distinct from the statute’s antidiscrimination protections, but rather a key aspect of them. It is an example of a law that simultaneously incorporates both kinds of protections in its attempt to thwart systematic disadvantage. Congress was well aware of the utility of using privacy law to stop discrimination when drafting GINA’s section 202.<sup>204</sup> The privacy/antidiscrimination symbiosis is therefore not mere scholarly speculation but an actual, real-world

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202. Mark A. Rothstein, *Legal Conceptions of Equality in the Genomic Age*, 25 *LAW & INEQUALITY* 429, 456 (2007); *see also* Roberts, *supra* note 27, at 622.

203. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202(a)(1)-(2), 122 Stat. 881, 907 (codified as amended at 42 U.S.C. § 2000ff-1 (2012)).

204. *See supra* text accompanying notes 176-82.

legislative strategy that has already been openly employed in at least one federal antidiscrimination law. The following Part will outline the potential of privacy/antidiscrimination symbiosis in other zones of antidiscrimination protection.

### III. THE PRIVACY/ANTIDISCRIMINATION SYMBIOSIS ANALYZED

This Article's central assertion is that privacy law can do the work of antidiscrimination. With that intention in mind, I have challenged privacy/antidiscrimination essentialism on both theoretical and practical levels. Part I demonstrated the conceptual connection between privacy and antidiscrimination, introducing the privacy/antidiscrimination symbiosis. Part II looked to GINA as an example of how lawmakers might harness the power of privacy law to combat discrimination. In Part III, the Article turns to the practical implications of using privacy law as a tool for antidiscrimination beyond the realm of genetic information.

Currently, the law forbids employers from discriminating on the basis of a variety of attributes: race, color, ethnicity, national origin, religion, sex, age, and disability.<sup>205</sup> Discrimination based on several of these protected statuses requires knowing specific information. For instance, even though an employer may be able to make basic inferences about an employee's age, ethnicity, or national origin, specific knowledge of those protected statuses requires additional information. Although an employer may guess that an employee is in her forties and from South America, the employer cannot know that the employee is forty-four years old and from Chile without acquiring more facts. Likewise, although some religions have associated visual cues, such as clothing or grooming practices, others remain unknown without further inquiry. Yet even for those protected statuses that are more readily knowable, privacy law still may be of use in certain circumstances. For example, an individual's race is not always detectable through personal interaction. Forbidding an employer from asking a racially ambiguous employee about her race could, therefore, prevent discrimination. Moreover, not everyone

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205. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012).

with a disability uses a wheelchair or a cane. Millions of people have hidden disabilities that are not obvious upon an initial meeting.<sup>206</sup> Finally, gender ambiguity exists. Thus, privacy law could prevent an employer from inquiring about an employee's sex, a safeguard that could be of particular utility if an individual has undergone gender reassignment. Put simply, privacy protections can stop discrimination whenever the protected status is not completely known to the potential discriminator.

Privacy, when applicable, offers certain clear advantages as an antidiscrimination strategy. First, recovering for privacy violations tends to be simpler procedurally than obtaining relief under ordinary antidiscrimination laws. Second, privacy law intervenes at an earlier point in the process of discrimination, thereby limiting the scope of the harms that the wronged employee might experience. Although current best practices might advise employers to avoid probing questions at the hiring stage, individuals currently enjoy little protection against such inquiries once employed. Using privacy to prevent potential discriminators from accessing information related to protected status would add an additional layer of antidiscrimination protection.

Even though privacy law offers substantial benefits, it also has its limitations. To begin, privacy law may at times overprotect the information in question, leading people to fail to disclose when it would be beneficial to them or to society as a whole. Further, legislatures and courts have at times been reluctant to provide protection or relief for privacy violations that do not inflict an associated harm. Thankfully, however, antidiscrimination's strengths could help to mitigate privacy's weaknesses. Linking antidiscrimination to privacy could provide an added incentive for lawmakers to safeguard sensitive information. Additionally, in the case of overprotection, pairing privacy protections with antidiscrimination goals, particularly those associated with antisubordination, could encourage disclosure for accommodation or consciousness-raising purposes. Thus, privacy law supports antidiscrimination purposes, and antidiscrimination purposes may similarly support privacy law.

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206. See generally Alecia M. Santuzzi et al., *Invisible Disabilities: Unique Challenges for Employees and Organizations*, 7 *INDUS. & ORGANIZATIONAL PSYCHOL.* 204 (2014). The prevalence of invisible disabilities explains the utility of the ADA's privacy provision.

*A. Beyond Genetic Information*

Privacy law can only undermine discrimination when the protected status is unknown to the potential discriminator. Because traditional antidiscrimination categories often have associated visual or sociocultural cues, employers can frequently ascertain information about protected status through casual observation. As a practical matter, antidiscrimination protections have focused on outlawing discriminatory conduct (specifically when there is an intent to discriminate) because the relevant underlying information was readily available.<sup>207</sup> Although laws banning discriminatory conduct offer some protection, employers may make both conscious and unconscious decisions based on this information, regardless of the law. Importantly, despite the existence of legal protection, discrimination on the basis of the protected categories still persists.

At first blush, privacy law's ability to thwart discrimination may be unclear. Certainly, genetic information differs from other antidiscrimination categories in key ways. As noted, obtaining genetic information about an individual frequently requires taking a test, whereas obtaining information about other legally protected statuses (for example, race, gender, and disability) does not.<sup>208</sup> Consequently, privacy law would seem to do far more for genetic information than it possibly could for other protected statuses. But this initial reaction underestimates the potential of privacy law to undermine discrimination. Information related to many antidiscrimination categories regularly remains unknown to employers absent further inquiry.

For example, in *Mitchell v. Champ Sports*, the plaintiff, who self-identified as a black woman, had light skin.<sup>209</sup> Her supervisor assumed she was white.<sup>210</sup> When black friends and relatives visited her at work, her supervisor was surprised to discover that the plaintiff did, in fact, consider herself black.<sup>211</sup> Following that revelation, her supervisor demoted her to part-time associate despite

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207. See Kim, *supra* note 19, at 1537.

208. See Roberts, *supra* note 27, at 623-24.

209. 42 F. Supp. 2d 642, 645 (E.D. Tex. 1998).

210. *Id.*

211. *Id.*



her highly positive performance reviews, leading her to sue under Title VII.<sup>212</sup>

Similar kinds of scenarios occur with respect to other antidiscrimination categories, such as national origin or ethnicity. For example, in 2007, an arbitration panel required Merrill Lynch, the world's largest brokerage firm, to pay a former broker \$400,000 in compensatory damages and \$1.2 million in punitive damages.<sup>213</sup> The broker had worked for Merrill Lynch as a financial advisor for nine years, held a clean record, and was being considered for a career in management, when he was abruptly fired and his reputation was intentionally tarnished after his branch director discovered, over a lunch conversation, that the broker was of Iranian descent.<sup>214</sup>

Employers have also discriminated against employees upon learning of those employees' religious beliefs. In 2011, a former employee of the Texas Health and Human Services Commission, who received excellent reviews and compliments from her co-workers and supervisors, sued under state and federal antidiscrimination law because she was unexpectedly terminated only a few days after revealing her deeply held religious beliefs during a conversation with her immediate supervisor.<sup>215</sup> Similarly, in Florida, two married former teachers filed a complaint against their school district alleging that the district's principal discriminated against them after they revealed that they were Jehovah's Witnesses.<sup>216</sup> The couple had previously received positive reviews and praise at work.<sup>217</sup> Most recently, a

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212. *Id.*

213. See *Merrill Fined for Discrimination Against Iranian Broker*, N.Y. TIMES DEALBOOK (July 24, 2007, 7:25 AM), [http://dealbook.nytimes.com/2007/07/24/merrill-fined-for-discrimination-against-iranian-broker/?\\_r=0](http://dealbook.nytimes.com/2007/07/24/merrill-fined-for-discrimination-against-iranian-broker/?_r=0) [<http://perma.cc/3NA7-KP3X>]; see also Amended Award NASD Dispute Resolution at 2-3, *Zojaji v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (July 19, 2009), available at <http://perma.cc/9UZY-FW7M>.

214. Amended Award NASD Dispute Resolution, *supra* note 213, at 3.

215. Complaint at 2, *Vaughan v. Tex. Health & Human Servs. Comm.*, No. 6:11-CV-00199-JKG (E.D. Tex. Apr. 20, 2011); see also Michelle Massey, *Woman Files Religious Discrimination Lawsuit over Alleged Voodoo Curse*, SOUTHEAST TEX. REC. (May 2, 2011, 4:28 PM), <http://setexasrecord.com/news/235187-woman-files-religious-discrimination-lawsuit-over-alleged-voodoo-curse> [<http://perma.cc/JZ9P-RHB9>].

216. Complaint at 3-4, 6, *Rosales v. Sch. Dist. of Lee Cnty.*, No. 2:12-CV-00454-JES-DNF (M.D. Fla. Aug. 20, 2012); see also Sabina Bhasin, *Former Teachers, Jehovah's Witnesses File Discrimination Lawsuit Against School District*, NAPLES NEWS DAILY (Aug. 30, 2012, 5:05 AM), <http://www.naplesnews.com/news/2012/aug/30/former-teachers-jehovahs-witnesses-file-lawsuit> [<http://perma.cc/AJX-5F3P>].

217. Complaint at 4, *Rosales*, No. 2:12-CV-00454-JES-DNF.

pastor brought hostile work environment and wrongful termination claims against his former employer based on the actions of his regional manager once that manager learned of the pastor's religious activities.<sup>218</sup>

Privacy law can even preempt discrimination on the basis of sex or gender in certain circumstances. In *Lopez v. River Oaks Imaging & Diagnostic Group*, the plaintiff, although biologically male, was living her life as a woman.<sup>219</sup> She had successfully applied for a job with a medical clinic, pending a background check and drug test.<sup>220</sup> Although she passed both, her prospective employer withdrew its offer when the background check revealed the plaintiff had been born a man.<sup>221</sup> She then sued pursuant to Title VII.<sup>222</sup>

Likewise, plaintiffs have experienced discrimination after their employers learned of their age. For example, one plaintiff, who had been actively recruited by her employer for a position as a bank teller, was fired five days after a human resources representative asked her, "You're not sixty-five, are you?" when the representative learned the plaintiff was on Medicare.<sup>223</sup> One of her arguments in response to the bank's assertion that she was underperforming was that the bank did not similarly discharge younger employees with identical performance issues.<sup>224</sup>

Finally, even with the ADA's mild privacy provisions, information related to a previously unknown disability can also lead to discrimination at work. For instance, a county prison was employing a licensed practical nurse, who was undergoing treatment for depression and anxiety.<sup>225</sup> Because she did not require an accommodation,

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218. Complaint at 2, *Calame v. Aarons, Inc.*, No. 3:13-CV-00441-DRH-DGW (S.D. Ill. June 17, 2013); see also Ann Maher, *Religious Discrimination Suit Against Aaron's Removed to Federal Court*, MADISON-ST. CLAIR REC. (May 21, 2013), <http://madisonrecord.com/issues/893-retaliatory-discharge/255832-religious-discrimination-suit-against-aarons-removed-to-federal-court> [<http://perma.cc/7488-9M4N>].

219. 542 F. Supp. 2d 653, 655 (S.D. Tex. 2008).

220. *Id.* at 656.

221. *Id.*

222. *Id.*

223. *Rubel v. Century Bancshares, Inc.*, No. Civ.02-482(MJD/JGL), 2004 WL 114942, at \*1-2 (D. Minn. Jan. 8, 2004).

224. *Id.* at \*4.

225. *Weaver v. McKean*, No. 11-254 Eire, 2012 WL 1564661, at \*1 (W.D. Pa. Apr. 9, 2012) (magistrate's recommendation adopted by No. 1:11-cv-254-SJM-SPB, 2012 WL 1564617 (W.D. Pa. May 3, 2012)).

she did not disclose her conditions to her employer.<sup>226</sup> However, when she began taking additional medication for attention deficit disorder and started suffering side effects as a result, her employer asked her what medications she was taking, then put her on administrative leave and eventually fired her.<sup>227</sup>

The employers in these cases obtained *previously unknown information* regarding the plaintiffs' protected statuses, which they then used as the basis for discrimination. For example, in *Lopez*, if the information related to her sex had been considered private, it could have been redacted from her background check, thereby limiting her employer's ability to discriminate on the basis of her gender.

Symphony auditions provide another meaningful—albeit temporary—example of how restricting access to information related to a protected status can bypass certain kinds of discrimination. Historically, women faced significant disadvantages in being hired to symphony orchestras. As of 1970, roughly 10 percent of orchestra members were women.<sup>228</sup> When orchestras introduced blind auditions by having prospective members play behind screens, the number of female musicians increased to 35 percent by the mid-1990s.<sup>229</sup> Researchers have attributed a significant portion of these gains to the blind audition process.<sup>230</sup> Although female musicians would be hard pressed to conceal their gender once joining the orchestras, the blind auditions demonstrate how obscuring information related to a protected status can help eliminate disparities, at least at the hiring stage. GINA, and the ADA in a more limited capacity, already includes a privacy protection designed to bypass future discrimination. But the cases described above, as well as the proven benefit of sex-blind symphony auditions, demonstrate the potential for the privacy/antidiscrimination symbiosis in other contexts. Prohibiting requests for information related to race, sex, ethnicity, national origin, religion, age, or disability could bypass discrimination in at least some instances. Congress might therefore

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226. *Id.*

227. *Id.*

228. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 717 (2000); see also Marilyn Mark, *Blind Auditions Key to Hiring Musicians*, PRINCETON WKLY. BULL. (Princeton Univ., Princeton, N.J.), Feb. 12, 2001, at 7, available at <http://perma.cc/B2A6-B6QQ>.

229. Goldin & Rouse, *supra* note 228, at 738; see also Mark, *supra* note 228.

230. See Goldin & Rouse, *supra* note 228, at 738; see also Mark, *supra* note 228.

consider adding a prohibition against such inquiries to Title VII and the Age Discrimination in Employment Act (ADEA), as well as strengthening the protections of the ADA.

### *B. Privacy's Advantages*

Part I outlined the process of discrimination and explained how even unintentional conduct may undermine antidiscrimination's goals of equality and fairness. At present, however, much of employment discrimination law fails to adequately cover several kinds of employer conduct that ultimately result in systematic disadvantage. Many individuals report experiencing discrimination at work, but legal relief lies frustratingly out of reach. For example, an employee may feel that an employer treats her differently on the basis of her national origin by reprimanding her more severely for lateness or by giving her less favorable performance reviews. Although the employee herself may be convinced that she was the object of discrimination—and, based on social cognition theory, she likely was—she has little chance of prevailing in court.<sup>231</sup>

The nature of discrimination is changing. When Title VII (the paradigmatic piece of employment discrimination legislation) passed in 1964, individuals faced clear and intentional exclusion.<sup>232</sup> Although deliberate discrimination may persist, today's most common genre of discrimination is of the subtle, cumulative variety.<sup>233</sup> Consequently, Title VII and many of the subsequent laws based on its protections are ill-suited for addressing the most pervasive variety of discrimination happening today.<sup>234</sup> Current antidiscrimination law falls short in at least two ways: (1) it frequently requires plaintiffs to demonstrate that their employers had an intent to discriminate, or that the employer had no other plausible reason for the

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231. See, e.g., Krieger, *supra* note 71, at 1162 (describing an “unremarkable” Title VII case in which her client, the only nonwhite employee at a factory, believed he had suffered discrimination in a variety of subtle ways); see also Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) (explaining that employees “report incidents that would not be legally cognizable under current [antidiscrimination] frameworks but that are arguably discriminatory within the statutory language”).

232. See Krieger, *supra* note 71, at 1164, 1241.

233. See *id.* at 1241; Sperino, *supra* note 231, at 84-85; Sturm, *supra* note 90, at 459-61.

234. Krieger, *supra* note 71, at 1241; see also Sperino, *supra* note 231, at 71, 84-85; Sturm, *supra* note 90, at 459-61.

adverse employment action; and (2) it focuses on large-scale events such as hiring and firing but ignores the smaller, more subtle kinds of differential treatment that culminate in disadvantage over time.

Sadly, judicial stagnation appears at the root of ordinary antidiscrimination law's current shortfalls. Discrimination itself has evolved since the 1960s, but courts have been reluctant to reflect those changes in their interpretations of the law.<sup>235</sup> As a result, courts have tended to ignore potentially meritorious claims.<sup>236</sup> Further, this narrow conception of what courts consider an antidiscrimination violation has far-reaching effects. Because judges are limited in their viewpoints regarding what constitutes actionable discrimination, lawyers have adopted a similarly restricted perspective, leading them to ignore cases where there is true disadvantage but relief is unlikely.<sup>237</sup> The result is that existing law is largely ineffective. To return to the legislative triad from Part I, ordinary antidiscrimination protections fail to achieve their purpose of promoting fairness and equality.

While current antidiscrimination legislation may seek to prevent the harmful impacts of unconscious, small-scale discrimination, the shortfalls of ordinary antidiscrimination laws are well-documented.<sup>238</sup> Antidiscrimination advocates are in need of new

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235. See Krieger, *supra* note 71, at 1241; Sperino, *supra* note 231, at 81-82.

236. Sperino argues that the judicially imposed frameworks squeeze out potentially cognizable claims in two ways:

First, even when a plaintiff's theory of the case fits within recognized categories of discrimination, the claim may be rejected if it does not fit neatly within an accepted rubric. This happens, in part, because the rubrics often fail to reflect the language of the discrimination statutes. And in many cases, courts do not question whether the rubrics ask the correct questions. Second, the frameworks allow courts to implicitly reject new theories of discrimination without explicitly considering their merits.

Sperino, *supra* note 231, at 86.

237. Sperino describes this phenomenon as "path dependence." She explains:

This path dependence is especially troubling because it has effects outside of the courtroom. Many practicing lawyers also view discrimination through the frameworks, either because they have a formalistic view of the law that situates the frameworks as the definition of discrimination or because they believe it is futile or too costly to litigate against them. When litigants begin to frame their discrimination complaints, they do so within the accepted discrimination frameworks.

*Id.* at 108.

238. See Jolls & Sunstein, *supra* note 87, at 978 (explaining that "legal rules might seek to reduce the likelihood that implicit bias will produce differential outcomes; but it would be

tools.<sup>239</sup> Privacy law offers two key advantages for combating discrimination. First, plaintiffs who have experienced discrimination may encounter substantial difficulty when proving their claims, especially with regard to discriminatory intent. Proving a violation of privacy is, by contrast, much easier because intent is irrelevant. Second, because privacy law is preemptive—it renders the subsequent discrimination impossible by intervening at the differentiation stage. Thus, using privacy law for antidiscrimination purposes limits the scope of possible harm. An employee can challenge an attempt at prying, and potentially bypass the adverse employment action that could follow, instead of being forced to wait for a discriminatory event to occur to obtain relief. Privacy laws therefore present clear advantages for preventing discrimination.

### *1. Elimination of Proof of Employer Mindset*

To start, employment discrimination claims are notoriously difficult to prove because plaintiffs often find themselves in the position of attempting to establish the mindset of their alleged discriminator. The Supreme Court famously stated that Title VII is not “a general civility code,” meaning that employment discrimination statutes do not require employers or fellow employees to be nice; the laws merely provide that employers may not discriminate on the enumerated bases.<sup>240</sup> Consequently, an employer may lawfully choose not to hire or promote the most qualified person for any number of reasons, including simply if the employer does not like her. Given the near infinite number of potentially acceptable reasons for most employment decisions, to establish an actionable violation, a plaintiff must frequently show that the employer used the protected status as the basis for its decision.<sup>241</sup> Plaintiffs, there-

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quite different to conclude that current antidiscrimination law adequately achieves this goal”).

239. See Sperino, *supra* note 231, at 82-83 (“Sex and race discrimination are unfortunately still present, and discrimination law must remain nimble enough to adapt to the ever-changing contours of the workplace.”).

240. See *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80 (1998).

241. See *id.* Notably, there are exceptions to this statement. Although an individual may struggle to establish a particular employment decision was made on the basis of a protected status, employment discrimination cases may proceed when litigants are able to demonstrate that the employer, or one of its policies, categorically excludes members of a protected class. For example, in pattern or practice disparate treatment cases, claimants can present

fore, find themselves in the position of needing to establish their employers' mindset as a crucial element of their cases.

As noted, the primary focus of this Article is disparate treatment cases—cases in which the employer treated its employees differently on the basis of protected status—regardless of whether that differential treatment was intentional or even conscious. Yet although scholars have acknowledged that conscious intent may not be necessary for disparate treatment,<sup>242</sup> courts have focused on discriminatory motive as a key aspect of these cases.<sup>243</sup> With respect to Title VII, the current claim structure is predicated on the notion that employers who discriminate had the intent to do so, and that absent such an intent, those employers would act rationally and without bias.<sup>244</sup> Courts have equated causation and intent in Title VII disparate treatment cases.<sup>245</sup> They “must either find that the decision maker intended to discriminate or that no discrimination occurred.”<sup>246</sup>

However, proving intent in employment discrimination cases is no easy task.<sup>247</sup> One reason for this difficulty is the availability of nondiscriminatory explanations for the challenged conduct.<sup>248</sup> For instance, to answer an allegation of discrimination, the employer may only need to establish a believable alternate rationale for its actions. Although Title VII plaintiffs can bring “mixed-motive” cases—lawsuits that combine both proper and improper reasons for employment decisions—they must establish that the forbidden status was a motivating factor by a preponderance of the evidence.<sup>249</sup> Thus, both single- and mixed-motive cases require plaintiffs to

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statistical evidence. *See, e.g.*, *Teamsters v. United States*, 431 U.S. 324, 339 (1977). Similarly, when a facially neutral policy disparately impacts a protected class, plaintiffs do not have to establish intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1977). However, as explained in Part I, this Article focuses on ordinary disparate impact claims, not pattern or practice claims.

242. *See Krieger, supra* note 71, at 1241.

243. For a discussion of this line of cases, see *supra* notes 209-27 and accompanying text.

244. *See Krieger, supra* note 71, at 1212; Sperino, *supra* note 231, at 85.

245. *See Krieger, supra* note 71, at 1169.

246. *Id.* at 1170, 1178-79, 1181.

247. *See id.* at 1177.

248. *See id.* at 1178.

249. 42 U.S.C. § 2000e-2(m) (2012). However, the Supreme Court recently held that plaintiffs bringing Title VII retaliation claims must establish but-for causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2520 (2013).

establish intent.<sup>250</sup> Further, if the employer can establish that it would have arrived at the same decision regardless of the protected attribute, the plaintiff may not be eligible for damages, such as back pay, or for court-mandated employment actions, such as hiring, promotion, or reinstatement.<sup>251</sup>

Different antidiscrimination statutes treat the role of the discriminator's mindset differently. The ADEA's doctrine evolved separately from Title VII.<sup>252</sup> Although Title VII allows for mixed-motive claims, the Supreme Court held that plaintiffs who are alleging a disparate treatment claim under the ADEA must establish that age was the but-for cause of the adverse employment action.<sup>253</sup> Consequently, intent requirements seem to have an arguably stronger impact in these cases. Additionally, the ADA also has its own line of jurisprudence related to intent. Although the statute covers both intentional and unintentional discrimination,<sup>254</sup> the causation element remains unclear. That is to say, courts have not settled whether plaintiffs can recover for mixed-motive claims, as in Title VII claims, or whether they must establish but-for causation, as in the ADEA claims.<sup>255</sup> Hence, even though ADEA and ADA litigants may not need to establish intent in the same way as their Title VII disparate treatment counterparts, requiring but-for causation also puts a substantial burden on the plaintiff.

Given the central role of intent in all of these cases, it can be relatively easy for an employer to defend an allegation of discrimination. Imagine that the only applicant of color for a particular job also went to the hiring chair's rival school, as in the USC/UCLA example.<sup>256</sup> Returning to the analysis from Part I, while institutional

250. Krieger, *supra* note 71, at 1171.

251. 42 U.S.C. § 2000e-5(g)(2)(B).

252. See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 173 (2009) (“[B]ecause Title VII is materially different with respect to the relevant burden of persuasion ... [Title VII] decisions do not control our construction of the ADEA.”).

253. *Id.* at 176.

254. LARSON ET AL., *supra* note 92, § 156.04.

255. The ADA, unlike the Rehabilitation Act, may allow mixed-motive cases. See, e.g., *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000) (explaining that an ADA plaintiff “must show only that disability played a motivating role in the [employer’s] decision”). Compare *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2520-21 (2013) (arguably leaving the door open for ADA mixed-motive claims), with *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 314 (6th Cir. 2012) (en banc) (applying *Gross* to the ADA).

256. See *supra* text accompanying notes 49-50.



loyalty may not be a “good” reason to fail to promote a qualified applicant, it is also not a discriminatory one. Because no two employees or applicants are completely identical with the exception of the relevant protected status, litigants frequently have difficulty proving their claims because they lack a perfect comparison (that is, a nonminority candidate with identical educational credentials), making it challenging to establish that the alleged discriminatory motive was even a factor in the decision.<sup>257</sup> Regardless of the true motivation, the employer could point to the employee’s education or almost any factor besides her race to justify its decision. Moreover, all employees make mistakes. In many instances, an employer will be able to find some reason for an adverse employment action if the employer looks hard enough.<sup>258</sup>

The subtle, unconscious nature of much of modern discrimination is yet another stumbling block for plaintiffs who must prove discriminatory intent. At present, disparate treatment that results from unconscious bias must adhere to the same claim structure as disparate treatment that results from conscious intent.<sup>259</sup> The current law does not recognize the biasing effect that normal human cognition could have on employers’ decision making,<sup>260</sup> creating a substantial disconnect between the lived experience of discrimination and the legal protection designed to stop it.<sup>261</sup>

Not only do ordinary antidiscrimination statutes fail employees, they also fail employers by forbidding conduct entrenched in the process of human cognition. Under the current regime, an employer who wishes not to discriminate will be powerless to reach that goal. As explained in Part I, the cognitive processes responsible for many instances of present-day disparate treatment are more than simply adaptive—they are crucial for humans to be able to function effectively in their environments.<sup>262</sup> Moreover, people frequently fail to truly understand why we do what we do. Studies show that most

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257. See generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011).

258. Krieger, *supra* note 71, at 1178.

259. *Id.* at 1164-65.

260. *Id.* at 1167.

261. Krieger asserts that the focus on discriminatory motivation creates “a substantial discontinuity between the jurisprudential construction of discrimination and the real life phenomenon it purports to represent.” *Id.* at 1165.

262. *Id.* at 1239.

individuals remain largely unaware of their own mental processes and are surprisingly poor at identifying the causes for their actions.<sup>263</sup> Consequently, employers will rarely be consciously aware of the actual reasons for their hiring, firing, and promotion decisions.<sup>264</sup> The deeply embedded cognitive processes related to differentiation, categorization, and stereotyping, combined with the lack of access to our true reasons for acting, reveal an unfortunate reality. In many cases, employers could not stop discriminating even if they wanted to. A person can only avoid discriminating if she can identify why she is doing what she does in the first place.<sup>265</sup> A decision maker who self-identifies as “blind” to the various protected statuses will still engage in the basic human cognitive processes that produce bias without even knowing it.<sup>266</sup> Given her conscious intent not to discriminate combined with her ignorance with respect to her cognitive functioning, that individual would likely be surprised and perhaps deeply offended at the notion that she had discriminated against another person.<sup>267</sup> Krieger explains that, when read against an understanding of human cognitive function:

A legal duty which admonishes people simply not to consider race, national origin, or gender harkens to Dostoevsky’s problem of the polar bear: “Try ... not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.” For reasons this anecdote makes plain, the “color-blindness” approach to the nondiscrimination duty embodied in current disparate treatment jurisprudence cannot succeed in eliminating category-based judgment errors and thus cannot effectuate equal opportunity.<sup>268</sup>

Ordinary antidiscrimination statutes face significant challenges in identifying and addressing the disadvantages generated by today’s predominant form of discrimination.<sup>269</sup>

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263. *Id.* at 1214.

264. *Id.* at 1215.

265. *Id.* at 1186 (“One can refrain from ‘discriminating’ only to the extent that one can accurately identify the factors inducing one’s actions and decisions.”).

266. *Id.* at 1217.

267. *Id.*

268. *Id.* at 1240.

269. Jolls & Sunstein, *supra* note 87, at 976.

Privacy law has distinct advantages as a legal strategy for combating discrimination. Unlike the burden of establishing an employer's mindset found in ordinary antidiscrimination laws, demonstrating that an employer attempted to obtain a certain kind of information is markedly easier. It is a straightforward factual inquiry instead of an attempt to divine a potential discriminator's true intent, to the exclusion of all other possible explanations.<sup>270</sup>

The first GINA case settled by the EEOC illustrates this very point. The claimant held a temporary clerk position with her employer.<sup>271</sup> However, when she applied for permanent employment, the company extended her an offer contingent on a preplacement medical examination.<sup>272</sup> During the evaluation, the medical examiner asked the claimant for her family history of a number of conditions and tested her for carpal tunnel syndrome.<sup>273</sup> Despite her personal physician's determination to the contrary, the employer rescinded its offer based on its medical examiner's diagnosis of carpal tunnel syndrome.<sup>274</sup> In establishing her GINA claim, she did not have to establish why she was denied employment or whether that denial was appropriate, just that the employer made an inquiry related to her genetic information by asking for her family history.<sup>275</sup> GINA's less onerous standards for proving a privacy violation smoothed this litigant's path to recovery. This example suggests that privacy claims may have a practical benefit, as they are easier to establish than their antidiscrimination counterparts. Specifically, by stopping discrimination at the differentiation stage, before the discriminatory conduct has the chance to occur, privacy law eliminates the need for plaintiffs to establish intent. Moreover, employers do not need to worry that an individual's protected status might unconsciously influence their decisions because they do not

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270. See Corbett, *supra* note 19, at 9; see also Kim, *supra* note 19, at 1543; Kim, *supra* note 115, at 700.

271. Press Release, U.S. Equal Emp't Opportunity Comm'n, Fabricut to Pay \$50,000 to Settle EEOC Disability and Genetic Information Lawsuit (May 7, 2013) [hereinafter EEOC Press Release], available at <http://perma.cc/VGJ6-W5XX>.

272. Complaint at 4-5, EEOC v. Fabricut, Inc., No. 14:13-CV-00248-CVE-PJC, 2013 WL 3058660 (N.D. Okla. May 7, 2013).

273. *Id.*

274. EEOC Press Release, *supra* note 271.

275. The claimant also raised an ADA claim, for which she would have had to establish that she was denied the position on the basis of a disability. See Complaint, *supra* note 272, at 4.

have the information in the first place. Privacy law therefore targets conscious and unconscious biases alike, in a way that ordinary antidiscrimination law cannot.

## 2. Preemption

Preempting adverse employment actions of all types and degrees is yet another advantage to intervening at the differentiation stage. Ordinary employment discrimination statutes focus on large-scale workplace events, like hiring and firing, leaving smaller scale incidents, such as social exclusion and negative performance evaluations, largely not actionable.<sup>276</sup> However, this limited scope of protection fails to reflect the lived experience of potential plaintiffs, for whom minor, everyday slights can be genuinely damaging.<sup>277</sup> Thus, certain assumptions related to the nature of what constitutes true harm are embedded in the current law. Particularly, it assumes that the small, cumulative types of disadvantage that may flow from cognitive biases are not truly harmful. Because of this assumption, plaintiffs must experience a specific, large-scale kind of harm before suing.<sup>278</sup> An employee who has reason to believe a protected status affected the assessment of her work can do little to rectify the harm she has experienced.<sup>279</sup> Because ordinary antidiscrimination statutes fail to capture small-scale adverse employment actions, employees who are currently facing such discrimination must find a new job, endure the biased differential treatment, or wait until a large-scale event finally occurs. None of these outcomes is desirable. Lawmakers should consider ways to discourage adverse differential

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276. Sperino, *supra* note 231, at 103-04.

277. *See id.* at 84 (describing these little insults as “microaggressions”).

278. *Id.* at 85.

279. For example:

The plaintiff cannot prevail on her individual disparate treatment claim because receiving two negative evaluations (without a corresponding compensation decision) does not create a cognizable adverse employment action. She might wait until she was denied a management position and then sue, but few [people] are likely to invest their human capital in such an endeavor. Even if the evaluation results in a discriminatory compensation decision, the plaintiff may be unable to convince the court that some or all of her evidence is connected to that decision.

*Id.* at 93.

treatment of all shapes and sizes yet without putting too much of a burden on employers.

By intervening at the point of differentiation, privacy law could preempt subsequent large- and small-scale harms alike. This strategy is desirable because it offers employees protections against all kinds of workplace harms, yet avoids overregulating the day-to-day operation of employers. Critics of using privacy law for antidiscrimination might assert that adding those protections to existing employment discrimination legislation is ultimately unnecessary because such protections arguably already exist. Although not rising to the level of the symphony auditions described above, employers remain somewhat “blind,” because they rarely ask applicants questions related to protected status. This norm against asking developed as best practice because, should a particular applicant not be hired after answering questions related to her race, age, or intent to start a family, such inquiries could be viewed as evidence of discrimination.<sup>280</sup> Surely something is better than nothing, so a widely accepted convention against asking about protected status does some work to avoid the potential for future discrimination. However, it falls short in at least two ways. First, it does not carry the force of law. Although it may be bad form to inquire into an applicant’s protected status, in many jurisdictions it is perfectly legal.<sup>281</sup> Second, the norm against asking is most present at the hiring stage, leaving individuals who are already employed, such as the majority of the cases described above, vulnerable to prying by their employers.

### *C. Privacy’s Disadvantages*

Although privacy has some clear advantages as a vehicle to avert discrimination, it also has its drawbacks. Strong prohibitions on requesting or requiring information pertaining to protected status

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280. See, e.g., 2 FAIR EMPLOYMENT PRACTICES § 16:2 (2014); GUIDE TO HR POLICIES AND PROCEDURES MANUALS app. § 2.I1 (2013); 1 POLICIES AND PRACTICES § 38:6 (2014).

281. However, some states prohibit pre-employment inquiries into protected status. Those states include Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois (by regulation), Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wisconsin. See generally LEX K. LARSON, EMPLOYMENT SCREENING (Matthew Bender 2014).

could undermine antidiscrimination objectives by impeding personally and socially beneficial disclosures. Furthermore, judges and legislators may be hesitant to provide privacy protections generally, given the notion that the associated harms are solely dignitary.

### 1. *Hindrance of Beneficial Disclosures*

Privacy may at times overprotect. Returning to the concepts of anticlassification and antisubordination is helpful here. As explained in Part I, these principles represent two distinct variations on the proper goal of the American antidiscrimination project.<sup>282</sup> Anticlassification holds that no distinction on the basis of a protected trait is desirable, whereas antisubordination maintains that positive differential treatment is warranted when it combats previous social disadvantage. Anticlassification would always support nondisclosure or blindness, whereas antisubordination would require access to information related to protected status to facilitate affirmative action.

Because antisubordination efforts may require disclosure, protecting privacy can at times stand in the way of addressing disadvantage. Importantly, antidiscrimination notions of equality and fairness do not always mandate identical treatment. Recall the perhaps counterintuitive notion that we must at times treat people *differently* to treat them *equally* or *fairly*.<sup>283</sup> Although this Article has criticized the ADA's privacy provision as being unduly permissive post-hiring, too strong a privacy protection for disability status might stand in the way of furthering disability rights by interfering with the accommodation process. Pursuant to the statute's implementing regulations, the employee requesting the accommodation and the employer may need to engage in an "interactive process" to allow full consideration of the concerns of both parties.<sup>284</sup> A blanket

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282. See *supra* notes 101-09 and accompanying text (distinguishing between the anticlassification and antisubordination readings of the antidiscrimination principle).

283. Given the potential salience of genetic information to our daily lives, I have previously asserted that "allowing entities to consider genetic information might actually lead to more meaningful equality." Roberts, *supra* note 27, at 638-39.

284. See 29 C.F.R. § 1630.2(o)(3) (2013) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable

prohibition on requesting or requiring information related to disability could hinder accommodation because although the employee could voluntarily provide information, her employer would be unable to lawfully ask follow-up questions. Moreover, Title VII also requires employers to reasonably accommodate employees' religious beliefs or practices.<sup>285</sup> If an employer is too restricted in its ability to ask about an employee's religion, it could likewise impede the employer's ability to obtain information that would allow it to make the adjustments necessary to accommodate. Consequently, privacy law designed to prevent discrimination must incorporate accommodation exceptions.

Diversity initiatives, another kind of positive differential treatment associated with antisubordination, could likewise be undermined if privacy protections are too restrictive. Title VII's EEOC regulations currently permit employers to engage in affirmative action "to correct the effects of prior discriminatory practices" and encourage such action in certain contexts, like training and recruiting practices.<sup>286</sup> "Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited."<sup>287</sup> As with accommodation, information related to protected status is necessary to further an employer's diversity goals.

GINA's robust privacy protection provides a case study in overprotection. In the context of genetics, as in the context of disability, difference is the norm. Aside from identical twins, no two people share the same genetic information. However, the prohibition on requesting genetic information is not context specific. Even if an employer wishes to obtain genetic information to promote antidis-

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accommodations that could overcome those limitations.").

285. See 42 U.S.C. § 2000e(j) (2012) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is *unable to reasonably accommodate* to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.") (emphasis added); see also 29 C.F.R. § 1605.2(b)(1) ("Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.").

286. 29 C.F.R. § 1608.3(b).

287. *Id.* § 1608.3(c).

crimination goals, such as providing accommodations or promoting diversity, it cannot do so by law. Imagine a factory worker with a genetic proclivity for carpal tunnel syndrome. This person could perhaps benefit from a longer workday with more frequent breaks to avoid repetitive stress on her wrists, effectively a genetic-information accommodation.<sup>288</sup> GINA's regulations explicitly permit employers to request genetic information when accommodating a disability.<sup>289</sup> However, employers cannot make similar requests to accommodate an employee's genetic difference because of the robust nature of GINA's privacy provision.<sup>290</sup>

Whereas exceptions for Title II of GINA and the accompanying EEOC regulations permit voluntary disclosure in the context of wellness programs and do not penalize employers for inadvertent acquisition, GINA at present does not include a reasonable accommodation provision.<sup>291</sup> Consequently, GINA does not relax its privacy protection to allow the kind of back and forth necessary to arrive at a mutually beneficial outcome for employee and employer. The same issue arises in the context of genetic diversity. Although the notion of genetic diversity initiatives may read like

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288. A comparison to disability rights law further illuminates this point. Bradley Areheart has explained that a person with an invisible disability who requires an accommodation must decide between privacy (that is, keeping her disability a secret) and antidiscrimination (that is, requesting an accommodation). Areheart, *supra* note 115, at 714-15.

289. See 29 C.F.R. § 1635.8. This line may not be as clear as it seems. For example, plaintiffs have alleged GINA violations after employers obtained information for accommodations purposes but then released it to unnecessary third parties. See *Bell v. PSS World Med., Inc.*, No. 3:12-CV-381-J-99MMH-JRK, 2012 WL 6761660, at \*2-3 (M.D. Fla. Dec. 7, 2012).

290. To be clear, GINA does not stop employees from giving their employers genetic information. As described in Part II, the statute exempts the employer from liability under just those conditions. However, following a voluntary disclosure, if the employer wishes to acquire additional genetic information with the goal of accommodating the employee on the basis of her genetic difference, the employer cannot make that request. For a more lengthy account of the benefits of a reasonable accommodation requirement in GINA, see Roberts, *supra* note 27, at 642-45.

291. Current law only requires accommodation for manifested impairments under the ADA. The EEOC regulations for Title I explain that the ADA only requires employers to provide accommodations to individuals who are "regarded as" having a disability, only those people who presently have a substantially limiting impairment or who have a record of a substantially limiting impairment. See 29 C.F.R. § 1630.9(e) ("A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the 'actual disability' prong ... or 'record of' prong ... but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the 'regarded as' prong.").



science fiction, as genetic technology continues to advance,<sup>292</sup> and as people begin to develop senses of genetic identity, the need for promoting genetic diversity could very well soon follow. If Congress were to amend Title VII to mirror GINA exactly, an employer that wishes to have a racially diverse work force would be prohibited from requesting information related to race. Thus, privacy protections to further antidiscrimination goals should also permit exceptions when the employer wishes to obtain the relevant information to promote diversity.

Moreover, privacy by its very nature hinders disclosure. When information is widely understood as private, people may be unwilling to share it, thereby stifling their expression. To be clear, this concern is normative, not legal. Use of privacy law to thwart discrimination could swathe the relevant status with a shroud of secrecy, or even worse, imply that the status is shameful and therefore worth hiding. An individual who becomes aware that her employer cannot request certain information could conclude that such information is “private,” making it inappropriate for disclosure. Thus, privacy protections might signal that the relevant information is best kept to oneself. Similarly, risk-averse employers may discourage—or outright ban—all disclosures, even voluntary ones on the part of the individual employee, in an attempt to avoid potential liability. However, both externally imposed (by the employer) and internally imposed (by the person herself) constraints on disclosure could undermine certain key antidiscrimination objectives.

Encouraging people to keep information related to protected status private could generate both personally and socially undesirable outcomes. With respect to traditional antidiscrimination categories, such as race and sex, individuals have historically been encouraged by society to obscure their identity status in various ways. One way that members of historically disadvantaged groups may

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292. Next-generation sequencing refers to a new scientific approach that allows more rapid, comprehensive DNA sequencing. This technology has transformed genetic science and simultaneously generated serious legal and ethical concerns. *See generally*, PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICS, *supra* note 186. The first baby screened using next-gen technology was born in the United Kingdom in July 2013. Ben Hirschler, *First Test-Tube Baby Born After New, Cheaper Genome Screening*, REUTERS (July 7, 2013, 7:12 PM), <http://www.reuters.com/article/2013/07/07/us-science-fertility-screening-idUSBRE9660LI20130707> [<http://perma.cc/BLP3-EEBG>].

conform to majoritarian norms and culture is through the process of passing. Randall Kennedy has described the process of passing as “a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct.”<sup>293</sup> The paradigmatic example of racial passing in the United States occurs when a black individual intentionally presents herself as white to reap the social benefits associated with whiteness.<sup>294</sup> However, people may pass anytime a particular attribute is not readily apparent, including ethnicity, religion, age, or disability. According to Kennedy, one cannot pass unknowingly, “passing requires that a person be self-consciously engaged in concealment.”<sup>295</sup> Although Kennedy himself does not adopt an absolute position regarding the rightness (or wrongness) of passing,<sup>296</sup> he does acknowledge the potentially harmful effect that practice can have on identity, explaining that passing results in assimilation into majoritarian culture and, by consequence, a dilution of the relevant identity group’s solidarity.<sup>297</sup>

Moreover, individuals may face pressure to conform to majoritarian norms even when that identity status is known to outsiders, a phenomenon known as “covering.” An individual covers her identity status when she claims that status yet makes special efforts to downplay it.<sup>298</sup> For example, a person may self-identify as a member of a particular racial group but intentionally not adopt a style of dress, speech pattern, or other behaviors typically associated with that group. That individual is covering her race. Kenji Yoshino famously applied the concept of covering to the incentives faced by gays to assimilate into straight culture, arguing that coerced assimilation constitutes an antidiscrimination harm.<sup>299</sup> He then expanded his discussion to explore how both racial minorities and women face similar pressures to downplay certain aspects of their identity in the workplace.<sup>300</sup>

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293. Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001).

294. *Id.*

295. *Id.* at 1146.

296. *Id.* at 1188.

297. *See id.* at 1187-88 (explaining the arguments against modern-day passing).

298. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772-74 (2002) (explaining Erving Goffman’s theory).

299. *See id.* at 783-875.

300. *See id.* at 875-924.

Incentives to pass and to cover entrench majoritarian norms, thereby holding the potential to undermine the expression of identity and the importance of valuing diversity. Hence, insofar as protecting privacy to stop discrimination encourages individuals to pass or to cover, it could be socially damaging by devaluing non-majoritarian identities and undermining diversity. Advocates of privacy to prevent discrimination must be careful that the resulting protections do not add the power of law to the already potentially stifling incentives for nonmajoritarian people to assimilate. As will be discussed further, including clear antisubordination-oriented elements could also mitigate this concern.<sup>301</sup>

Although norms against disclosure may be damaging when associated with existing identity groups, it may appear to be less of a risk in the context of genetic information. Genetic information, of course, does not currently form the foundation of widely recognized identity groups.<sup>302</sup> However, that may soon change. Studies show that individuals who have taken genetic tests incorporate the results of those tests into their self-concept.<sup>303</sup> Depending on the value the individual places on her genetic information and the extent to which it becomes relevant to her sense of self, genetic information could thereby constitute the basis of a new identity category.<sup>304</sup> Take, for example, actress Angelina Jolie's recent revelation that she carries a BRCA-1 mutation, which greatly raises her chances of developing breast and ovarian cancer, and her consequent decisions to undergo preventative surgeries.<sup>305</sup> Several women with risk profiles similar to Jolie's lauded her decisions both to undergo genetic testing and to take preventive measures with respect to her health.<sup>306</sup> This strong sense of solidarity indicates that these women

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301. See *infra* Part III.D.1.

302. Roberts, *supra* note 27, at 623-24 (discussing the absence of a strong sense of genetic identity).

303. ROBERT L. KLITZMAN, AM I MY GENES? CONFRONTING FATE & FAMILY SECRETS IN THE AGE OF GENETIC TESTING 169-182 (2012) (discussing the incorporation of genetic information into an individual's self-concept and the formation of genetic identity).

304. *Id.*; see also Roberts, *supra* note 27, at 623-24 (discussing the possibility of genetic identity).

305. To read Jolie's story in her own words, see Angelina Jolie, Editorial, *My Medical Choice*, N.Y. TIMES, May 14, 2013, at A25. For Jolie's story about her decision to have preventative surgery to remove her ovaries and fallopian tubes, see Angelina Jolie, Editorial, *Diary of a Surgery*, N.Y. TIMES, Mar. 25, 2015, at A23.

306. See, e.g., Lidia Dinkova, *Opening Up the Conversation About BRCA*, MIAMI HERALD,

relate to Jolie and consider themselves members of a particular population: women with a heightened genetic risk for breast and ovarian cancer. Should privacy norms surrounding genetic information grow too strong, individuals who could have a positive impact, like Jolie, may choose not to share their genetic profiles. In essence, they might be encouraged to engage in genetic passing or genetic covering, practices that could be problematic for the same reasons associated with their more traditional counterparts.

A robust norm against disclosing genetic information could also have practical implications beyond the identity concerns explored above. During the late 1980s and early 1990s, researchers in France were able to trace more than half of the French cases of juvenile glaucoma to one fifteenth-century couple who lived in a village in Brittany.<sup>307</sup> By combing through meticulous lineage records, the research team identified the names of individuals descended from that family, who might be at heightened risk.<sup>308</sup> Early detection and treatment are particularly important for cases of juvenile glaucoma because, although medically effective interventions exist, by the time an individual becomes symptomatic permanent eye damage has likely already occurred.<sup>309</sup> The researchers hoped they could use their findings to alert the at-risk individuals, only to discover that the strong privacy laws in France prevented such disclosures.<sup>310</sup> The French glaucoma study presents another example of how strong privacy laws and norms could hinder socially useful information sharing in the context of genetic information.

To sum up, strong privacy protections could impede useful disclosures both with respect to traditional antidiscrimination categories and to genetic information. This possibility presents a significant drawback to employing privacy law as antidiscrimination law. Consequently, lawmakers who opt to use this strategy must be careful to allow positive differential treatment, like for accommodation and diversity purposes, as well as not to unduly restrict individual autonomy by encouraging people to pass or cover.

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June 30, 2013, at 6HH.

307. Alexander Dorozynski, *Privacy Rules Blindside French Glaucoma Effort*, 252 SCI. 369, 369 (1991).

308. *Id.*

309. *Id.*

310. *Id.* at 369-70.

## 2. Legislative and Judicial Reluctance

Another potential obstacle to using privacy to further antidiscrimination lies in the legislative and judicial reluctance to provide or enforce robust independent privacy protections. The legislature in California enacted the California Genetic Information Nondiscrimination Act (CalGINA) in 2011, a law that expanded the prohibition against genetic information discrimination to life insurance, state programs, housing and mortgage lending, public accommodations, and emergency medical services.<sup>311</sup> However, California failed to pass the Genetic Information Privacy Act, S.B. 1267 in 2012.<sup>312</sup> The proposed law, which would have protected genetic information under the state's constitutional right to privacy, sought to prohibit obtaining, analyzing, retaining, or disclosing genetic information absent written authorization from the person in question.<sup>313</sup> The bill included both civil and criminal penalties<sup>314</sup> and carved out exceptions for law enforcement, healthcare provision, and newborn screening.<sup>315</sup> Although S.B. 1267 died in committee, its sponsor introduced a very similar bill in the next legislative term.<sup>316</sup> S.B. 222 likewise did not make it out of committee in 2014.<sup>317</sup> Those bills targeted *intrinsic* privacy harms on the basis of genetic information.

The failure of S.B. 1267 and S.B. 222 implies that legislators may be reluctant to pass broad independent protections for privacy.

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311. On January 1, 2012, the California Genetic Information Nondiscrimination Act (CalGINA) took effect. California Genetic Information Nondiscrimination Act, 2011 Cal. Legis. Serv. ch. 261 (West).

312. See *Bill Seeking Greater Genetic Privacy Protection Reintroduced in California*, GENOMEWEB DAILY NEWS (Feb. 22, 2013), <http://www.genomeweb.com/bill-seeking-greater-genetic-privacy-protection-reintroduced-california> [<http://perma.cc/5B8T-4GRZ>].

313. S.B. 1267, 2011-2012 Reg. Sess. § 56.19(a) (Cal. 2012) ("Genetic information is protected by the right of privacy pursuant to Article I of Section I of the California Constitution, and ... shall not be obtained, analyzed, retained, or disclosed without the written authorization of the individual to whom the information pertains.").

314. *Id.* § 56.19(b)-(f).

315. *Id.* § 56.19(i)(1)-(5).

316. See S.B. 222, 2012-2013 Reg. Sess. (Cal. 2013), available at <http://perma.cc/97LX-RPJA>; see also *Bill Seeking Greater Genetic Privacy Protection Reintroduced in California*, *supra* note 312.

317. For more information about the bill's history, see *Complete Bill History*, [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0201-0250/sb\\_222\\_bill\\_20140203\\_history.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0201-0250/sb_222_bill_20140203_history.html) [<http://perma.cc/U746-D2VA>] (last visited Apr. 14, 2015).

Given the success of CalGINA, a statute that extended the scope of the protections against genetic information discrimination well beyond the federal level,<sup>318</sup> this insight is particularly salient. The California example tells us that, whereas legislatures may be willing to provide broad antidiscrimination protection, they may not be similarly amenable to providing broad privacy protection, perhaps because of the intangible nature of the associated harm. If this explanation is true, it could hinder the use of privacy law to prevent discrimination. In addition to legislative reticence, the purely dignitary nature of simple privacy violations may present an obstacle to litigants because, like legislators, judges could be unsympathetic. As outlined in Part I, intrinsic privacy harms are, by definition, intangible, making them a challenging basis for a legal remedy.<sup>319</sup>

An unflattering read of protections against intrinsic privacy violations holds that the only people who stand to benefit from these types of safeguards are those individuals who have something shameful they wish to hide. Given the perceived relationship between privacy and shame, characterizing information related to protected status as “private” could possibly communicate the message that one should be self-conscious or embarrassed about one’s status.<sup>320</sup> However, shame is not the only reason to safeguard privacy.<sup>321</sup> Recall from Part I that autonomy is the primary norm driving privacy protections.<sup>322</sup> Arguably, then, regardless of what is revealed, the impacted party experiences shame, not because of the content of the revelation but rather because of the loss of control

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318. CalGINA extends protection against genetic-information discrimination to a number of areas beyond GINA’s current scope. *Bill Seeking Greater Genetic Privacy Protection Reintroduced in California*, *supra* note 312. CalGINA also offers greater remedies than available under Title II. Compare Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 207, 122 Stat. 881 (codified as amended at 42 U.S.C. § 2000ff-6 (2012)) (capping damages at \$50,000 to \$300,000 in accordance with Title VII of the Civil Rights Act), with California Genetic Information Nondiscrimination Act, 2011 Cal. Legis. Serv. ch. 261 (West) (providing unlimited monetary damages pursuant to the California Fair Employment and Housing Act).

319. Daniel Solove notes that Warren and Brandeis themselves “were concerned that such dignitary harms might strike some as too ethereal to be legally cognizable.” Solove, *A Taxonomy of Privacy*, *supra* note 20, at 487.

320. See Gross, *supra* note 26, at 176.

321. *Id.* at 177.

322. See *supra* notes 27-32 and accompanying text.

over personal information.<sup>323</sup> Should legislators choose to adopt privacy protections to prevent discrimination, they must be careful not to imply there is something shameful about the nature of the protected information.

Regardless of whether protection implies shame, some scholars have attacked protecting privacy generally. Richard Epstein writes that “the plea for privacy is often ... for the right to misrepresent one’s self to the rest of the world.”<sup>324</sup> We can therefore understand the right to privacy as effectively the right to lie, more often than not, by omission. Yet Epstein acknowledges that a right to privacy is not completely devoid of value. Epstein notes that such a right “[i]n and of itself ... may not be a bad thing.”<sup>325</sup> In fact, he believes that privacy can serve the essential social functions explored in the preceding Parts:

We are certainly not obligated to disclose all of our embarrassing past to persons in ordinary social conversations; and it is certainly acceptable to use long sleeves to cover an ugly scar. White lies are part of the glue that makes human interaction possible without shame and loss of face. Strictly speaking, people may be deceived, but they are rarely hurt.<sup>326</sup>

Privacy facilitates social interaction and engagement by giving people control over their personal information. Yet it is worth noting that Epstein’s support of privacy is actually quite limited. While he would not want us to be forced to share “all” of our past secrets in “ordinary social conversations,” he leaves the door open for whether it may be appropriate to share at least *some* of those secrets under *specific* circumstances.<sup>327</sup> The goal of avoiding “shame and loss of face” may simply not warrant protection if the potential disclosure is meaningful enough.<sup>328</sup>

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323. Gross, *supra* note 26, at 177.

324. Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994). *But see* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399-401 (1978).

325. Epstein, *supra* note 324, at 12.

326. *Id.*

327. *Id.*

328. *Id.*

Because the pain caused by intrinsic privacy violations is not physical or pecuniary but psychological,<sup>329</sup> one of privacy's strengths is also one of its weaknesses. Although potential litigants may be able to more readily *prove* their claims under section 202(b) because that provision does not require litigants to establish discriminatory intent, claims for violations of section 202(b) require no associated adverse employment action, making the harm at stake purely dignitary in nature.<sup>330</sup> Courts have notoriously struggled with how to provide adequate remedies for privacy violations absent another associated harm.<sup>331</sup> Even if claimants enjoy privacy protection, judges may be hesitant to provide them with meaningful relief if they suffer no other associated harm.

#### *D. Antidiscrimination as a Solution*

Two of the major drawbacks of using privacy provisions to achieve antidiscrimination goals are (1) their potential to impede both personally and socially beneficial disclosures, such as those associated with accommodation, diversity, personal identity, or consciousness-raising, and (2) the hesitance that courts and legislatures have exhibited regarding dignitary violations absent other kinds of harms. Yet just as privacy can do work for antidiscrimination, antidiscrimination can do work for privacy in addressing these concerns.

##### *1. Antisubordination to Facilitate Positive Disclosures*

While privacy works extremely well under an anticlassification paradigm, using privacy to combat discrimination could be undesirable for antisubordination. As explained, the antisubordination vision of antidiscrimination supports, and at times even requires, access to information regarding protected status.<sup>332</sup> Remember that antisubordination holds that the proper goal of antidiscrimination

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329. See *supra* notes 60-63 and accompanying text.

330. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202(b), 122 Stat. 881, 907-08 (codified as amended at 42 U.S.C. § 2000ff-1 (2012)).

331. See, e.g., Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 HASTINGS L.J. 899, 911 (2003); Jacqueline D. Lipton, *Mapping Online Privacy*, 104 Nw. U. L. REV. 477, 505 (2010).

332. See *supra* Part I.C.



law should be to elevate the social status of historically subjugated groups. With respect to genetic information, which currently has no widely associated social class, an antisubordination approach would seek to preempt genetic disadvantage.<sup>333</sup> Yet how can society accommodate or value difference without some knowledge of the existence and nature of that difference? It cannot. Disclosure is, as a result, central to the antisubordination vision of the antidiscrimination principle.<sup>334</sup>

If the governing norms behind privacy protections are ones of antidiscrimination, and lawmakers adopt an antisubordination approach, this strategy would support disclosure when done to thwart disadvantage. Returning to a previous example, the individual with a genetic proclivity for carpal tunnel syndrome would feel free to request an accommodation from the employer and the employer could then, as with the ADA, request additional information to honor that request.<sup>335</sup> Similarly, antisubordination would also urge us to value diversity.<sup>336</sup> Efforts to accommodate or promote diversity would indicate a regard for nonmajoritarian statuses, thereby decreasing pressures to cover or assimilate. Consequently, identity-related disclosures, like being able to claim a particular protected status, and consciousness-raising disclosures that are designed to create solidarity and promote acceptance would likewise be desirable. If legislators imbue a privacy provision with an antisubordination purpose, it would permit, or perhaps even encourage, disclosure under certain circumstances.

People would feel free to express information about their protected status on their own terms. Entities like employers could only request that information with the express purpose of furthering antisubordination goals. Using privacy law to combat discrimination could thereby capture the best of both worlds. Individuals could maintain *autonomy* by deciding how and when to disclose information related to protected status, and potential discriminators would be unable to ask about protected status unless the inquiry were

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333. See *supra* Part II.B. It would do so with all of the typical tools of antisubordination, prohibitions on both intended and unintended discrimination and the use of positive differential treatment. See *supra* Part I.C.

334. Areheart, *supra* note 115, at 710-11.

335. See *supra* text accompanying notes 283-85.

336. See Rothstein, *supra* note 202, at 455-60.

explicitly designed to accommodate or to cultivate diversity, thereby facilitating *equality* and *fairness* by limiting opportunities for future discrimination.

Empowering individuals to disclose their nonmajoritarian statuses serves important antistatutory goals. Allowing (or even encouraging) positive disclosures, while essential, does create a small additional problem. Specifically, individuals could strategically use positive disclosures to capitalize on existing majoritarian norms. For example, imagine a job candidate intentionally referencing her church and religious beliefs in an interview with a Catholic employer. Because it would be too challenging for an instrument as blunt as the law to differentiate between genuine expressions of identity and strategic disclosures, this kind of intentional gaming must regrettably go untouched.

## 2. Antidiscrimination Harms as Extrinsic Privacy Harms

Legislators and judges might be more willing to safeguard privacy if they are aware of the potential *extrinsic* privacy harms (that is, discrimination) in addition to the *intrinsic* ones. As recently demonstrated in California, lawmakers appear more open to prohibiting discrimination than to protecting privacy.<sup>337</sup> Tying privacy protections to antidiscrimination might offer a useful strategy to counter this hesitance to safeguard privacy independently. It could be more appealing to legislatures, or courts, to associate privacy protections with antidiscrimination harms.

Contrast the California experience with GINA itself. Congress opted to protect genetic privacy by including the prohibition on requesting, requiring, or purchasing genetic information in Title II.<sup>338</sup> Congress was willing to protect privacy to stop discrimination. Had supporters of the Genetic Information Privacy Act included those protections within CalGINA, they would likely have had greater success. Similarly, if judges understood certain kinds of privacy violations as related to discrimination, they might be more open to awarding greater remedies. Hence, advocates of privacy could frame

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337. See *supra* notes 311-17 and accompanying text.

338. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, tit. II, 122 Stat. 881, 905 (codified as amended at scattered sections of 42 U.S.C.).

their arguments in terms of antidiscrimination to contextualize the kinds of harms that might come from unauthorized disclosures. Safeguarding privacy thereby shifts from simply protecting a purely dignitary “right to lie” to a means for bypassing tangible future harm.

GINA already protects employees from requests for their genetic information.<sup>339</sup> However, other employment discrimination statutes could benefit from bans on requesting, requiring, or purchasing information related to protected status. Title VII again provides a useful case study. As described above, not all protected statuses under Title VII are immediately apparent.<sup>340</sup> Real-world examples exist of employers learning previously unknown information about their employees and then using that information to discriminate.<sup>341</sup> Consequently, a privacy protection could be useful to combat discrimination on the basis of race, national origin, ethnicity, and religion, in addition to genetic information. Tethering privacy to antidiscrimination thus simultaneously bypasses discrimination and respects personal autonomy. An explicit antidiscrimination purpose can address the weaknesses inherent in the privacy law, thereby leading to more comprehensive protection for genetic information, as well as for other protected statuses. Privacy law has much to offer antidiscrimination and antidiscrimination has much to offer privacy law.

### *E. A Final Caveat*

This Article has described the work that privacy law can do in ending discrimination. This proposal, however, is an imperfect solution, responding to an imperfect world. In many cases, the discriminator must first identify the object of discrimination as different and attach a particular value to that difference.<sup>342</sup> Exploiting the privacy/antidiscrimination symbiosis intervenes at the differentiation stage. By obscuring certain ways in which an employee may be different from her coworkers, this strategy undermines the process of discrimination. However, this approach does

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339. *See supra* Part II.A.

340. *See supra* Part III.A.

341. *See supra* Part III.A.

342. *See supra* Part I.B.2.

accept the present reality that differentiation may lead to value assignment and, by consequence, discrimination. My desire to foreclose the possibility of eventual discriminatory conduct does not indicate a belief that the first step in this process is the only appropriate place for intervention. It may be the least desirable in some ways.

In particular, using privacy law to bypass discrimination is a shortcut. It allows us to preempt discriminatory treatment without thinking deeply about the meaning of difference and the values we may attach to it. Relying on privacy law as antidiscrimination law allows the existing power structures and status hierarchies to remain intact.<sup>343</sup> Privacy law fails to push us to understand why we value one attribute over another. Alternatively, instead of intervening at the first step, lawmakers could also attempt to intervene at the second stage in the process, value assigning. Christine Jolls and Cass Sunstein call this goal “debiasing.”<sup>344</sup> Of course, the primary objection to focusing on value assignment is that the government has no business policing the preferences and internal thought processes of its citizens.<sup>345</sup> While no one questions the ability of legislatures to target discriminatory conduct, targeting discriminatory beliefs—even if the goal of targeting those beliefs is to eliminate the corresponding behaviors—raises serious concerns.<sup>346</sup>

Interestingly enough, Jolls and Sunstein have also maintained that ordinary antidiscrimination protections, which attack the third and final step in the process of discrimination, can also have debiasing effects by increasing the number of historically disadvantaged people in the workforce, thereby creating more opportunities to debunk the existing stereotypes.<sup>347</sup> Perhaps the same could be argued for using privacy law as antidiscrimination law, but such an outcome would admittedly be a byproduct of the legislation, not its primary objective. Privacy law is therefore a second best. It makes discrimination practically impossible, but does not attack the under-

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343. Minow warns against the dangers of this possibility, “I think we must think seriously about difference. Otherwise, its meanings—embedded in unstated norms, institutional practices, and unspoken prejudices—will operate without examination or justification.” MINOW, *supra* note 69, at 374.

344. Jolls & Sunstein, *supra* note 87, at 973.

345. *Id.* at 992.

346. *Id.* at 993.

347. *Id.* at 980-85.

lying norms that lead to discrimination in the first place. Yet in the meantime, as we continue to dismantle the beliefs and social practices that have created and perpetuated inequality, privacy law offers a simple and straightforward tool for bypassing discrimination.

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Privacy law carries significant advantages for furthering the goals of antidiscrimination. It avoids the need to establish discriminatory intent and it preempts discrimination, possibly reducing the scope of harm the affected individual experiences. However, strong privacy protections could discourage useful disclosures, and the general apprehension surrounding independent legal protection for pure privacy violations may undermine the utility of such an approach. Antidiscrimination itself thankfully provides a remedy for privacy law's potential shortcomings. For one, the antisubordination paradigm could guide lawmakers when evaluating which disclosures might be useful both for genetic information and other protected categories, such as to allow accommodation or to promote diversity and solidarity. Further, antidiscrimination lends mass to pure privacy law, which is often associated with dignitary harms. By understanding prohibitions on requesting, requiring, or purchasing protected information as designed to preempt discriminatory actions, what appears at first blush to protect against a harm that is solely dignitary in nature becomes associated with another substantive kind of legal wrong. Legislators and judges may be more inclined to draft and to enforce, respectively, privacy protections when they are linked to the potential for antidiscrimination harms. The privacy/antidiscrimination symbiosis is just that—a true symbiosis running in both directions.

## CONCLUSION

Privacy law can do the work of antidiscrimination. By restricting access to information about protected status, privacy legislation can promote fairness and equality by denying potential discriminators access to the very information they need to discriminate. Hence, although privacy law and antidiscrimination law have typically been considered separate and distinct areas of legal protection, they can also act symbiotically. GINA broke new ground when it included a prohibition on requesting, requiring, or purchasing genetic information in its employment discrimination title. Yet this novel protection does more than safeguard against invasions of genetic privacy. GINA's privacy provision can be understood in explicitly antidiscrimination terms, as a real-world example of the privacy/antidiscrimination symbiosis.

Despite privacy law's strong benefits as an alternative antidiscrimination paradigm, norms against disclosure can at times do more harm than good. Additionally, a general disdain surrounding independent privacy violations on the part of legislators or judges could undermine the practical impact of these legal protections. Fortunately, antidiscrimination itself offers the solution. As noted, an antisubordination approach to privacy provides useful insight into when disclosures are desirable. Antisubordination could avoid the potential chilling effects of privacy law and the resulting inability to accommodate or consider diversity, as well as the pressures to cover or assimilate. Moreover, tying privacy protections to antidiscrimination goals allows legislators and judges to understand an alternate class of harms that may result from unauthorized disclosures and could, as a result, make them more amenable to providing protection and relief. In other words, invocations of antidiscrimination could help proponents of privacy laws further their cause.

The alliance of privacy and antidiscrimination has powerful implications for the future of antidiscrimination law. Congress and state legislatures ought to consider whether bans on requesting, requiring, or purchasing information related to other protected categories, such as race, sex, ethnicity, national origin, religion, and age, should be similarly prohibited. Preventing employers from inquiring into protected status generally could bypass the discrimination that

might result if an employer discovers previously unknown information about an employee.

The privacy/antidiscrimination symbiosis illustrates how lawmakers can use privacy to prevent discrimination. This observation adds a previously under-utilized weapon to the antidiscrimination arsenal. Yet like any fledgling armament, privacy law carries with it certain dangers. Although advocates of antidiscrimination should be willing to deploy this alternative tool, they should likewise remain aware of its drawbacks and never lose sight of their true purpose: to create a more just, equitable world.