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GINA, Privacy, and Antisubordination

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I. INTRODUCTION

Recent changes to statutory antidiscrimination law raise questions about the current and optimal role of privacy in employment discrimination jurisprudence. The recently amended Americans with Disabilities Act (ADA)[1] and recently passed Genetic Information Nondiscrimination Act (GINA)[2] both provide employment protections that are allied with privacy in some instances and at tension in others. Framed another way, one might question whether privacy is a civil right or civil want in the context of employment discrimination law. This Essay argues that in the statutory areas of the ADA and GINA, foregoing privacy is sometimes desirable in order to fight subordination by employees revealing, and employers considering, particular health traits and information.

II. THE GENETIC INFORMATION NONDISCRIMINATION ACT

GINA illustrates how the values of privacy and antidiscrimination may be allies. In 2008, Congress passed GINA, making it illegal to discriminate against applicants, employees, and former employees on the basis of genetic information.[3] GINA includes a prohibition on the use of genetic information in all employment decisions,[4] strict limits on the ability of employers and other covered entities to request or to acquire genetic information,[5] and requirements to maintain the confidentiality of any genetic information acquired.[6] Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members.[7] Notably, GINA generally forbids both an employer's

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[1] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

[2] Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in scattered sections of 26, 29, and 42 U.S.C.).

[3] *Id.* § 202.

[4] *Id.* § 202(a).

[5] *See id.* § 202(b) (noting six exceptions to the general prohibition against requesting or acquiring genetic information).

[6] *Id.* § 206.

[7] *Id.* § 201(4).

acquisition and use of genetic information, requiring a "genome-blind" approach to protecting genetic information.[8]

GINA is both similar to and different from previous antidiscrimination statutes. While the language of GINA's employment provisions tracks the language of Title VII of the Civil Rights Act of 1964 fairly closely,[9] the nature of its protections differ in that they are more forward-looking and less responsive to serious social harms. After all, only a few cases of genetic discrimination have been documented.[10] In contrast, Title VII was retrospective, legislated in response to a history of widespread racism and civil unrest.[11] Additionally, whereas the purpose of previous antidiscrimination statutes was to protect identifiable social groups, individuals with genetic predispositions constitute no visible underclass.[12] Given that every individual carries some genetic traits that render them vulnerable to illness or disease, GINA's "protected class" is necessarily indeterminate.[13] GINA was, therefore, legislated not to counteract systemic disadvantage

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[8] Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 622 (2011) (citing Mark A. Rothstein, *Legal Conceptions of Equality in the Genomic Age*, 25 LAW & INEQ. 429, 456 (2007)).

[9] *See* Pauline T. Kim, *Regulating the Use of Genetic Information: Perspectives from the U.S. Experience*, 31 COMP. LAB. L. & POL'Y J. 693, 697 (2010) (explaining how GINA's operative language parallels Title VII's main provisions). For the statutory text of Title VII, see Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2006)) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

[10] Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 441 (2010) (noting that GINA is "the first preemptive antidiscrimination statute in American history"). There have, however, been some incidents of nonconsensual genetic testing over the last decade. *See, e.g.*, Jeffrey S. Morrow, Note, *Insuring Fairness: The Popular Creation of Genetic Antidiscrimination*, 98 GEO. L.J. 215, 245 (2009) (discussing one company's efforts to test workers for a predisposition to carpal tunnel syndrome as a way to avoid disability payments to workers who developed the condition).

[11] Kim, *supra* note 9, at 697–98; Roberts, *supra* note 8, at 625 (stating that Title VII and the ADA retrospectively looked "to existing discrimination to justify protecting against future harm").

[12] Kim, *supra* note 9, at 698 ("Genetic discrimination is not an ongoing and widespread social practice that has produced a visible underclass.").

[13] *Id.* (noting that it is difficult to identify who is in the "protected class").

or inequality but to prevent genetic discrimination and promote the use of genetic technologies.[14]

III. THE ANTICLASSIFICATION TURN

I have recently argued that GINA, in concert with a few other developments in employment discrimination law, represents a noteworthy and anticlassificationist departure from previous employment discrimination statutes, which have historically been oriented around antisubordination.[15] The antisubordination/ anticlassification framework has been invoked widely both to describe and advocate for certain readings of antidiscrimination law.[16] The antisubordination principle generally prohibits practices that "enforce the inferior social status of historically oppressed groups" and allows practices that challenge historical oppression.[17] In contrast, anticlassification principles prohibit practices that "classify people either overtly or surreptitiously on the basis of a forbidden category."[18] Adopting a purely anticlassificationist viewpoint would mean never making use of a forbidden trait (such as race), while an antisubordinationist

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[14] *Id.* ("[U]nlike traditional civil rights legislation, the purpose of GINA is . . . to prevent *prospectively* the emergence of genetic discrimination . . . to promote the use of genetic technologies.").

[15] *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887772 (arguing that recent changes to the ADA, Title VII, and the enactment of GINA may imperil the underlying normative foundation of employment discrimination law by turning toward and emphasizing anticlassification values at the expense of employment discrimination's antisubordinationist foundation).

[16] *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 78 (2000) (noting that this distinction "has dominated arguments about equality in popular, academic, and judicial fora" for over two decades).

[17] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004); *see* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that the Equal Protection Clause prohibits laws or official practices that "aggravate[ ] . . . the subordinate position of a specially disadvantaged group"); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994) ("[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society.").

[18] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

orientation would allow consideration of the classification as long as it serves antisubordination goals.

Title VII, the ADA, and the Age Discrimination in Employment Act (ADEA)[19] each illustrate how employment discrimination law has, as a whole, been antisubordination-oriented.[20] Even though certain provisions of the statutes are facially anticlassificationist, these laws prize antisubordination values, in that they are designed to respond to a history of discrimination and incorporate many provisions that expressly take account of forbidden traits—through doctrines such as disparate impact and reasonable accommodation and the policy of affirmative action.[21]

GINA stands in contrast to this historical orientation by representing a turn toward anticlassification principles (and a possible turn away from antisubordination norms). There are several reasons why. Beyond its textual anticlassificationist requirement that employers not classify on the basis of genetic information,[22] GINA only proscribes disparate treatment, or intentional discrimination.[23] Indeed, the text expressly provides that no cause of action exists for practices that have a disparate impact.[24] This cause of action is available under Title VII,[25] the ADEA,[26] and the ADA,[27]

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[19] Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634).

[20] *See* Areheart, *supra* note 15, at 11–19 (explaining how each statute, and employment discrimination jurisprudence as a whole, has been oriented around antisubordination values).

[21] *See id.* at 14–15 (noting that while "the disparate treatment provisions . . . are on face anticlassificationist," the laws primarily advance antisubordination values).

[22] GINA, Pub. L. No. 110-233, § 202(a), 122 Stat. 881, 907 (2008) (making it unlawful for an employer to discriminate because of genetic information).

[23] *Id.* § 202(a)(1).

[24] *Id.* § 208(a) ("Notwithstanding any other provision of this Act, 'disparate impact', as that term is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of genetic information does not establish a cause of action under this Act."). This provision may stem from the fact that GINA was not passed to protect any particular subordinated group.

[25] Title VII expressly prohibits employers from using any "particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" unless the practice is both job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k) (2006).

[26] *See* Smith v. City of Jackson, Miss., 544 U.S. 228, 233–40 (2005) (interpreting 29 U.S.C. § 623(a)(2) of the ADEA—in light of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its consideration of identical text—to cover disparate impact claims).

[27] 42 U.S.C. § 12112(b)(3), (6) (2006) (noting the phrase "discriminate against a qualified individual on the basis of disability" includes neutral policies and practices "that have the effect of discrimination on the basis of disability").

and takes into account the demographic results of facially neutral policies and practices in the workplace to help uncover covert discrimination. GINA also does not allow the strategic consideration of genetic information to counter future genetic subordination.[28] For example, no provision addresses reasonable accommodation—despite the fact such a provision could have been easily integrated into the statute to achieve antisubordination goals. Nor does the statute allow any positive consideration of genetic information through programs like genetic diversity initiatives. In whole, various key provisions and omissions indicate GINA is largely an anticlassificationist statute.[29]

GINA may also represent a possible trend in employment discrimination toward privacy. Indeed, anticlassification principles are a natural ally to privacy. If consideration of a trait is forbidden, there is no need to disclose information pertaining to the trait, and thus we can afford strong privacy rights to individuals possessing the trait. In this way, GINA's passage helps ensure privacy rights for genetic information by generally prohibiting employers from considering the "forbidden trait" of genetic information.

IV. ANTISUBORDINATION AND PRIVACY

But are the privacy rights afforded by GINA optimal? A natural tension exists between maintaining privacy and effectuating the antidiscrimination mandate in the employment context. In particular, the antisubordination principle of considering certain traits to further antisubordination ends may advance antidiscrimination's goals but chafe privacy. For example, doctrines such as disparate impact,[30] reasonable

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[28] *See generally* Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in scattered sections of 26, 29, and 42 U.S.C.) (declaring legislative findings and outlining the scope of the Act).

[29] *See* Roberts, *supra* note 8, at 634 ("Because GINA provides individualized protection, prohibits any consideration of genetic information—positive or negative—and only outlaws intentional discrimination, the statute currently favors anticlassification."). GINA is "largely" an anticlassificationist statute. Even though the legislative findings reference eugenics and forced sterilization laws (examples of historical genetic subordination), the statute is substantially directed toward anticlassification norms, and there is no indication that any genetic subordination is ongoing.

[30] *See infra* notes 40–41 and accompanying text.

accommodation,[31] and affirmative action[32] require us to consider and make use of information about employees' identity traits. If an employer does not have knowledge of an employee's disability or religion, the employer cannot provide a reasonable accommodation under the ADA or Title VII, respectively. Likewise, an employer cannot gauge whether a policy or test has a disparate impact if unaware of the identity traits of the individuals who take such a test or are affected by a particular policy. In short, various antisubordination policies require employers to know of particular identity traits to enable them to compensate for a potentially inequitable practice or state of affairs.

This tension between antisubordination and privacy has particular salience in the antidiscrimination areas of disability and genetics since the underlying information of these characteristics is often not readily discernible. In contrast, an employer is much more likely to be intuitively (or otherwise) aware of an employee's race, age, or sex. Privacy thus holds less promise under a statute like Title VII or the ADEA—and has more potential value under statutes like the ADA or GINA. Given the tension between antisubordination and privacy in the areas of disability and genetics, should we prioritize privacy or antisubordination?

In the context of GINA, it may be desirable to take account of and use genetic information for antisubordination purposes, much like the ADA allows such use of disability-related information. In particular, the ADA allows employers to consider health-related information when determining whether a requested accommodation will be effective and whether their employment practices have a disparate impact on people with disabilities.[33] Under GINA, reserving the ability to use genetic information to

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[31] Title VII, 42 U.S.C. § 2000e(j) (2006); ADA, 42 U.S.C. § 12112(b)(5) (2006).

[32] Title VII permits properly tailored "affirmative action plan[s] voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987) (extending *Weber* to gender-based affirmative action). Title VII also expressly allows for court-ordered affirmative action to remediate past discrimination. In particular, Title VII permits courts, upon finding that an employer is engaging in an unlawful employment practice, to "order such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g)(1) (2006).

[33] ADA, 42 U.S.C. § 12112(b)(5)–(6) (2006).

fight future subordination may similarly be optimal. As we learn more about genetic information and such knowledge becomes widespread, requiring employers to consider genetic information for the discrete purposes of providing reasonable accommodation, gauging disparate impact discrimination, and promoting initiatives that affirm genetic diversity may be helpful.

The ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless doing so would cause undue hardship.[34] Under the ADA, an accommodation includes any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.[35]

In the genetic context, consider Professor Jessica Roberts's example of a person with a genetic predisposition to develop carpal tunnel syndrome.[36] GINA employs an anticlassificationist scheme that, unlike the ADA, bars an employer from considering such genetic information and classifying on that basis.[37] However, if an employer could consider genetic information, she might be able to provide an accommodation for the person genetically predisposed to carpal tunnel (such as working longer hours with more frequent breaks or switching positions throughout the day) that would prevent or slow the onset of this particular condition.[38] Besides the obvious benefits to the employee, the employer could avoid possible "work-related injury and any resulting gaps in employment."[39]

As previously noted, other antidiscrimination statutes, such as Title VII and the ADA, allow claimants to challenge facially

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[34] *Id.* § 12112(b)(5)(A) (noting the phrase "discriminate against a qualified individual on the basis of disability" includes an unwillingness to make reasonable accommodations, unless such an accommodation imposes an undue hardship on the operation of the business).

[35] 29 C.F.R. § 1630.2(o) (2011).

[36] Roberts, *supra* note 8, at 639.

[37] *Id.*

[38] *Id.*

[39] *Id.* Knowledge of a condition like carpal tunnel could, however, also lead an employer to discriminate. *See* Morrow, *supra* note 10, at 245 (describing an employer's attempts to avoid disability payments). However, disclosing one's impairment to secure a reasonable accommodation involves a level of risk/reward tolerated under the ADA.

neutral policies that create discriminatory results even where no intent to discriminate exists.[40] This type of claim is referred to as a "disparate impact" cause of action. An employer, in response, must show that the policy or requirement that creates the disparate impact is both job-related and a business necessity—or face liability for unlawful discrimination.[41]

In the genetic context, the risk of disparate impact discrimination stems from the fact that as scientists discover genes associated with certain illnesses and corresponding identifiable traits, individuals with such identifiable traits could potentially be screened out. For example, Roberts notes that scientists have discovered that a gene associated with height is linked to a genetic variant that predisposes its carriers to heart disease.[42] Accordingly, an employer might well decide to impose height requirements as a pretext for discriminating on the basis of the genetic predisposition to develop heart disease.[43]

The specter of disparate impact genetic discrimination is akin to statistical discrimination, where employers use race or gender proxies that correlate with a fact employers may validly consider—such as criminal convictions, financial distress, or lack of citizenry.[44] If employers discover that a nonproscribed trait, such as height, is statistically tied to severe illness, they could engage in disparate impact genetic discrimination.[45] A disparate impact cause of action would thus provide employees with a useful tool to ferret out genetic discrimination, especially since intentional discrimination is notoriously difficult to prove.[46] Accordingly, one

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[40] *See, e.g.*, Title VII, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (prohibiting practices that "cause[ ] a disparate impact on the basis of race, color, religion, sex, or national origin"); ADA, 42 U.S.C. § 12112(b)(3)(A) (2006) (prohibiting practices "that have the effect of discrimination on the basis of disability").

[41] ADA, 42 U.S.C. § 12113(a).

[42] Roberts, *supra* note 8, at 640.

[43] *Id.* Requiring the employer, though, to show both that the requirement is job-related and that it is a business necessity would likely uncover the discrimination.

[44] *See generally* Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363 (2008) (arguing that increasing the availability of information about individuals can reduce statistical discrimination).

[45] Roberts, *supra* note 8, at 640.

[46] *See* Ross v. Runyon, 859 F. Supp. 15, 21–22 (D.D.C. 1994) (acknowledging "that discriminatory intent and proof of disparate treatment are notoriously difficult to establish").

possible way to prevent a genetic underclass is to supplement the existing disparate treatment scheme with disparate impact protection now.[47]

Finally, genetic diversity initiatives could, in the future, prove useful for the same reason that they have been common for other antidiscrimination categories in work and education.[48] While we may be unable to predict who will incur stigma due to their genetic status, "we know enough about social subjugation in other contexts to take preventative measures."[49] Celebrating genetic diversity and its fundamentality to human existence might help "prevent negative stereotypes based on genetic difference from forming."[50]

Such recommendations are commensurate with, and would represent an incremental extension of, the ADA's current approach. The ADA provides the right to reasonable accommodation and a disparate impact cause of action and allows an employer to use disability-related information for "positive" purposes such as diversity initiatives. GINA's genetic exceptionalism[51]—or treating genetic information separately and differently from other health information—is without strong justification.

V. DISCLOSING GENETIC INFORMATION

Disclosure of private information may be preferable to silent subordination. The best example of this is found in the ADA's doctrine of reasonable accommodation. A disabled employee whose illness or condition is exacerbated by current working conditions

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[47] Disparate impact protection may seem unnecessary since genetic knowledge is young and evidence of disparate treatment is thus far scant. Indeed, such an inference is supported by Congress's notation to revisit in 2014 whether GINA ought to support a disparate impact cause of action. GINA, 42 U.S.C. § 2000ff-7 (Supp. II 2009) ("On the date that is [six] years after May 21, 2008, there shall be established a commission, to be known as the Genetic Nondiscrimination Study Commission . . . to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this Act.").

[48] Roberts, *supra* note 8, at 632.

[49] *Id.* at 631.

[50] *Id.* at 632.

[51] *See, e.g.*, Deborah Hellman, *What Makes Genetic Discrimination Exceptional?*, 29 AM. J.L. & MED. 77, 83 n.28 (2003) (defining genetic exceptionalism); Mark A. Rothstein, *Is GINA Worth the Wait?*, 36 J.L. MED. & ETHICS 174, 177 (2008) (same).

has two choices: to stay quiet about her disability (and, thus, preserve privacy if her employer has no knowledge of the condition) or to voluntarily approach the employer, disclose the condition, and suggest a reasonable accommodation that would allow her to remain able to perform the essential functions of the job. In such a situation a tension exists between privacy and the need to ameliorate one's subordinating situation. Yet, the ADA's emphasis on reasonable accommodation implies that self-disclosure of one's disability is worth the loss of privacy. There is no obvious reason why we ought to treat genetic information differently—even though the information pertains to a health condition that has not yet manifested itself. GINA, in this context, has both the potential to fight genetic discrimination and to prevent some disabilities.[52]

GINA should encourage the voluntary self-disclosure of genetic conditions under certain circumstances.[53] As with the ADA, people should be able to choose to disclose their health-related (genetic) information—permitting an employer to consider that information—when it would benefit them.[54] Requiring employers to consider voluntarily-disclosed genetic information in certain contexts would allow individuals to benefit from genetic testing and not fear discrimination.[55] For example, providing the right to a genetic-based reasonable accommodation would encourage applicants and employees to undergo genetic testing and think carefully about what they can do to protect their future health—which may well include seeking a reasonable accommodation.

Additionally, encouraging openness about genetic information may spur solidarity among those who are predisposed to dire physical conditions. This point ties into the earlier suggestion

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[52] For example, if the person with a genetic predisposition to carpal tunnel secures a reasonable accommodation, she might never develop carpal tunnel.

[53] This Essay is not advocating making all genetic information public. Many of GINA's anticlassificationist protections are important, such as strict limits on requesting or acquiring genetic information and the requirement to maintain the confidentiality of any genetic information acquired.

[54] Roberts, *supra* note 8, at 646.

[55] *Id.*

regarding genetic diversity initiatives.[56] Keeping genetic information private could lead those who have certain "negative" genes to feel stigmatized and cause the public to underappreciate the commonality of having a predisposition to one or more debilitating conditions. Much like it is important for people to realize that disability exists on a continuum and that we will all be disabled if we live long enough, the public must understand that everyone has genes—some good and some bad—and society must insist on nondiscrimination for all.

One might question whether GINA should facilitate disclosure of genetic information for antisubordination ends at a time when genetic discrimination is not yet common. This same question might be asked of the statute generally: Why provide protection from genetic discrimination before it is widespread? One answer is found in GINA's legislative findings. Given this country's history of eugenic-based immigration and sterilization laws in the 1920s and the influx of mandatory testing for sickle cell anemia in the 1970s—and given that knowledge of genetics is rapidly expanding—being preemptive instead of reactionary makes sense.[57]

A second answer is that laws have symbolic value, which transcends any immediate practical consequences.[58] In particular, antidiscrimination laws have an expressive function, which has historically, and gradually, helped change private parties' attitudes about particular identity traits.[59] In the expressive context, GINA's enactment signals both a particular valuation of genetic information as well as a general emphasis on protecting immutable traits as

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[56] *See id.* at 639 ("Additionally, allowing employers to consider genetic information leaves the door open for genetic diversity initiatives that would teach us to value genetic difference early in the creation of this new antidiscrimination category.").

[57] *See generally* GINA, Pub. L. No. 101-233 § 2, 122 Stat. 881 (2008) (outlining history of genetic-related discrimination in the United States).

[58] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996) ("My basic proposition is that, at least for purposes of law, any support for 'statements' should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms and hence in 'on balance' judgments about its consequences." (footnote omitted)).

[59] Rothstein, *supra* note 51, at 177.

part of the antidiscrimination project.[60] Accordingly, augmenting the statute to give greater protections—even at the expense of privacy—has both future instrumental value and current expressive value. If the political will exists to secure "negative" (or anticlassificationist) rights for genetic information, why not also now provide "positive" (or antisubordination-based) rights?

One might also question whether permitting the use of genetic information for the specified purposes is too injurious to privacy. While this short Essay is only intended to be exploratory and cannot possibly weigh the competing normative considerations that inhere in privacy and antisubordination, it is worth noting that a handful of de jure exceptions already exist that allow an employer to legally discover genetic information, such as when a company includes genetic tests in a company-sponsored wellness program[61] or genetically monitors the biological effects of toxic substances in the workplace.[62] Such exceptions suggest that any genetic privacy secured through GINA was not intended to be absolute, but instead, balanced against other considerations.

The most notable exception to GINA's proscription of employer acquisition of genetic information, however, is a de facto one. Under the ADA, employers may lawfully require individuals to release all of their health records once a conditional offer of employment has been made.[63] The purpose of this provision is to allow the employer to ensure the individual can perform the essential functions of the job with or without reasonable accommodation. If the records were to indicate that the individual is likely to be unable to perform the essential functions of the job, the offer could be withdrawn.[64] Even if an employer were to request only nongenetic health information, it is commonplace for

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[60] *See generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011) (considering immutability as a unifying principle for employment discrimination law).

[61] GINA, 42 U.S.C. § 2000ff-1 (Supp. II 2009).

[62] *Id.* § 2000ff-5.

[63] ADA, 42 U.S.C. § 12112(d)(3) (2006).

[64] *See id.* § 12112(a) (providing employment discrimination protection for disabled applicants or employees who are "qualified"); § 12111(8) (requiring a "qualified individual" to be able to "perform the essential functions of the employment position that such individual holds or desires").

custodians to release all of an individual's health records.[65] Any injury to privacy furthered by this Essay's recommendations would thus only be incremental. Moreover, the recommendations herein contemplate only voluntary disclosure. An employer could not compel the information that would, for example, constitute the basis for a reasonable accommodation.

VI. CONCLUSION

GINA currently employs a pure anticlassificationist scheme that grants employees strong privacy rights by prohibiting any employer consideration of genetic information. However, adding certain antisubordinationist provisions, which would require employer consideration of self-disclosed genetic information, would strengthen GINA's current framework. Under both GINA and the ADA, foregoing privacy to fight subordination is in many instances desirable. Privacy may thus be a civil want—rather than a civil right—in the area of health traits that receive protection from employment discrimination.

[65] *See* Rothstein, *supra* note 51, at 177 (noting lack of practical way to filter out non-genetic information).