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What Is in GINA's Genes? The Curious Case of the Mutant-Hybrid Employment Law

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WHAT IS IN GINA'S GENES? THE CURIOUS CASE OF THE MUTANT-HYBRID EMPLOYMENT LAW

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I. Announcing the Discovery of a Mutation

The Genetic Information Nondiscrimination Act (GINA)¹ was signed into law on May 21, 2008.² In general, GINA prohibits employers and health insurers from obtaining genetic information or using it to make adverse

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

2. See Derrick Cain, *Bush Signs Legislation to Prohibit Genetic Discrimination in the Workplace*, Daily Lab. Rep. (BNA) No. 99 (May 22, 2008).

decisions against individuals.³ GINA has been hailed as the “first civil rights act of the 21st Century.”⁴ Politically, it was an overwhelmingly popular piece of legislation, with the Senate passing it unanimously and the House passing it with only one vote in opposition.⁵ Its enactment was widely applauded, with the *New York Times*, for example, declaring that “lawmakers rightly saw that fairness and public policy arguments demanded a ban on discriminating against people for genetic traits they can do nothing about.”⁶

For all of its accolades, however, GINA also is a conundrum. It is the first employment discrimination statute passed without a history of discrimination against the protected class. Accordingly, one commentator labeled it “the first preemptive antidiscrimination statute in American history,”⁷ and further noted that it is “perhaps the first antidiscrimination statute passed without an associated identity group.”⁸ One might say that genetic testing of GINA has revealed it to be a mutant antidiscrimination statute, differing in significant ways from prior antidiscrimination laws.

The discovery of such a mutation should be monumental. However, it has been argued that GINA, at least in practice, may turn out to be much ado about very little.⁹ Genetic information employment discrimination was not a problem when GINA was passed, and it may never have become a problem even without the passage of GINA. With the new law, it seems very unlikely that a significant problem will emerge regarding genetic information

3. Title I of GINA covers health insurance, and Title II addresses employment discrimination. This essay focuses on Title II.

4. Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 475 (2010) (quoting Senator Judd Gregg and the late Senator Edward Kennedy). Senator Kennedy actually referred to GINA as “the first civil rights bill of the new century of life sciences.” David H. Kaye, Commentary, *GINA’s Genotypes*, 108 MICH. L. REV. FIRST IMPRESSIONS 51, 51 (2010); Ricardo Alonso-Zaldivar, *Senate Backs Privacy for Genetic Data*, L.A. TIMES, Apr. 25, 2008.

5. See Cain, *supra* note 2; Editorial, *A Ban on Genetic Discrimination*, N.Y. TIMES, Nov. 22, 2009, at WK9.

6. Editorial, *supra* note 5. Of course, those regulated by GINA viewed it less favorably. See *id.* (discussing opposition of “[s]ome insurance companies and business groups”); Patricia Alten, Abstract, *GINA: A Genetic Information Nondiscrimination Solution in Search of a Problem*, 61 FLA. L. REV. 379, 389 (2009) (“Employers argued vehemently against GINA.”); Roberts, *supra* note 4, at 448-49 (discussing the opposition group known as the Genetic Information Nondiscrimination in Employment Coalition); see also Kevin P. McGowan, *Employer Advocates Remain Wary of New Bias Law’s Potential Effects*, Daily Lab. Rep. (BNA) No. 99, at C-1 (May 22, 2008).

7. Roberts, *supra* note 4, at 441.

8. *Id.* at 484.

9. See *id.* at 462 (“[L]ittle evidence indicates that genetic-information discrimination is currently taking place on a large scale.”).

discrimination.¹⁰ So, maybe this mutation is not so monumental. Perhaps it will fade almost unnoticed into the annals of antidiscrimination law.

From a theoretical perspective, however, GINA is well worth considering as an aberrant antidiscrimination law, and reconsidering it as something other than just an antidiscrimination mutant. A law like none other before it may have significant theoretical implications. It may reveal something important about the current state of our employment laws, as well as the history, and perhaps the future. If GINA is such an exceptional law, how did it come to be enacted? Does its enactment suggest possible trends for the future of employment law? Ruminating about GINA may elucidate some truths about how employment law, politics, and societal values interact and provide some insight into future employment laws.

GINA is undoubtedly an exceptional antidiscrimination law, and I will treat it as such. However, when one tests GINA, one finds that GINA is not just a mutant antidiscrimination statute, but also a hybrid — part antidiscrimination statute and part privacy law.¹¹

Most of GINA's ancestors are employment antidiscrimination laws that say little about privacy. Title VII of the Civil Rights Act of 1964¹² and the Age Discrimination in Employment Act of 1967 (ADEA)¹³ do not prohibit employers from inquiring about or revealing to others an employee's color, race, sex, religion, national origin, or age. Under both of those laws, often there is no secrecy or privacy regarding these characteristics because they are easily discernible by observation or other means without making inquiry. In cases in which the protected characteristic is not obvious, an employer may be well advised not to ask about it, but that is because such an inquiry may help the employee prove that an adverse employment action was taken because of the protected characteristic — not because the statute protects the privacy of the information. On the other hand, the Americans with Disabilities Act of 1990 (ADA),¹⁴ although predominantly an antidiscrimination statute, does

10. Beyond litigation, GINA may play a significant role in alleviating people's fears about genetic testing and thereby facilitate genetic research. *See, e.g., id.* at 471-74. However, it is far from certain that GINA will have that effect. *See id.* at 488-89 (positing that GINA may "legitimiz[e] the very fears it sought to relieve").

11. I am not the first commentator to recognize the privacy DNA in genetic discrimination. *See, e.g.,* Gaia Bernstein, *The Paradoxes of Technological Diffusion: Genetic Discrimination and Internet Privacy*, 39 CONN. L. REV. 241 (2006); Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497 (2002); *see also* MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 31-34 (3d ed. 2009).

12. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

13. 29 U.S.C. §§ 621-633a (2006).

14. 42 U.S.C. §§ 12101-12117 (2006 & Supp. III 2009). Another federal employment

have a less prominent privacy aspect. The ADA, in a limited way, prohibits inquiries regarding disabilities,¹⁵ but the statutory language of the Act and the litigation thereunder are predominantly about nondiscrimination.¹⁶ In contrast, the statutory language of GINA is devoted more to protecting the privacy of genetic information¹⁷ than to antidiscrimination.¹⁸ As discussed more fully below,¹⁹ part of GINA's section declaring unlawful practices reads more like a privacy protection statute, similar to that in the Employee Polygraph Protection Act of 1988,²⁰ than an antidiscrimination law.

Part II of this essay considers GINA as a nonprototypical (mutant) antidiscrimination law and discusses its improbable enactment. Part III evaluates the privacy aspects of GINA, thus typing it as a hybrid privacy-antidiscrimination law. Part IV discusses what the enactment of a mutant-hybrid employment law may presage for future employment laws. Is the enactment of GINA the beginning of an evolutionary trend or a one-time mutation?

II. The Improbable Enactment of a Mutant Antidiscrimination Law

A. GINA as a Mutant Antidiscrimination Law

GINA is unusual as an antidiscrimination statute. It was enacted after about a thirteen-year track record in Congress,²¹ with no history of discrimination and no multitude of discrimination victims clamoring for justice. How did such an antidiscrimination law become enacted and what, if anything, does it tell us about future laws?

It is tempting to proclaim that GINA is not an antidiscrimination statute at all.²² It does not, after all, actually prohibit discrimination based on a characteristic that a person has, such as race, color, sex, national origin, religion, age, or disability, but instead it prohibits discrimination based on genetic information and testing. One aspect of this distinction is that the

discrimination statute is the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2006). The Act prohibits discrimination based on handicap, but its coverage is limited to employment by the federal government, federal government contractors, and recipients of federal funds.

15. *See id.* § 12112(d) (prohibiting certain medical inquiries).

16. *See id.* § 12112(a)-(b) (prohibiting discrimination).

17. *See* 42 U.S.C. §§ 2000ff-1(b)-(c), 2000ff-5.

18. *See id.* § 2000ff-1 (a).

19. *See* discussion *infra* Part III.

20. 29 U.S.C. §§ 2001-2009 (2006).

21. *See* Roberts, *supra* note 4, at 447-51 (detailing GINA's path to law).

22. *See* Kim, *supra* note 11, at 1524 (“[T]he most commonly accepted justifications for forbidding race and other prohibited forms of discrimination do not necessarily apply to employer discrimination based on genetic traits.”).

genetic trait itself is not the thing that is protected, but information about it, which usually is generated by testing or inquiring.²³ Yet, ultimately it is the genetic trait that is being protected. Although this aspect of GINA does distinguish it from the other employment discrimination statutes in most cases, it does not make it unique among antidiscrimination laws. An employer cannot discriminate because of a protected characteristic unless the employer knows the employee possesses that characteristic. Most of the characteristics covered by antidiscrimination statutes are readily observable in most cases, and there is no question about the employer's knowledge. However, in cases in which they are not, as in some cases of religion,²⁴ disability,²⁵ and pregnancy,²⁶ the plaintiff must prove the employer's knowledge. Thus, GINA's protection of genetic information and testing differs somewhat from other antidiscrimination laws, but not much.

A second aspect of the distinction between protecting personal characteristics and genetic information and testing is that there is no well-defined class of people protected by GINA.²⁷ For race, national origin, and sex (including pregnancy), in most cases persons can be classified in a group. However, this aspect of GINA also does not distinguish it from all other antidiscrimination laws in all cases. Consider, for example, that religion and disability often do not involve well-defined classes. With race and sex, there are only a few races and two sexes, and we know the races and sex that historically have been discriminated against in employment. In contrast, with religion and disability, there are an almost infinite number of classifications

23. See Roberts, *supra* note 4, at 482-83 ("Discriminating on the basis of genetic information often relies on testing and scientific expertise, making genetic-information discrimination patently different from discrimination on the basis of race, sex, age, or disability. To face the kind of discrimination covered by GINA, most individuals will have to opt-in to the category of potential victims by taking genetic tests.").

24. See, e.g., Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003) ("It is difficult to see how an employer can be charged with discrimination on the basis of an employee's religion when he doesn't know the employee's religion . . .").

25. See, e.g., EEOC v. Lee's Log Cabin, Inc., 554 F.3d 1102, 1104 (7th Cir. 2009) ("Certainly an ADA plaintiff must demonstrate a causal connection between an employer's adverse action and its knowledge of her disability.").

26. See, e.g., Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578, 581 (3d Cir. 1996) ("We cannot presume that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class. The employer's knowledge, in this class of cases, is a critical element of the plaintiff's prima facie case.").

27. See Kim, *supra* note 11, at 1520 ("One obvious reason that no widespread animus is directed against persons with genetic anomalies is that those individuals do not constitute a socially recognized group. Even conceptualizing the relevant disadvantaged 'group' raises some difficulties, given that each individual's genetic material contains some anomalies that predispose to disease."); Roberts, *supra* note 4, at 484 (characterizing GINA as an antidiscrimination statute "passed without an associated identity group").

within each, and the history of discrimination is less focused. Age also presents the same diffuse group issues in the context of the ADEA, as age spreads out over a continuum from age forty upward. Of the characteristics covered by antidiscrimination laws before GINA, disability yields the most amorphous class,²⁸ and the issue of coverage (whether one has a disability) has been the dominant issue in much of the litigation under the ADA.²⁹

In the end, one can say that genetic discrimination differs from other types of discrimination and that GINA is a different kind of antidiscrimination statute, but it has enough DNA to belong to the antidiscrimination family.

B. Enactment Without the Usual Pedigree of an Antidiscrimination Law

Before GINA was enacted there were three federal employment antidiscrimination laws that covered several characteristics: Title VII of the Civil Rights Act of 1964 (covering color, race, sex, religion, and national origin);³⁰ the Age Discrimination in Employment Act of 1967 (ADEA);³¹ and the Americans with Disabilities Act (ADA) of 1990.³² There are, of course, state and local laws that cover some traits not covered by federal laws.³³ In about forty-six years since the formal recognition of employment discrimination law, it has not been easy for new traits to be added, although there have been numerous candidates. There is no comprehensive list of factors that lead to passage of an antidiscrimination law, but the following are often mentioned: 1) moral objection to the discrimination; 2) a cohesive and identifiable group of people that would be covered; 3) a history of discrimination against people who possess the characteristic; 4) immutability of the characteristic;³⁴ and 5) irrelevance of the characteristic to job

28. See Michael Selmi, *Interpreting the Americans With Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 533 (2008) (“[T]he need to define the protected class renders disability statutes different from other antidiscrimination statutes, and there is no accepted way to define disability.”).

29. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Antidiscrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000).

30. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

31. 29 U.S.C. §§ 621-633a (2006).

32. 42 U.S.C. §§ 12101-12117 (2006 & Supp. III 2009).

33. See, e.g., D.C. CODE ANN. §§ 2-1401.02(22), 2-1402.11 (personal appearance); LA. REV. STAT. ANN. 23:351 (sickle cell trait); MICH. COMP. LAWS § 37.2202 (height and weight); SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, 9.83.020(13) (physical appearance).

34. Regarding the importance of immutability as a unifying principle that explains all of the protected characteristics in employment discrimination law, see Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1544 (2011).

performance.³⁵ As already discussed, GINA does not score well on the important factors of a history of discrimination and a cohesive and identifiable covered group. However, another thing that characterizes all laws that are enacted is political support. GINA was supported by the scientific research community and the private biotechnology sector.³⁶

With the enactment of GINA, genetic information and genetic testing achieved coverage without the usual pedigree and arguably jumped ahead of other candidates for employment discrimination protection. The most obvious example of a characteristic supplanted by GINA is sexual orientation, a characteristic with a better pedigree for coverage and a track record of legislative efforts, beginning in Congress in 1994.³⁷ The proposed Employment Non-Discrimination Act (ENDA) would add sexual orientation and, as recently introduced, gender identity, to the characteristics protected by the federal antidiscrimination laws.³⁸ Yet, GINA was enacted before ENDA.

Another predictor of the likelihood of enactment of new federal antidiscrimination laws is the enactment of such laws by states. On that factor, GINA had the advantage over ENDA. Genetic information and testing was covered by laws in a majority of states — about thirty-four — before GINA became federal law.³⁹ In contrast, sexual orientation is not yet covered by a

35. See Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right*, 35 U. MICH. J.L. REFORM 569, 601 (2002) (listing immutability, relevance, history of discrimination, and political power).

36. See, e.g., Perry W. Payne, Jr., *Genetic Information Nondiscrimination Act of 2008: The Federal Answer for Genetic Discrimination*, 5 J. HEALTH & BIOMEDICAL L. 33, 41-42 (2009) (“Companies, similar to genetic researchers, see genetic information nondiscrimination legislation as critical to their business model.”). I am grateful to Professor Pauline Kim for pointing out the important role of the scientific community in supporting the enactment of GINA.

37. See, e.g., Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 8-13 (2009) (chronicling legislative efforts).

38. H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

39. See Daniel Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008*, 19 GEO. MASON U. C.R. L.J. 311, 347 (2009); see also National Conference of State Legislatures, *Genetic Privacy Laws*, <http://www.ncsl.org/IssuesResearch/Health/GeneticPrivacyLaws/tabid/14287/Default.aspx> (last updated Mar. 2008).

majority of state laws,⁴⁰ although we may be on the brink of Congressional passage of ENDA.

In addition to sexual orientation, other candidates for employment antidiscrimination coverage for which a good case has been made include caregiver status,⁴¹ family status,⁴² and appearance.⁴³ Whether GINA “broke in line” ahead of ENDA or other possible antidiscrimination laws to achieve coverage for genetic information and testing, it is clear that it enjoyed a relatively rapid ascent without some of the qualifications possessed by other candidates for coverage.

Given the improbable enactment of GINA without the supporting history of discrimination, one commentator contemplated the mutant antidiscrimination law and asked whether it is a harbinger of a new race of mutant preemptive antidiscrimination laws.⁴⁴ I think, however, that the key to unlocking the mystery of GINA’s improbable birth and any prognostications for the future based on its emergence lies in its hybrid nature. It leapt to the front of the antidiscrimination pack without the standard pedigree largely because it is not just an antidiscrimination law. It is also part privacy law.

III. Improbable Enactment of a Hybrid Antidiscrimination/Privacy Law

A. GINA as a Hybrid Antidiscrimination/Privacy Law

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

40. The current number seems to be twenty-one states and the District of Columbia. See *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (last visited Oct. 23, 2011). Colorado was the twentieth state to enact such a law in 2008. See Tripp Baltz, *Colorado Governor Signs Legislation Expanding Workplace Protections for Gays*, Daily Lab. Rep. (BNA) No. 109, at A-8 (June 6, 2008). Delaware followed in 2009. See Lorraine McCarthy, *Delaware Governor Signs Bill Banning Discrimination Based on Sexual Orientation*, Daily Lab. Rep. (BNA) No. 126, at A-10 (July 6, 2009).

41. The EEOC issued a guidance document in 2007 on such discrimination. EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES NO. 915.002 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. The EEOC later issued *Employer Best Practices for Workers with Caregiving Responsibilities*, available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>. See generally Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of Real Workers*, 58 U. KAN. L. REV. 355 (2010).

42. See Smith, *supra* note 35, at 606-07.

43. See DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 117-43 (2010) (examining legal challenges and frameworks for discrimination based on appearance).

44. See Roberts, *supra* note 4, at 441, 489-90.

treatment than antidiscrimination law.⁴⁵ What is the difference? First, the interests implicated by privacy are distinct from those implicated by antidiscrimination. Antidiscrimination law addresses interests in equal treatment of similarly situated individuals and antistatutory of historically disadvantaged groups,⁴⁶ whereas privacy deals with a person's "right to be let alone."⁴⁷ Privacy is a complicated concept and includes interests such as secrecy of information and autonomy.⁴⁸ Second, the forms of the laws are different. Antidiscrimination laws focus on discriminatory motive--prohibiting employers from taking adverse employment actions because of a characteristic.⁴⁹ Workplace privacy laws, on the other hand, tend to prohibit employers from taking certain actions that constitute invasions of the protected privacy interest without regard for the motive.⁵⁰

So which is GINA — antidiscrimination law or privacy law? Both. In name, it is an antidiscrimination law. As discussed above, it has some characteristics of an antidiscrimination law, but it also lacks some. It is written in the language of an antidiscrimination law, prohibiting employment discrimination because of genetic information.⁵¹ However, it also is written in the language of a workplace privacy law, prohibiting employers from "request[ing], requir[ing], or purchas[ing]" genetic information.⁵² Indeed,

45. See, e.g., Bernstein, *supra* note 11; Kim, *supra* note 11.

46. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 40-42 (2006).

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

48. See Kim, *supra* note 11, at 1535; Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1099-1124 (2002).

49. See Kim, *supra* note 11, at 1537. I do not mean to ignore disparate impact, which is a theory of nonintentional discrimination. However, intentional discrimination is the focus of antidiscrimination law, and most charges and lawsuits allege intentional discrimination.

50. *Id.*

51. See 42 U.S.C. 2000ff-1(a) (Supp. II 2008):

a) Discrimination Based on Genetic Information. — It shall be an unlawful employment practice 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 of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

Id.

52. *Id.* § 2000ff-1(b).

years before the passage of GINA, Professor Pauline Kim, in urging passage of a privacy law rather than an antidiscrimination law, argued:

If regulating employer use of genetic information is primarily a problem of protecting informational privacy, rather than preventing invidious discrimination, the appropriate legal response looks quite different. Any legal effort will focus on defining and controlling the flow of critical information, rather than determining the motive of the employer in taking adverse personnel actions.⁵³

Thus, GINA has both antidiscrimination and privacy DNA. This might not be apparent, however, given the name of the law and the assignment of enforcement jurisdiction to the Equal Employment Opportunity Commission (EEOC). The EEOC is the agency charged with enforcement of the federal employment antidiscrimination laws.⁵⁴

B. GINA: Rare Enactment of a Federal Workplace Privacy Law

Just as enactment of employment antidiscrimination laws is difficult and politically charged, it is no simple task to pass workplace privacy legislation. Employees claim various expectations of privacy in the workplace, and employers counter, claiming a need to monitor or discover things that employees prefer to keep secret. Consider, for example, the topical issue of electronic and computer monitoring in the workplace. While employees claim a right of privacy in their communications, employers justify their “invasions” based on their needs to ensure productivity, secure confidential information, and avoid legal liability for communications by employees.⁵⁵ To appreciate the significance of the enactment of GINA as a federal workplace privacy law, it is instructive to consider another privacy law that was enacted — the Employee Polygraph Protection Act of 1988 (EPPA)⁵⁶ — and a workplace privacy issue that remains largely unregulated by federal law — electronic and computer monitoring.

Enacted at a time when employer polygraphing of employees and applicants was rampant,⁵⁷ the EPPA pronounced a virtual ban on the administering of lie detectors.⁵⁸ The language of the prohibitory section of the EPPA is similar to

53. See Kim, *supra* note 11, at 1543.

54. See Laws Enforced by EEOC, U.S. E.E.O.C., <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited June 10, 2011).

55. See, e.g., FINKIN, *supra* note 11, at 281.

56. 29 U.S.C. §§ 2001-2008 (2006).

57. S. REP. NO. 100-284, at 3 (1988) (stating that “over two million polygraphs were administered annually”).

58. “Lie detector” is defined more broadly than polygraph. See 29 U.S.C. § 2001(3).

the language in section 202(b) of GINA,⁵⁹ declaring it unlawful for an employer to “directly or indirectly . . . require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test”⁶⁰ or “to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee.”⁶¹

The EPPA should be seen as a monumental workplace privacy statute — a statute that essentially prohibits an employment practice that employers used pervasively for the purpose of protecting clear, legitimate, and undeniable interests.⁶² Compare Congress’s definitive ban on the use of lie detectors with its refusal to date to impose any limits on employers’ monitoring of employees’ computer and Internet use. Employers’ electronic monitoring of employees is pervasive and growing.⁶³ Electronic monitoring, like lie detectors and genetic testing, is an example of science and technology advancing and making discoverable previously private information, thus pitting employers’ legitimate business and workplace regulation interests against the privacy interests of employees.⁶⁴ In contrast to the virtual ban on the use of lie detectors by the EPPA, there is very little federal regulation of employers’ electronic monitoring of employees.⁶⁵ Congress has considered

59. See Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified at scattered sections of 42, 29 and 26 U.S.C.).

60. 29 U.S.C. § 2002(1).

61. *Id.* § 2002(2).

62. Employers most often used polygraphs to protect property interests — most commonly to predict or investigate thefts of property. See, e.g., Brad V. Driscoll, Note, *The Employee Polygraph Protection Act of 1988: A Balance of Interests*, 75 IOWA L. REV. 539, 554 (1990).

63. See, e.g., Bernstein, *supra* note 11, at 273-77; Press Release, American Management Association, 2007 Electronic Monitoring & Surveillance Survey (Feb. 28, 2008), <http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/>.

64. See Bernstein, *supra* note 11, at 252 (“Although the history of technologies — such as wiretapping — manifests a social aspiration toward balancing technological diffusion and privacy protection, these resolutions are not always achieved. In some cases, an equilibrium may occur only decades later.”); *id.* at 241 (“New technologies often cause social controversies by creating novel privacy threats.”).

65. Although some would cite the Electronic Communications Privacy Act and the Stored Communications Act, they have had little impact on the practice of employer electronic monitoring or litigation regarding those practices. The Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.), which amended the Omnibus Crime Control and Safe Streets Act of 1968, and the Stored Communications Act (SCA), which is Title II of the ECPA, predated widespread use of the Internet and many of the modern means of electronic communication. Thus, the laws were not written in terms that fit well with modern electronic communications. Furthermore, the ECPA and SCA are a “skein of statutory opacity.” FINKIN, *supra* note 11, at 358. Employees have pursued claims under the ECPA and the SCA based on electronic monitoring by employers, but most have foundered and failed in the ill-fitting statutory language. See, e.g., Jay P. Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles*

bills that would have minimally regulated electronic monitoring by requiring employers to give notice before monitoring, but those bills have not become law,⁶⁶ and it seems unlikely that they will.

There are many distinctions one can make between employers' use of polygraphs and employers' monitoring of computers and electronic communications, and those distinctions may well justify Congress's different treatment of the two workplace privacy issues. My point is that the EPPA is a rare federal workplace privacy regulation — an almost absolute ban of privacy-invasive tests used pervasively by employers to protect undisputed interests. GINA follows the path blazed by the EPPA. Before GINA, the EPPA stood as the exception to the principle that neither Congress nor the courts were very sympathetic to employee privacy interests when balanced against significant employer interests.⁶⁷ Prior to the passage of GINA, some commentators paired genetic discrimination with electronic monitoring in discussions of workplace privacy issues.⁶⁸ Acquisition and use of genetic information by employers became regulated, but electronic monitoring has not, beyond a few state laws.⁶⁹

GINA's successful enactment as a workplace privacy law can be explained in part by reference to the EPPA. Like polygraphs, genetic testing and screening is a scientific advancement that probes deeply within a person and lays bare information that a person may prefer to keep private.⁷⁰ Yet, there are

Examination of Electronic Privacy in the Workplace, 54 FLA. L. REV. 289, 295-99 (2002); Eric P. Robinson, *Big Brother or Modern Management: E-Mail Monitoring in the Private Workplace*, 17 LAB. LAW 311, 313-20 (2001); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 839-41 (1998).

66. Privacy for Consumers and Workers Act, H.R. 1900, 103d Cong. (1993-94); S. 984, 103d Cong. (1993-94). The bills were introduced in the 1989-90 term and in subsequent terms. A subsequent version was the Notice of Electronic Monitoring Act (NEMA), H.R. 4908, 106th Cong. (2000). Business interests killed NEMA in committee. *Business Coalition Blocks Markup of Bill Requiring Electronic Monitoring Notification*, Daily Lab. Rep. (BNA) No. 180, at A-9 (Sept. 15, 2000). For additional discussion of the bills, see Charles E. Frayer, Note, *Employee Privacy and Internet Monitoring: Balancing Workers' Rights and Dignity With Legitimate Management Interests*, 57 BUS. LAW. 857 (2002); Kesan, *supra* note 65, at 299-301; Amanda Richman, Note, *Restoring the Balance: Employer Liability and Employee Privacy*, 86 IOWA L. REV. 1337 (2001); Nathan Watson, Note, *The Private Workplace and the Proposed "Notice of Electronic Monitoring Act": Is "Notice" Enough?*, 54 FED. COMM. L.J. 79 (2001); Wilborn, *supra* note 65, at 850-52.

67. See generally William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 107-12 (2003).

68. See, e.g., *id.*; Bernstein, *supra* note 11.

69. Connecticut and Delaware have such laws. CONN. GEN. STAT. ANN. § 31-48d(b)(1) (West 2000); DEL. CODE ANN. tit. 19, § 705 (2008).

70. See, e.g., Bernstein, *supra* note 11, at 255-59 (discussing popular fears about genetic

differences. Genetic testing may be more accurate than polygraphs, and the occurrence of inaccurate polygraph results was a major concern with their use.⁷¹ However, the pervasive use of polygraphs at the time that the EPPA was enacted makes a better case for regulation than the dearth of genetic testing and screening at the time GINA was enacted.

In the final analysis, the common theme that yokes the EPPA and GINA is an Orwellian quality about the shredding of the deepest recesses of personal privacy by scientific and technological probing. This theme alarms people and resonates with lawmakers, who can campaign for election (or reelection) on defending the privacy rights of people. With lie detectors and genetic testing, devices contact and invade people's bodies and extract information; this is intimate invasion of the person. As for computer and electronic monitoring, perhaps the invasion is not as frightening as devices do not act directly upon people's bodies. However, although employers' interests have been prevailing in electronic monitoring cases and debates to date, the striking of the balance in that area is far from over.⁷²

IV. Does GINA Signal an Evolutionary Trend In Employment Laws?

GINA is an exceptional antidiscrimination statute because it is preemptive — meaning that it was enacted without a supporting history of discrimination.⁷³ Thus, it is a mutant antidiscrimination statute. I have reconsidered GINA to show that not only is it a mutant, but it is a hybrid law — part antidiscrimination and part workplace privacy.⁷⁴ That

testing and discrimination).

71. See S. REP. NO. 100-284, *supra* note 57.

72. Consider, for example, the cautious qualifying comments of the United States Supreme Court in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010):

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In *Katz[v. United States]*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Id. at 2629.

73. Roberts, *supra* note 4, *passim*.

74. GINA may not be the first hybrid, as the ADA also has privacy aspects. However, GINA is the first hybrid so evenly balanced between privacy and antidiscrimination. The dominant genes in the ADA are more clearly antidiscrimination.

characterization, when fully explored, helps explain how a law protecting an unlikely candidate for employment discrimination coverage was enacted.

In view of the difficulty and controversy involved in enactment of both federal employment antidiscrimination laws and workplace privacy laws and the unsuccessful candidates in each category,⁷⁵ it seems that the hybrid nature of GINA strengthened it and improved its prospects for becoming law. The analogy that genetic discrimination is like racial discrimination and they are equally wrong⁷⁶ has powerful, if facile, appeal, and this argument permitted proponents of GINA to “tap the moral authority of the civil rights movement.”⁷⁷ The merging of the privacy arguments discussed above with the antidiscrimination arguments provided a powerful “two-fisted” rationale for enactment. Although either antidiscrimination or privacy arguments alone may have failed to carry the day, the pairing proved persuasive.

One lesson from GINA’s ascendancy may be that pure-breed antidiscrimination laws and privacy laws have less chance of enactment than the new breed: hybrid antidiscrimination/privacy laws. That brings us to the provocative question: Is GINA the beginning of a trend or was it a one-time thing?⁷⁸ Because I have characterized GINA as a mutant-hybrid antidiscrimination/privacy law, I ask a variation on that question: Will such hybrid statutes be an evolutionary trend or a one-time mutation that is unlikely to be replicated? The successful passage of GINA may tempt advocates of other causes, such as electronic monitoring regulation, to attempt to follow the template, but it is hard to see how many other privacy issues could be fitted with antidiscrimination trappings as effectively as GINA was. Additionally, there may be no more hybrid antidiscrimination/privacy bills that will garner the level of political support that the scientific community gave to GINA.⁷⁹

But before leaving this as a question to be answered in retrospect, let us consider a possible descendant to carry on GINA’s line: legislation prohibiting employers from obtaining or using credit history and credit information. Several states have passed laws significantly restricting the use of credit history and credit information, and of the four states, two passed such laws in 2010.⁸⁰ California recently became the latest state to enact such a

75. *See supra* Parts II and III.

76. *See Kim, supra* note 11, at 1501.

77. *Id.* at 1500.

78. *See Roberts, supra* note 4, at 490.

79. *See supra* note 36.

80. Oregon and Illinois in 2010 became the third and fourth states, respectively, joining Washington and Hawaii, to enact a law imposing restrictions on credit checks for employment purposes. *See Philip L. Gordon, Incipient Legislative Trend Toward “Credit Privacy” Compels Restraint in Use of Credit Checks for Employment Purposes*, Daily Lab. Rep. (BNA) No. 131, at I-1 (July 10, 2010) (discussing Oregon’s Job Applicant Fairness Act); Thom Wilder, *New*

law.⁸¹ As mentioned above, enactment of antidiscrimination laws in a number of states sometimes presages federal legislation.⁸² A bill introduced in the U.S. House in 2009, the Equal Employment for All Act, would amend the federal Fair Credit Reporting Act⁸³ to prohibit employers and prospective employers from taking adverse employment actions on the basis of consumer reports containing information regarding creditworthiness, credit standing, or credit capacity.⁸⁴ The credit history and information bills, like GINA, are hybrid antidiscrimination/privacy laws. The name of the proposed federal law invokes the antidiscrimination theory of equal treatment without regard for the protected characteristic. Further establishing the bill's antidiscrimination credentials, there have been numerous administrative charges and lawsuits filed under Title VII asserting that employment decisions based on credit information were illegal racial discrimination because of their disparate impact.⁸⁵ Thus, the antidiscrimination credentials of the credit information laws are well established. Moreover, the privacy and secrecy of information aspect is obvious as well.

So, will credit information be the basis of the next mutant-hybrid antidiscrimination/privacy law, following the lead of GINA? My guess is that the proposed legislation will not enjoy success comparable to that of GINA for several reasons: 1) consumer reports and credit information seem more relevant to many jobs than does genetic information; 2) the important factor of immutability of the protected characteristic is wholly inapplicable; 3) assembling and acquiring credit information do not involve the invasive reach of science into people's privacy; and 4) the groundswell of state laws has not yet reached the level that it did before GINA was enacted.

I think that the federal credit history bill will fail, and I can identify few other progeny of GINA that are likely to become law. I predict that GINA is a marvelous mutant-hybrid, which will have little practical usefulness and the likes of which we may never see again.

Illinois Law Bans Employer Inquiries Into Credit History of Employees, Job Seekers, Daily Lab. Rep. (BNA) No. 155, at A-10 (Aug. 12, 2010).

81. See Laura Mahoney, *California Governor Signs Credit Report, Farmworker Bills Before Midnight Deadline*, Daily Lab. Rep. (BNA) No. 196, at A-10 (Oct. 11, 2011).

82. See discussion accompanying *supra* notes 39-40.

83. 15 U.S.C. §§ 1681-1681t (2006).

84. See H.R. 3149, 111th Cong. (2009).

85. See generally Steven C. Bednar, *Employment Law Dilemmas: What to Do When the Law Forbids Compliance*, 11 UTAH B.J. 15, 17 (Dec. 1998); see also, Press Release, *EEOC Files Nationwide Hiring Discrimination Lawsuit Against Freeman*, <http://www.eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm> (detailing EEOC lawsuit alleging racial disparate impact based on use of credit information).

Conclusion

GINA is a seminal law in many ways. It is indeed “the first civil rights bill of the 21st century.”⁸⁶ It is “the first civil rights bill of the new century of life sciences.”⁸⁷ It is the first preemptive federal antidiscrimination law.⁸⁸ So, it is a mutant antidiscrimination law. However, it also is the first significant hybrid privacy-antidiscrimination law. GINA is indeed a strange marvel to behold. At the end of the day, however, its effectiveness will be dubious and difficult to gauge, and it is not likely to be replicated in form by other federal employment laws. The enactment of GINA is a curious case.

86. *See supra* note 4 and accompanying text.

87. *Id.*

88. *Id.*