Center on Race, Law and Justice presents

How Long ‘Til Black Future Month?

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Zoom Webinar

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*How Long ‘Til Black Future Month?*


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Ifeoma Ajunwa
Ifeoma Ajunwa joined Carolina Law in January of 2021 as an Associate Professor of Law with tenure. She is also the Founding Director of the AI Decision-Making Research Program. Professor Ajunwa has been Faculty Associate at the Berkman Klein Center at Harvard Law School since 2017. Her research interests include: Race & the Law, Law & Technology, Employment & Labor Law, Health Law, etc. She has a budding interest in law & literature. Professor Ajunwa’s work is published or forthcoming in high impact factor law reviews of general interest: the California Law Review, Cardozo Law Review, Fordham Law Review, and Northwestern Law Review, as well as, the top law journals for specialty areas such as: anti-discrimination law (Harvard Civil Rights-Civil Liberties Law Review), employment and labor law (Berkeley Journal of Employment and Labor Law), and law and technology (Harvard Journal of Law and Technology). She has published op-eds in the New York Times, Washington Post, The Atlantic, etc., and her research has been featured in major media outlets such as the New York Times, the Wall Street Journal, CNN, Guardian, the BBC, NPR, etc. In 2020, she testified before the U.S. Congressional Committee on Education and Labor, and has spoken before governmental agencies, such as, the Consumer Financial Protection Bureau (the CFPB), and the Equal Employment Opportunity Commission (the EEOC). In 2018, the Association of American Law Schools (AALS) awarded Professor Ajunwa the Derrick A. Bell Award in recognition of her scholarly and teaching efforts addressing racial discrimination. In 2019, the National Science Foundation (NSF) selected her NSF CAREER Award proposal on automated hiring for funding. And in 2020, she received a pioneer grant from the Robert Wood Johnson Foundation to research genetic testing as part of workplace wellness programs.

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Deborah N. Archer is the Jacob K. Javits Professor at New York University, and Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality at NYU School of Law. Deborah is also the President of the American Civil Liberties Union and a nationally recognized expert in civil rights, civil liberties, and racial justice. She is a graduate of Yale Law School, where she was awarded the Charles G. Albom Prize, and Smith College. She previously worked as an attorney with the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc., where she litigated in the areas of voting rights, employment discrimination, and school desegregation. She was also a member of the faculty at New York Law School for fifteen years and an associate at the firm Simpson, Thacher & Bartlett. Deborah is also a former chair of the American Association of Law School's Section on Civil Rights and Section on Minority Groups. She previously served on the New York City Civilian Complaint Review Board, the nation’s oldest and largest police oversight agency, and the 2018 New York City Charter Revision Commission. Deborah received the Otto L. Walter Distinguished Writing Award and the 2014 Haywood Burns/Shanara Guildbert Award from the Northeast People of Color Legal Scholarship Conference. Deborah was recognized by the New York Law Journal as one of New York’s Top Women in the Law.

Kimberly Bain
Kimberly Bain earned a Ph.D. in English and Interdisciplinary Humanistic Study from Princeton University. Bain's most pressing intellectual interests have consolidated around questions of the history, theory, and philosophy of: diaspora, race, gender, postcolonialism, enslavement, flesh, environmental racism, resistance, embodiment, and subjection and subjecthood. She is currently at work on two book projects.
Her first book project, entitled "On Black Breath", takes seriously the charge of "I can't breathe" and considers breath as more than the mere metaphor—rather, as also a somatic and sociopolitical phenomenon that has resonances in the wake of enslavement to the contemporary moment.

Her second book project, entitled "Dirt: Soil and Other Dark Matters," builds on her first project's methodological commitments to multi-temporal and nonchronological avenues of inquiry that trace the development and deployment of the mundane. Revising the impulse to read the Middle Passage as the singular heuristic for understanding Black movement, migration, and mobility throughout history, she turns to dirt for understanding contemporary Black diasporic relations.

Bain has been the recipient of numerous awards and has forthcoming essays on pettiness as a praxis, labored Black breathing, and more. More information about her current work can be found at kimbain.com.

Kendall Thomas

Kendall Thomas is a scholar of comparative constitutional law and human rights whose teaching and research focus on critical race theory, legal philosophy, feminist legal theory, and law and sexuality.

Thomas is the co-founder and director of the Center for the Study of Law and Culture at Columbia Law School, where he leads interdisciplinary projects and programs that explore how the law operates as one of the central ways to create meaning in society. He is a founder of Amend the 13th, a movement to amend the U.S. Constitution to end enforced prison labor.

His seminal writing on the intersection of race and law appears in Critical Race Theory: The Key Writings That Founded the Movement (1996), which he co-edited. He is also a co-editor of Legge Razza Diritti: La Critical Race Theory negli Stati Uniti (2005) and What's Left of Theory? (2000).

Thomas has taught at Columbia Law since 1986. He has been a visiting professor at Stanford Law School and a visiting professor in American studies and Afro-American studies at Princeton University. His writing has appeared in volumes of collected essays and in journals including National Black Law Journal, Widener Law Symposium Journal, and Columbia Journal of European Law.

Thomas was an inaugural recipient of the Berlin Prize Fellowship of the American Academy in Berlin and a member of the Special Committee of the American Center in Paris. He has been chair of the Jurisprudence Section and the Law and Humanities Section of the Association of American Law Schools.

He also has written and spoken widely on the impact of AIDS and was a founding member of the Majority Action Caucus of ACT UP, Sex Panic!, and the AIDS Prevention Action League. A former board member of the Gay Men’s Health Crisis, he now serves on the board of the NYC AIDS Memorial.

Thomas is also a professional jazz vocalist who performs at venues including Joe’s Pub and is on the board of advisors of the Broadway Advocacy Coalition.
Genetic Data and Civil Rights

Ifeoma Ajunwa*

Well-settled legal doctrines prohibit employers from discriminating against job applicants on the basis of physical characteristics such as race, sex, age, or disability. However, the full implications of genetic testing were inconceivable during the promulgation of those doctrines. Technological advancements and social trends in the interpretation of genetic testing create the need to re-examine the legal boundaries of the employer’s power to make hiring decisions on the basis of genetic information. Although the Genetic Information Nondiscrimination Act (“GINA”) took effect in 2009, there continues to be a steady increase in reported instances of genetic discrimination. This Article argues that Congress should strengthen GINA by adding a provision that authorizes a disparate impact cause of action. Currently, Section 208 of GINA explicitly prohibits disparate impact as a cause of action, but the section mandates the establishment of the Genetic Nondiscrimination Study Commission, which is charged with examining the developing science of genetics and will recommend to Congress whether to provide a disparate impact cause of action for GINA. This Article argues for the addition of a disparate impact clause for four reasons: (1) the addition of a disparate impact clause is in line with the precedent set by prior employment discrimination laws; (2) the EEOC has declared that proof of deliberate acquisition of genetic information is not necessary to establish a violation of GINA, and proof of intent to discriminate, likewise, should not be required to demonstrate genetic discrimination; (3) ease of access to genetic testing and the insecurity of genetic information has increased the likelihood of genetic discrimination in employment; and (4) real world instances of genetic testing have shown that facially neutral testing may result in racial disparities.

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INTRODUCTION

In February 2014, AOL CEO Tim Armstrong made headline news when he attributed his company’s cut of spending on 401K plans to “two AOL-ers that had distressed babies.”1 Treatment for the babies’ conditions had resulted in increased healthcare costs for the entire company.2 Amid a hail of criticism, Armstrong apologized for his comments, but the implications of his words continue to echo. Imagine if Armstrong were able to determine which potential employees were at a greater risk of having “distressed babies.” Should employers be permitted to use this information to exclude individuals from consideration for employment because they fear potential increased healthcare costs for their companies? With recent news of deals between the company 23andMe and companies such as Pfizer and

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1 The Washington Post reported:

“We had two AOL-ers that had distressed babies that were born that we paid a million dollars each to make sure those babies were OK in general,” said Armstrong, according to a transcript first obtained by Capital New York. “And those are the things that add up into our benefits cost. So when we had the final decision about what benefits to cut because of the increased healthcare costs, we made the decision, and I made the decision, to basically change the 401(k) plan.”


2 Id.
Genentech, involving the trading of access to large genetic databases for health research and with now-ubiquitous database breaches in the age of Big Data, we must secure greater legal protection against genetic discrimination.

Consider how often genetic discrimination plays out in the employment arena. In 2010, a few months after she underwent a double mastectomy, Pamela Fink, a resident of Connecticut, was fired. Fink was not ill. Like the actress Angelina Jolie later did, Fink chose an elective mastectomy after genetic testing revealed that she was a carrier of BRCA2, a mutated gene linked to breast cancer. According to Fink, she had been an exemplary employee, but she received her first negative review after her double mastectomy and the day before her reconstructive surgery. Although Fink is thought to be the first to file a complaint with the Equal Employment Opportunity Commission ("EEOC") on the basis of genetic discrimination as prohibited under the Genetic Information Nondiscrimination Act of 2008 ("GINA"), there are many more stories like hers. Before GINA was

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7 According to the National Cancer Institute, BRCA1 and BRCA2 are human genes that produce tumor suppressor proteins. These proteins help repair damaged DNA and, therefore, play a role in ensuring the stability of the cell’s genetic material. When either of these genes is mutated, or altered, such that its protein product is not made or does not function correctly, DNA damage may not be repaired properly. As a result, cells are more likely to develop additional genetic alterations that can lead to cancer.


8 See Friedman, *supra* note 5.

9 See id.


11 See Friedman, *supra* note 5. Fink’s case did not proceed to trial; rather, it was settled out of court. See Gina Kolata, *‘Devious Defecator’ Case Tests Genetics Law*, N.Y. TIMES
signed into law in 2008, the Council for Responsible Genetics asserts, there had been as many as 500 cases of documented genetic discrimination. The Council lists personal stories such as an applicant for a government job who was denied employment after medical and genetic tests had revealed that he was an asymptomatic carrier of Gaucher’s Disease.

Well-settled legal doctrines prohibit employers from discriminating against job applicants on the basis of physical characteristics such as race, sex, age, or disability. However, the full implications of genetic testing were inconceivable during the promulgation of those doctrines. Technological advancements and social trends in the interpretation of genetic testing create the need to re-examine the legal boundaries of the employer’s power to make hiring decisions on the basis of genetic information. While genetic testing has benevolent uses (including the discovery of propensity for disease and the possible early intervention for deadly diseases such as Tay-Sachs disease, cystic fibrosis, and sickle cell anemia), the public perception that genetic mutations inevitably lead to future disease opens the door for employment discrimination based on an employee’s genetic information. Although GINA took effect in 2009, there has been an increase in reported instances of genetic discrimination in each following year. As part of its Enforcement and Litigation Statistics, the EEOC reported that it had received 201 complaints of genetic discrimination in 2010, 245 complaints in 2011, 280 complaints in 2012, and 333 complaints in both 2013 and 2014. This statistical information suggests a trend towards increased occurrences of genetic discrimination. In fact, incidents of genetic discrimina-

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13 Id.

14 See infra Part II.C.


18 See infra Parts I.A–B; see also id. (describing the public perception as genetic essentialism and determinism).


20 Id.

tion may be underreported because the public remains relatively ignorant of the law and of its applications.22

This Article argues that GINA has been inadequate in preventing employment discrimination and that further action—specifically, the creation of a disparate impact cause of action—is necessary to fulfill the law’s objectives. Part I discusses both the increased significance afforded genetic information and the potential for abuse. Part II provides the background for GINA and analyzes relevant sections of the law, while contrasting it to earlier legislation enacted to check employment discrimination. Part III provides four arguments in favor of a disparate impact clause: (1) the addition of a disparate impact clause is in line with the precedent set by prior employment discrimination laws; (2) the EEOC has declared that proof of deliberate acquisition of genetic information is not necessary to establish a violation of GINA, and, similarly, proof of intent to discriminate should not be required to demonstrate genetic discrimination; (3) ease of access to genetic testing and the insecurity of genetic information has increased the likelihood of genetic discrimination in employment; and (4) real world instances of genetic testing have shown that facially neutral testing may result in racial disparities. Finally, Part IV addresses three anticipated criticisms.

I. THE ORIGINS OF GENETIC DISCRIMINATION

Genetic discrimination is the result of underlying sociological phenomena such as technological advances in the detection of genetic mutations and their links to genetic disease, and social beliefs regarding the probative value of genetic information. The relationship between the presumed agency afforded by genetic testing and the Foucauldian concept of biopower23—a concept that both explains the growing prevalence of genetic testing and bolsters the argument that the State holds a responsibility to further delineate boundaries for an employer’s use of genetic information—further illuminates the origins of genetic discrimination.

22 U.S. Representative Louise Slaughter, who supported GINA, recently wrote:

Despite the fact that Congress passed GINA in 2008, a nationally representative survey from 2011 indicated that fewer than one in five Americans (16%) are aware this law exists. Coupled with the observation that Americans are increasingly concerned about how their genetic information is stored and accessed, this would indicate that lack of understanding is not due to lack of interest. Surprisingly, even among physicians, a staggering [81% of Americans] are not familiar with GINA protections.


23 See infra Part I.C.
A. Genetic Essentialism

Genetic discrimination primarily stems from genetic essentialism, that is, “a reductionist view of human beings as essentially consisting of their genes.”24 The National Institute of Health describes genetic discrimination as occurring “when people are treated differently by their employer or insurance company because they have a gene mutation that causes or increases the risk of an inherited disorder.”25 Other scholars have defined genetic discrimination as circumstances in which “an individual is subjected to negative treatment, not as a result of the individual’s physical manifestation of disease or disability, but solely because of the individual’s genetic composition.”26

In *The DNA Mystique*, Dorothy Nelkin and M. Susan Lindee provide a compelling overview of the increased importance ascribed to DNA and the pervasiveness of genetic testing in American social life.27 Other contemporary popular media offer a glimpse of the social reification of genetic testing and the information such testing provides. For example, the catchphrase “You are NOT the father” has been passed on to the public by the melodramatic television program *Maury*, in which genetic tests to prove paternity are commonplace.28 Criminal-investigation television shows such as *CSI* and *Law & Order* have inculcated within American society an acceptance of DNA as the ultimate sleuth, manifested as the molecular Sherlock Holmes who always and accurately determines “whodunnit.” Moreover, from the headline-making news of the Innocence Project, the public has come to view DNA as the final truth teller, with the power to exonerate and overturn wrongful convictions and to save the lives of those falsely accused.29 It is not surprising, then, that the public highly favors genetic testing for the discovery of predisposition to diseases and other medical conditions and that the majority of the public would personally undergo genetic testing to detect propensity for genetic disease.30

26 Ajunwa, supra note 4, at 1235.
27 DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON 198 (1996); see also AUSTL. L. REFORM COMM’N, supra note 24, at § 3.72.
28 See generally Maury (NBC Universal).
The credence given to genetic testing as a preventive measure for heritable diseases is evidenced by the fact that, in the early 1980s over 310,000 Jews volunteered for genetic screening for Tay-Sachs disease, and that a major endeavor of the Black Panther Party was the establishment of clinics where African Americans could be tested for the sickle cell trait. The fact that these two populations with ample reason to be leery of medical tests would willingly subject their genetic material to examination speaks powerfully to the trust and authority now accorded genetic testing. Currently, all 50 states and the District of Columbia mandate newborn testing for 21 or more common disorders. Finally, most pregnant women, particularly those of advanced maternal age, now feel social pressure to undergo amniocentesis, during which the unborn child is tested for genetic abnormalities such as those signaling Down Syndrome.

B. Genetic Determinism

Popular belief in genetic determinism is another reason why genetic information might be employed for discriminatory purposes. “Genetic determinism” is the belief that human health and behavior are predetermined by a person’s genetic profile and that “personal traits are predictable and permanent, determined at conception, ‘hard-wired’ into the human constitution.” Genetic determinism derives from the phenomenon of the lay public acquiescing to an over-reliance on genetic information without fully comprehending its complexity. Many do not clearly understand that both genetic and environmental factors cause diseases, and therefore, they believe that the presence of a genetic probability for a disease means the certainty of developing the disease. The lay public also brings to bear its own social experiences in estimating probabilities or predicting outcomes, resulting in prejudiced or inaccurate conclusions about the likelihood of disease.

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31 Troy Duster, Backdoor to Eugenics 46 (2d ed. 2003).
32 Alondra Nelson, Body and Soul 90, 115–16 (2011). This development is particularly interesting given that African Americans had previously perceived genetic testing as a weapon of genocide.
With these inaccurate filters for interpretation, information obtained from genetic testing easily may be exploited to discriminate against people based on the assumption, wrongful or not, of certain future illness. In 1997, Paul R. Billings, Deputy Chief of Staff for the San Jose Clinic of the Veterans Administration Palo Alto Health Care System and a clinical associate professor of medicine at Stanford University, raised an early alarm regarding the potential for the misuse of genetic information. Billings noted that “genetic discrimination was already occurring in insurance and employment settings and was reaching into the areas of adoption and military service.” He added that “the storage of genetic information, in DNA banks like the one maintained by the Department of Defense, has already produced serious problems.” Billings also said that physicians, many of whom may be unaware of the dangers of genetic discrimination, are being asked to sanction the use of genetic tests as a “medical necessity”; Billings further observed that “this important change may increase the incidence of genetic discrimination.”

C. Foucauldian Biopower and Genetic Coercion

The essentialist view of genetic information has led to the ubiquity of genetic testing and the popular belief that such testing is always beneficial. While some concerns exist about false negatives derived from genetic testing, the prevailing belief is that genetic testing empowers individuals, conferring both the agency and the knowledge necessary to make crucial decisions about one’s health and the health of one’s future children. However, with the increasing prevalence of genetic testing in American society, to whom does this power truly fall? This Article proffers that the combination of genetic essentialism and genetic determinism has led to “genetic coercion.”

Genetic coercion is the overwhelming economic, social, and moral compulsion to scrutinize and police the genome that an individual experiences. The economic compulsion derives from the lack of universal healthcare, which renders life that is infirm or frail financially difficult to sustain. The social compulsion arises from the reification of genetic data as the key

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41 Id.
42 Id.
43 Ajunwa, supra note 4, at 1227–28.
to cohesive social life such that non-conforming genes must be exposed. In the *DNA Mystique*, the authors illustrate the high social value accorded DNA information:

As the science of genetics has moved from the laboratory to mass culture, from professional journals to the television screen, the gene has been transformed. Instead of a piece of hereditary information, it has become the *key to human relationships* and the basis of family cohesion. Instead of a string of purines and pyrimidines, it has become the essence of identity and the source of social difference. Instead of an important molecule, it has become the *secular equivalent of the human soul*.46

If DNA is the secular equivalent of the soul, then the moral compulsion is the notion of genetic testing as genetic hygiene for the betterment of society; that is, it is the moral duty of the individual to scrub from her germline deleterious genetic mutations that would be passed on to future generations.

The technology of genetic testing could be seen as affording *power* to act to control the *bios*, that is, the body, life, and procreation.47 The *idée reçue* is that through genetic testing, an individual can, and should discover latent genetic mutations that point to a predilection toward certain diseases, and that through selective mating, the individual can control whether these mutations are passed on or forever eradicated from the bloodline.48 However, the Foucauldian theory of *biopower* points to the concept of a third party appropriating the results of genetic testing and relieving the tested individual of the agency to act based on that information. Michel Foucault writes in *The History of Sexuality* that *biopower* is *governmental* power over other bodies through “an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations.”49 Therefore, *biopower* as applied to the phenomenon of genetic testing speaks to the government’s interest in fostering the health of its population and regulating new life, particularly when such life might be deemed burdensome to the state.50 Foucault contrasts *biopower* with the more traditional modes of governmental power that were based on the threat of death from a sovereign.51 As Foucault notes, modern legitimate government employs *biopower* with an emphasis on the protection of life, rather than the menace of death.52

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48 It is important not to lose sight of the eugenic implications of genetic testing. See, e.g., Duster, *supra* note 31, at 95–97.
49 Foucault, *supra* note 47, at 140.
50 Id. at 139.
51 Id. at 140.
52 Id. at 142.
Although the discourse on genetic testing is most frequently framed in positive terms as life promoting, it is also life limiting because it seeks to promote only certain kinds of life; that is, life that is deemed healthy and useful for society. Therefore, one conclusion is that by the biopower granted by genetic testing, the state makes the individual a willing agent of the state. As genetic testing is made ubiquitous and socially acceptable, the individual, through social and economic pressures, is now directly or indirectly called upon to police her own bios, resulting in genetic coercion.

That workplace wellness programs operate under the aegis of the government makes the employer an agent of the state in the support of biopower. Corporate wellness programs are designed to promote healthy behavior among workers by providing incentives (in the form of premium discounts, for example) for weight loss or smoking cessation. The government, through the Patient Protection and Affordable Care Act (“ACA”), has instituted support for wellness programs and set guidelines for employer provided incentives for wellness programs, including the allowance for the collection of family medical histories that reveal indicators for genetic disease. Given the established sociological phenomena of genetic essentialism, genetic determinism, and genetic coercion, the government must intervene with stronger protections against genetic discrimination.

II. GENETIC INFORMATION NONDISCRIMINATION ACT

GINA originated as a form of antidiscrimination legislation and has been touted as “the first civil rights bill of the 21st Century.” Key GINA provisions include Title I, which prohibits genetic discrimination in health insurance coverage, and Title II, which prohibits genetic discrimination in employment. While GINA shares some similarities with other employment antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act of 1990 (“ADA”), GINA lacks the latter statutes’ disparate impact liability provision.


GINA is the first federal law to address directly the issue of genetic discrimination. After several years of negotiations in Congress, President George W. Bush signed GINA into law on May 21, 2008. GINA, which was enacted “[t]o prohibit discrimination on the basis of genetic information with respect to health insurance and employment,” was a function of the many achievements in the field of genetics, such as the decoding of the human genome by the Human Genome Project and the creation and increased use of genomic medicine. As Congress has recognized, “[n]ew knowledge about genetics may allow for the development of better therapies that are more effective against disease or have fewer side effects than current treatments. These advances give rise to the potential misuse of genetic information to discriminate in health insurance and employment.”

1. The Rise of Genetic Explanations

The discovery of genetic factors for some diseases not only spurred the Human Genome Project (“HGP”) but also led to the presupposition of genetic explanations for other human conditions and opened the door to genetic discrimination. The HGP’s inception in 1990 was a significant development in human history, and it heralded the “genomic age.” Completed in 2003, the U.S. Department of Energy and the National Institutes of Health coordinated the HGP, with the participation of partners from the United Kingdom, Japan, France, Germany, China, and others. The HGP’s primary goals were to identify all the approximately 20,000–25,000 genes in human DNA and to determine sequences of the 3 billion chemical base pairs making up human DNA.

Prior to the completion of the HGP, many scholars had already started to document the “increasing appropriation of genetic explanations.” In his groundbreaking book, Backdoor to Eugenics, Troy Duster discovers at least two waves in popular and scientific media in which researchers posited genetic explanations for various societal ills. He notes that from the mid to late 1970s, there arose “a renewed claim to the genetic explanation of matters that the previous two decades had ‘laid to rest’ as social and environ-
mental.”65 He finds evidence that from 1976 to 1982, there was a 231% increase in articles asserting “a genetic basis for crime, mental illness, intelligence, and alcoholism.”66 This trend continued in the next decade. Duster notes that from 1983 to 1988, articles that attributed a genetic basis to crime appeared more than four times as frequently as the preceding decade.67 Amid this clamor for the hereditary causes of societal problems such as crime, a genetic explanation for unemployment was also proffered. Duster notes that Richard Herrnstein, a Harvard psychologist, not only concurred with the proponents of the genetics of intelligence argument but also speculated that someday geneticists could find that “the tendency to be unemployed may run in the genes.”68

Similarly, in Fatal Invention, Dorothy Roberts documents how genetic testing has served to calcify presumptions about race as a biological fact and how genetic testing has been employed to designate certain diseases as primarily linked to race.69 Roberts notes that contrary to the notion that genomic research could transcend race, in actuality, race is frequently discussed as a “key—even essential—classification in the genetic research and testing that informs biocitizenship.”70 She points to breast cancer and sickle cell disease as genetic diseases that have become siloed as belonging to a particular race or ethnic group resulting in, for example, at-risk black women not receiving breast cancer screening at the same rates as their equally at-risk white counterparts.71

Observing the growing phenomenon of reliance on genetic explanations for disease and other human conditions, lawmakers concerned about the potential for discrimination began to introduce bills to curb genetic discrimination. As early as 1995, Representative Louise Slaughter introduced the first piece of antidiscrimination legislation specifically designed to combat genetic discrimination.72 She prefaced the legislation on public support for genetic testing for research and health predictive purposes and on public fears, both imagined and realized, of genetic discrimination. In response to these growing ethical and social concerns, Congress passed the Genetic Information Nondiscrimination Act in 2008.73 However, the final bill for GINA that was signed into law did not allow for disparate impact claims.74 Some legal

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65 Id.
66 Id.
67 Id.
68 Id. at 97.
70 Id. at 210.
71 “White women were almost five times more likely to undergo BRCA1/2 counseling than African American women.” Id. at 210–11.
72 Slaughter, supra note 22, at 41.
73 See Ajumwa, supra note 4, at 1240–41.
74 See 42 U.S.C. §§ 2000ff-7(a)-(b) (stating that an allegation of “‘disparate impact’ . . . on the basis of genetic information does not establish a cause of action” under GINA); 29 C.F.R. § 1635.5(b) (2011); see also Jessica L. Roberts, The Genetic Information Nondiscrimi-
scholars have asserted that this departure from adding a disparate impact clause may reflect that, unlike Title VII or the ADA, GINA was not intended to address any specified protected class.75

2. The Threat of a Genetic Underclass

The creation of a genetic underclass is a natural consequence of unchecked genetic discrimination in employment. Prior to the promulgation of GINA, the potential for the creation of an unemployable genetic underclass existed as a credible threat. A survey in Massachusetts in 2000 found over 580 people who had been turned down for jobs because of “flaws” discovered in their genes.76 In addition, a 1996 nationwide survey found that 13% of respondents claimed that they or a member of their family had lost a job as a direct consequence of a genetic condition.77 Examples included employers turning down people with a risk of heart disease or mental problems based on responses to a job test.78

The structure of the American healthcare system is one that could enable the creation of an American “genetic underclass.” There is no universal healthcare in the United States. Therefore, the cost of treating or curing an inherited disease is often transferred to the employer, as most Americans rely on the health insurance obtained from employment as their means of access to necessary healthcare.79 Previously, American law allowed for discrimination against unhealthy persons by health insurance providers, and this practice had become so ingrained in the health insurance industry that it became a legitimate business application of underwriting and risk-classification principles.80 These principles reflected American individualistic attitudes “and a preference for voluntary action,”81 even as it pertains to health
coverage. Many Americans accept that an individual’s costs of coverage should vary with the individual’s predicted consumption of medical care as determined by pre-existing diseases or conditions.82 Furthermore, other scholars have found that American society has only a “weak and wavering commitment” to the notion that sickness is a condition that should be addressed by mutual aid.83 These attitudes towards sickness are in contrast with European countries, where there is more of an “ideal of social solidarity” than in the United States when it comes to health insurance.84

In the recent past, the group insurance offered by the employer was the only resort for many Americans who, as a result of a “pre-existing” condition, were precluded from obtaining individual health insurance or could do so only at a high premium.85 The employed unhealthy were “saved” from the financial and medical peril of no health insurance when the government, in passing the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”),86 effectively prohibited health insurers from excluding sickly individuals from group insurance and charging them higher premiums based on their health status.87 However, HIPAA does not prevent insurance companies from imposing higher premiums on employers because of employees’ pre-existing conditions,88 and because the employer can pass on only so much of its healthcare costs to the employee, the employer has an incentive not to hire those would-be employees who would pose a financial burden owing to their current or foreseeable physical condition.

The recent passage of the ACA has somewhat abated these issues. Individuals and families are no longer precluded from buying private health insurance because of a pre-existing condition.89 Like GINA, the ACA has

84 Jost, supra note 82, at 434.
85 Studies have shown that the high costs of medical treatment and medicine can cause tremendous medical and financial strains on people with diabetes. See generally Karen Pollitz et al., FALLING THROUGH THE CRACKS: STORIES OF HOW HEALTH INSURANCE CAN FAIL PEOPLE WITH DIABETES (Feb. 8, 2005), http://www.healthinsuranceinfo.net/diabetes_and_health_insurance.pdf, archived at https://perma.cc/J2VL-JX7F.
87 HIPAA prohibits group health insurers from discriminating against individual participants on the basis of health status in regards to eligibility rules and in setting premiums. It also includes provisions limiting group plans’ use of pre-existing condition clauses, and it helps to prevent gaps in coverage when workers change jobs. See Crossley, supra note 80, at 73; see also Jack A. Rovner, Federal Regulation Comes to Private Health Care Financing: The Group Health Insurance Provisions of the Health Insurance Portability and Accountability Act of 1996, 7 ANNALS HEALTH L. 183, 184–85 (1998); 29 U.S.C. § 1182(a)(1).
88 See 29 U.S.C. § 1182(b)(3)(B) (noting that provisions do not “limit the ability of a health insurance issuer offering health insurance coverage . . . to increase the premium for an employer based on the manifestation of a disease or disorder of an individual who is enrolled in the plan”).
provisions preventing the use of genetic information to deny health insurance coverage.\footnote{See id. at 156.} However, neither the ACA nor GINA addresses the raising of premiums for group employer-based insurance once a member of the group manifests a genetic disease. This means that employers would still have an incentive not to hire a class of people whom the employers believe will necessitate higher health insurance premiums in the future.

Ultimately, the acceptance of the deterministic nature of genetic testing, and the blind faith in its infallible accuracy to predict disease, does have an impact on an individual’s employment prospects. As part of the General Social Survey,\footnote{1991 Topical Module: Work Organizations, 1972–1994 General Social Survey Cumulative File, http://sda.berkeley.edu/GSS/Doc/gss025.html, archived at https://perma.cc/TA46-XUE6 (last visited Jan. 18, 2016).} the following question was posed to respondents in 1991:

Here are some questions about a new scientific technology called “genetic screening.” Using genetic screening, it is now possible to tell whether someone has inherited a tendency to develop certain cancers and certain forms of heart disease. These tests do not mean that a person will always develop the disease, but only that he or she may do so, depending on other conditions. Should employers have the right to give these genetic tests to people who are applying for a job, or shouldn’t they have that right?\footnote{Id.}

While most people (85% of respondents) answered in the negative, it is significant that a non-negligible percentage (15% of the respondents) would allow an employer the right to hire by genetic testing.\footnote{Id. at 1265.}

Before the passage of GINA, some employers exercised their perceived right to genetically test their employees, even without the consent of those employees. In 1995, employees of the Lawrence Berkeley Laboratory in California discovered that blood and urine samples they had provided (as a pre-condition to employment) had been subjected to genetic testing for sickle cell anemia as well as testing for syphilis and pregnancy.\footnote{Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1264–65 (9th Cir. 1998).} Because of this discovery, the employees brought suit under Title VII and the ADA.\footnote{Id. See GSS 1972–2008 Cumulative Datafile, SDA, http://sda.berkeley.edu/cgi-bin/hsda?harcgss+gss08, archived at http://perma.cc/ZAPA-XQPZ (last visited Jan. 18, 2016); see also GSS: General Social Survey, www.norc.uchicago.edu/GSS+Website, archived at https://perma.cc/FP7Z-CLTX (last visited Jan. 18, 2016). “The GSS has been conducted almost annually since 1972. It is the only full-probability, personal-interview survey designed to monitor changes in both social characteristics and attitudes currently being conducted in the United States.” Abstract, 1972–2014 General Social Survey Cumulative File, http://sda.berkeley.edu/Abstracts/GSS2014.html, archived at https://perma.cc/6T3Y-W53Z (last visited Jan. 18, 2016).} While the Ninth Circuit found that screening the women for pregnancy and only minorities for sickle cell anemia was sexually and racially discriminate-
tory in violation of Title VII and state and federal constitutional law, the court dismissed the plaintiffs’ ADA claims because the ADA does not restrict the scope of “employment entrance examinations.” The California case illustrates why GINA was necessary legislation, notwithstanding the existence of the ADA.

However, even after GINA went into effect in 2009, the threat of a genetic underclass has not waned. As discussed earlier, the statistics compiled by the EEOC continue to show yearly growth in the number of claims alleging genetics as the basis for employment discrimination. The trends show that genetic discrimination remains a credible threat to equal opportunity in employment and necessitates legislation that allows the plaintiff to pierce the veil of facially neutral policies and discover genetic discrimination. The danger remains of the growth of an economic underclass, comprised of individuals deemed genetically compromised.

Consider the premise of the 1997 science fiction film *Gattaca*. In the film, advances in genetic engineering mean that prospective parents, who have no moral compulsions against it and who can afford it, may genetically endow their progeny with superior intelligence and health. The film’s protagonist (portrayed by Ethan Hawke) is a man whose parents declined to participate in genetic engineering when he was conceived. Thus, he was born with some congenital defects including respiratory problems that render his aspirations as an astronaut risible in a genetically essentialist and deterministic society. Furthermore, because of his perceived inferior genetic status, and despite his natural intelligence, he is relegated to work as a janitor, while his younger brother, for whom his parents did engage in genetic engineering, enjoys high status as a police detective. From the film, we see how genetic engineering has created a new inequality, between those who are born of genetic engineering, and thus considered superior, and others who are not. We see the protagonist’s potential love interest (portrayed by Uma Thurman) testing a strand of his hair (unbeknownst to her, the protagonist has substituted the hair of a genetically modified individual for his own) to determine whether he is a worthy genetic mate.

This fictional scenario is no longer far from reality. Recently, Chinese scientists have started experimenting on editing the genome of a human embryo using a technique called “clustered, regularly interspaced, short palindromic repeat” (“CRISPR”). Many scientists view such germline

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96 Id. at 1271–73.
97 Id. at 1268–71.
98 Id. at 1273–74.
99 *Gattaca* (Columbia Pictures Corp. 1997).
100 David Cyranoski & Sara Reardon, *Chinese Scientists Genetically Modify Human Embryos*, *Nature* (Apr. 22, 2015), http://www.nature.com/news/chinese-scientists-genetically-modify-human-embryos-1.17378, archived at https://perma.cc/P96V-4PL6. The technique used by Junjiu Huang’s team involves injecting embryos with the enzyme complex CRISPR/Cas9, which “binds and splices DNA at specific locations.” *Id.* Cyranoski and Reardon explained:
modifications as “dangerous and ethically unacceptable,” particularly because “such research could be exploited for non-therapeutic modifications,”101 resulting in “designer babies.”102 Other scientists have noted that although “genome-editing technologies may offer a powerful approach to treat many human diseases, including HIV/AIDS, haemophilia, sickle-cell anaemia and several forms of cancer. . . . [G]enome editing in human embryos using current technologies could have unpredictable effects on future generations.”103 As Francis Collins, leader of the HGP and now Director of the National Institutes of Health, has observed, “Genetic information and genetic technology . . . can be used in ways that are fundamentally unjust. . . . Already . . . people have lost their jobs, lost their health insurance, and lost their economic wellbeing . . . due to the unfair and inappropriate use of genetic information.”104

3. GINA’s Provisions and EEOC Enforcement

GINA prohibits discrimination in health coverage and employment based on genetic information.105 It bars employers from using individuals’ genetic information when making hiring, firing, job placement, or promotion decisions.106 The sections relating to employment (Title II) took effect on November 21, 2009.107 It is important to note that GINA provides a baseline level of protection against genetic discrimination for all Americans. “Many states already have laws that protect against genetic discrimination in health

The complex can be programmed to target a problematic gene, which is then replaced or repaired by another molecule introduced at the same time. . . . The team injected 86 embryos and then waited 48 hours, enough time for the CRISPR/Cas9 system and the molecules that replace the missing DNA to act — and for the embryos to grow to about eight cells each. Of the 71 embryos that survived, 54 were genetically tested. This revealed that just 28 were successfully spliced, and that only a fraction of those contained the replacement genetic material. “If you want to do it in normal embryos, you need to be close to 100%,” Huang says. “That’s why we stopped. We still think it’s too immature.”

Id.

101 Id.
104 Slaughter, supra note 22, at 46.
106 Id.
insurance and employment situations." All entities subject to GINA must, at a minimum, comply with all applicable GINA requirements, and may need to comply with more protective state laws. GINA, together with the already existing nondiscrimination provisions of HIPAA, generally prohibits health insurers or health plan administrators from requesting or requiring genetic information from an individual or the individual’s family members, or using such information for decisions regarding coverage, rates, or preexisting conditions.

The statute defines "genetic information" as information about:

- genetic tests of the individual (including those done as part of a research study);
- genetic tests of the individual’s family members (defined as dependents and up to and including fourth-degree relatives);
- genetic tests of any fetus of an individual or family member who is a pregnant woman, and of any embryo legally held by an individual or family member utilizing assisted reproductive technology;
- the manifestation of a disease or disorder in family members (family history);
- any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (testing, counseling, or education) by an individual or family member.109

Various federal agencies enforce GINA. The Departments of Labor, Treasury, and Health and Human Services are responsible for Title I of GINA (which relates to health insurance coverage), and the EEOC is responsible for Title II. Remedies for violations include injunctive action and monetary penalties. Under Title II, individuals have the right to pursue private litigation once they have exhausted administrative remedies.110

In 2013, the EEOC filed its first two cases to enforce GINA. In its first lawsuit, the EEOC charged an employer with violating GINA’s general prohibition on requesting family medical history as part of the hiring process. According to the EEOC, Fabricut, Inc. had an applicant undergo a post-offer pre-employment drug test and physical examination by its contract medical examiner. As part of the exam, the applicant was required to fill out a questionnaire that asked whether she had a family history of heart disease, cancer, diabetes, or other medical conditions. After the employer’s medical

examiner concluded that the applicant might have carpal tunnel syndrome ("CTS"), Fabricut instructed her to see her personal physician and provide the results to the company. Even though her physician concluded that she did not suffer from CTS, the company allegedly rescinded the job offer based on its medical examiner’s indication that she had CTS. The EEOC maintained that Fabricut violated GINA, by asking for genetic information in the questionnaire, and the ADA, by taking an employment action based on the applicant’s disability or perceived disability. To settle the suit, Fabricut agreed to pay $50,000 and take other remedial action, such as providing antidiscrimination training to employees with hiring responsibilities.111

In its second lawsuit, and first class action lawsuit, the EEOC charged a nursing and rehabilitation facility with violating GINA by asking job applicants for genetic information during post-offer pre-employment medical examinations. The defendant routinely requested family medical history during employees’ return-to-work and annual medical exams. The EEOC alleged that the defendant effectively denied equal employment opportunities to a class of individuals and adversely affected their status as employees.112 In January 2014, Founders Pavilion settled the suit by agreeing to pay $370,000.113 As part of a five-year consent decree resolving the suit, Founders Pavilion will provide a fund of $110,400 for distribution to the 138 individuals who were asked for their genetic information. Founders Pavilion will also pay $259,600 to the five individuals who the EEOC alleged were fired or denied hire in violation of the ADA or Title VII.114

Although the EEOC enforcement actions described above offer a glimpse as to how GINA is employed to redress genetic discrimination in employment, GINA’s legal reach is limited. The next section will discuss GINA’s statutory limitations and shortcomings in comparison to similar employment antidiscrimination laws.

B. GINA’s Limitations

That GINA’s reach is statutorily limited in addressing all manner of genetic discrimination is reason enough to consider adding a disparate impact clause. For one, the statute defines “genetic test” as an analysis of

114 See id.
human DNA, RNA, chromosomes, proteins, or metabolites that detect genotypes, mutations, or chromosomal changes.\textsuperscript{115} Therefore, the results of tests that do not measure DNA, RNA, or chromosomal changes—such as complete blood counts, cholesterol tests, and liver-function tests—are not protected under GINA. This presents a gray area for discrimination, because some genetic diseases such as sickle cell anemia may be determined by a simple blood test.\textsuperscript{116} Moreover, GINA fails to protect “analysis[s] of proteins or metabolites that are directly related to a manifested disease, disorder, or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.”\textsuperscript{117} Given that some genetic diseases, such as Tay Sachs disease, implicate the metabolizing of or lack of ability to metabolize certain enzymes,\textsuperscript{118} such an exception opens the door to covert genetic discrimination. The disparate impact theory of action would allow plaintiffs to show a pattern of employers turning away individuals known to carry such genetic diseases from employment even if the employers had not subjected the plaintiffs to a genetic test under GINA’s definitions.

The EEOC makes clear that an individual’s diagnosed disease, disorder, or pathological condition is not considered genetic information. Similarly, information about the individual’s signs or symptoms of disease is not considered genetic information. However, the EEOC further elaborates that such information is still subject to other laws regulating the acquisition and use of medical information, including Title I of the ADA. This is problematic because some diseases are strictly genetic in nature or have strong genetic correlations, such that a manifested condition is evidence of the presence of a mutated gene. For example, because of the known link between mutations BRCA1 and BRCA2 to breast cancer,\textsuperscript{119} an employer may view applicants with known histories of breast cancer as financial risks to their group insurance coverage. The statutory limitations present in GINA represent both compromises made for the benefit of the healthcare industry as well as Congress’s limited scientific knowledge regarding genetic information.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{115} 29 U.S.C. § 1191b(d)(7)(A) (2012).
\item \textsuperscript{120} “GINA suffered in obscurity for a number of years as the result of a Republican led Congress that was hostile to adding additional restrictions on the insurance industry and employer communities.” Jeremy Gruber, The New Genetic Nondiscrimination Act - How It Came to Pass and What It Does, COUNCIL FOR RESPONSIBLE GENETICS, http://www.councilfor...
C. Comparing GINA to Similar Employment Antidiscrimination Laws

Although genetic discrimination represents a new frontier for employment antidiscrimination law, it is important to recognize that GINA shares a similar goal with prior examples of antidiscrimination legislation, including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The goal is to secure, for all Americans, the unfettered opportunity to pursue their livelihood through lawful and gainful employment. This objective has evolved over time to become part of the bedrock of American law.

The newly independent United States of America made no explicit constitutional provisions to protect workers striving for material wealth. In fact, the Lockean expression allowing for a “right to life, liberty and pursuit of property” found in the Declaration of Colonial Rights\textsuperscript{121} was altered by Thomas Jefferson to read “pursuit of happiness” when he wrote the Declaration of Independence\textsuperscript{122}. Later, the Due Process clauses of the Fifth\textsuperscript{123} and Fourteenth Amendments\textsuperscript{124} were read to imply a protection of the rights of individuals to pursue property and thus further interpreted to afford workers protection in an employment context. Yet, the U.S. Supreme Court has not always interpreted the Constitution in favor of workers. An era of “freedom of contract” cases was inaugurated by \textit{Allgeyer v. Louisiana},\textsuperscript{125} in which the Court interpreted the Due Process Clause of the Fourteenth Amendment as providing substantive protection to private contracts and thus disallowing a variety of social and economic regulation of businesses. Subsequently, the Equal Protection Clause has also been interpreted to afford some employment protection for workers, such as when it was used in \textit{Yick Wo v. Hopkins}.\textsuperscript{126} In \textit{Yick Wo}, the Court curbed economic discrimination against Chinese descendants in California resulting from a seemingly race-neutral regulation of the laundry business that disproportionately impacted the ethnic group.\textsuperscript{127} This recognition of a worker’s right to be free from discrimination in pursuit of her livelihood is what led to the establishment of the first employment antidiscrimination laws, and it is that line of legal reasoning that culminated in GINA. This section compares GINA with employment

\textsuperscript{121} See Declaration and Resolves of the First Continental Congress, \textsc{The Avalon Project} (Oct. 14, 1774), http://avalon.law.yale.edu/18th_century/resolves.asp, archived at https://perma.cc/327A-L2FR.


\textsuperscript{123} “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V.

\textsuperscript{124} “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” Id. amend. XIV, § 1.

\textsuperscript{125} 165 U.S. 578 (1897).

\textsuperscript{126} 118 U.S. 356 (1886).

\textsuperscript{127} See id. at 373–74.
antidiscrimination laws that carry clauses allowing for disparate impact causes of action. In so doing, the section examines how GINA fits within the body of statutory antidiscrimination law and concludes that, like those of traditional antidiscrimination laws, GINA’s objectives would be furthered by the addition of a disparate impact clause.

1. Title VII

Title VII128 prohibits discrimination in many more aspects of the employment relationship than GINA does, and Title VII applies to most employers engaged in interstate commerce with more than fifteen employees, labor organizations, and employment agencies.129 Title VII prohibits discrimination based on race, color, religion, sex, or national origin.130 It prevents employers from discriminating based upon protected characteristics regarding terms, conditions, and privileges of employment.131 Employment agencies may not discriminate when hiring or referring applicants, and labor organizations are also prohibited from basing membership or union classifications on race, color, religion, sex, or national origin.132

Although GINA tracks the language of Title VII fairly closely,133 important differences exist between the two. Bradley Areheart argues that “the nature of [GINA’s] protections differ in that they are more forward-looking and less responsive to serious social harms.”134 Title VII, on the other hand, “was retrospective, legislated in response to a history of widespread racism and civil unrest.”135 He further notes that GINA was not promulgated to “counteract systemic disadvantage or inequality, but to prevent genetic discrimination and promote the use of genetic technologies.”136 Areheart argues that the rationale for GINA was prefaced on the recognition that “only a few cases of genetic discrimination have been documented.”137 And, as he mentions, other scholars have referred to GINA as “the first preemptive antidiscrimination statute in American history.”138 Perhaps the documented history of race and sex discrimination in America is the reason why, unlike GINA, Title VII has a disparate impact clause. Specifically, 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

130 See id. § 2000e-2.
131 See id.
132 See id.
133 Areheart, supra note 75, at 707.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id. at 707 n.10.
national origin,” unless the practice is both job-related and consistent with business necessity.139

Although Congress enacted GINA as a preemptive strike at genetic discrimination in 2008, GINA no longer remains merely a preemptive law. As the steadily growing EEOC-compiled statistics of genetic discrimination claims demonstrate, there is now a real and present need for GINA to address currently occurring genetic discrimination in employment. Furthermore, sociological phenomena (notably genetic essentialism and genetic determinism), coupled with technological advances that make genetic testing more affordable and therefore more accessible to a wider demographic, provide a ripe environment for the misuse of genetic information for discrimination in employment.

2. Age Discrimination in Employment Act

Like Title VII, the Age Discrimination in Employment Act of 1967 (“ADEA”)140 was a remedial statute enacted to curb extant age discrimination in employment. Accordingly, the language of the ADEA is similar to that of Title VII, and the courts look to Title VII cases as authoritative for deciding ADEA cases.141 The ADEA generally prohibits employment discrimination against individuals who are forty years old or older.142 The Act also applies to employment agencies143 and labor organizations,144 while making an exception for individuals hired or to be hired as firefighters and police officers.145 The ADEA is unlike GINA in that it makes this exception for a group of people that would normally fall under its protected class. More significantly, unlike GINA but akin to Title VII, the ADEA has been read to provide for a disparate impact cause of action.146 It is important to parse that the ADEA does not have an explicit disparate impact clause like that found in Title VII. Rather, the reading of a disparate impact cause of action for the ADEA was based on some similar language between the ADEA and Title VII147 and on the recognition that the ADEA was enacted

141 See, e.g., EEOC v. Reno, 758 F.2d 581, 583–84 (11th Cir. 1985) (holding that because “prohibitions of the Age Discrimination in Employment Act were derived in haec verba from Title VII, . . . decisions under [the] analogous section of Title VII [are] highly relevant” (internal citation omitted)).
143 See id. § 623(b).
144 See id. § 623(c).
145 See id. § 623(j).
with the intention of mirroring Title VII’s provisions in the ADEA’s redress of age discrimination in employment.148

3. Americans with Disabilities Act

Congress enacted the ADA to eliminate discriminatory barriers against qualified individuals with a disability, a record of a disability, or a perceived disability.149 The law prohibits discrimination based on a physical or mental handicap and requires employers to make reasonable accommodations for workers with disabilities.150 President George H.W. Bush signed the ADA into law in 1990, in part “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”151 The term “disability” means, with respect to an individual: (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) the perception that the individual has such an impairment.152 The Americans with Disabilities Act Amendment Act (“ADAAA”) broadened the definition of disability under the ADA so that it covers individuals with systemic or cellular-level pathologies.153 Thus, courts have also found that the HIV-positive status of an individual is enough for the ADA to protect the individual, despite the fact that the disease has not progressed to AIDS.154

It is true that, prior to GINA, many of the traditional employment antidiscrimination laws already in place could provide prospective employees some protection against genetic discrimination. For one, many genetic defects, such as spina bifida, can result in visible disabilities, such as the use of braces, crutches, or a wheelchair for mobility.155 Thus, a wheelchair-bound

148 See Smith, 544 U.S. at 238 (“As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-Hazen Paper consensus concerning disparate-impact liability.” (citing Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993))).
150 42 U.S.C. § 12112(b)(5).
151 Id. § 12101(b)(1).
152 Id. § 12102(1).
154 Dharamsi states:
Because conditions like cancer and HIV are the result of mutations in an individual’s genetic machinery, it seems that the changes to the ADA, as manifested in the ADAAA, have forced courts to acknowledge that some genetic mutations are disabling, even if the genetic mutations do not have physical effects on the individual. The step from categorizing some genetic mutations as disabling to categorizing all genetic mutations as disabling is not a large one.
applicant who suffers from spina bifida might be able to sue under the ADA. Consider also that in 2001, the Burlington Northern Santa Fe Railway Co. agreed to stop testing its employees for genetic defects. This came as part of a workplace discrimination settlement of a case where the EEOC found that the tests violated the ADA. The settlement—the first of its kind—curbed the genetic tests of employees who had filed claims for work-related injuries stemming from carpal tunnel syndrome.\footnote{See Sarah Schafer, \textit{Railroad Agrees to Stop Gene-Testing Workers}, \textit{WASH. POST} (Apr. 19, 2001), http://www.washingtonpost.com/archive/business/2001/04/19/railroad-agrees-to-stop-gene-testing-workers/9ff240ca-64ff-45bd-a840-5997fb8d0c29, archived at https://perma.cc/9YNV-WZ4D.}

It is important to note, however, that traditional employment antidiscrimination laws like the ADA could typically protect only workers who had a manifested disability. Workers or job applicants who did not have visible disabilities were unable to rely on those laws.\footnote{See Dharamsi, \textit{supra} note 153, at 255–56 (arguing that the ADA expands the definition of “disability” to include genetic diseases).} The fact remains that many genetic “defects” are not readily visible or may present themselves only later in life. One example of the former is sickle cell anemia,\footnote{Samir K. Ballas & Margaret Lusardi, \textit{Hospital Readmission for Adult Acute Sickle Cell Painful Episodes: Frequency, Etiology and Prognostic Significance}, 79 A.J. HEMATOLOGY 17, 17 (2005). An individual with sickle cell disease is generally asymptomatic and superficially indistinguishable from the rest of the population. \textit{Id.} However, as a result of the disease, his red blood cells can become sickle-shaped under certain adverse conditions and lead to periodic “crises,” which involve symptoms such as pain in the legs and arms and can last approximately five to seven days. \textit{Id.}} and an example of the latter is autosomal dominant familial Alzheimer’s.\footnote{Kaj Blennow, Mony J. de Leon & Henrik Zetterberg, \textit{Alzheimer’s Disease}, 368 LANCET 387, 387 (2006). The vast majority of cases of Alzheimer’s disease are not genetically inherited, although some genes may act as risk factors. \textit{See id.} at 388. Still, about 0.1\% of the cases are familial forms of autosomal-dominant inheritance, which usually have an onset before age 65. \textit{See id.} Most of autosomal dominant familial cases of Alzheimer’s disease can be attributed to mutations in one of three genes: amyloid precursor protein (APP) and Presenilins 1 and 2. \textit{See id.}} As these genetic diseases might not result in readily apparent disabilities, individuals who live with them and are stigmatized as “undesirable job applicants” might have a tougher time proving that the cause of their lack of employment stems from an actual disability. A disparate impact clause for GINA would protect those individuals without a manifest disability.

Finally, it should be considered that the ADA has a disparate impact clause. As explicitly stated within the statute, 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.”\footnote{See 42 U.S.C. §§ 12112(a), (b)(3)(A); see also id. § 12112(b)(6).}
III. SUPPORT FOR A DISPARATE IMPACT CLAUSE

The three disparate impact provisions discussed above operate in similar ways, and all have their origins in the disparate impact theory of discrimination for allegations of employment discrimination that originated from Title VII.\(^{161}\) Under Title VII, a plaintiff may bring suit based on two theories of discrimination: disparate impact or disparate treatment.\(^ {162}\) The disparate impact theory for employment discrimination is unlike the disparate treatment theory in that there is no requirement to demonstrate intent.\(^ {163}\) The disparate impact theory requires a plaintiff to demonstrate that a facially neutral employment practice falls more harshly on one group than another; while a disparate impact employment discrimination claim does not require a plaintiff to prove the defendant’s intent to discriminate, the plaintiff must nonetheless demonstrate a connection between the challenged practice and the resulting disparities between protected and non-protected classes.\(^ {164}\) In order to make out a *prima facie* case of disparate impact under Title VII, the plaintiff must: (1) identify a policy or practice by the defendant; (2) demonstrate that there is an existing disparity; and (3) establish that the disparity was caused by the policy or practice.\(^ {165}\)

Congress should strengthen GINA by adding a clause that, like Title VII, allows for disparate impact cases. The following four reasons support the addition of such a clause: (1) a disparate impact theory of action is in line with the precedent set by prior employment discrimination laws; (2) the EEOC has declared that proof of deliberate acquisition of genetic information is not necessary to establish a violation of GINA, and proof of intent to discriminate likewise should not be required to demonstrate genetic discrimination; (3) ease of access to genetic testing and the insecurity of genetic information has increased the likelihood of genetic discrimination in employment; and (4) real world instances of genetic testing have shown that facially neutral testing may result in racial disparities.

A. A DISPARATE IMPACT CLAUSE FOLLOWS PRECEDENT

Adding a disparate impact clause to GINA would be in keeping with the spirit of prior employment antidiscrimination laws and with the precedent set by Supreme Court rulings on employment. Both Title VII and the ADA carry explicit statements allowing for a disparate impact theory of discrimination.\(^ {166}\) And although the ADEA does not have an explicit provision,


\(^{163}\) *Geller v. Markham*, 635 F.2d 1027, 1031 (2d Cir. 1980).

\(^{164}\) *Tartt v. Wilson Cty.*, Tenn, 982 F. Supp. 2d 810, 822 (M.D. Tenn. 2013), aff’d, 592 F. App’x 441 (6th Cir. 2014).


\(^{166}\) See *supra* Part I.C.
the courts have read it to imply one based on the statute’s legislative intent and historic ties to Title VII. Courts’ reading of the ADA as including a disparate impact provision recognizes the high hurdle of proving discriminatory intent when it comes to employment practices. Some might argue that, unlike the ADEA, Congress explicitly excluded disparate impact theory as a cause of action under GINA, and that this exclusion represents Congress’s conclusion that this theory of action is unnecessary. However, the mandate for a Genetic Nondiscrimination Study Commission underscores that Congress understood that, in 2009, it was operating with a limited understanding of genetic discrimination and that the years to come could bring more advances in the technology for genetic testing, thereby creating more opportunities for genetic discrimination and highlighting the need for a disparate impact theory of action.

Consider also the Supreme Court’s recent June 25, 2015, ruling in Texas Department of Housing v. Inclusive Communities Project, a Fair Housing Act case, which allowed for a disparate impact method of proving discrimination that is not typically employed in housing discrimination cases. The Supreme Court found that the Texas housing department had violated the Fair Housing Act and engaged in racial discrimination based on the established pattern of putting more subsidized housing in predominantly black urban neighborhoods and too little in white suburban neighborhoods. The Court ruled that this practice had disparately impacted Black people as a protected group, since it discouraged more low-income Black people from moving to majority white areas and thus perpetuated de facto housing segregation. This recent housing case opens the door for a disparate impact theory of action for the Fair Housing Act, much like the one that was read into the ADEA. These developments represent precedent in favor of a disparate impact cause of action for antidiscrimination law; GINA, as an antidiscrimination law with growing relevance in a world with advanced genetic testing technology and access, also merits a disparate impact theory provision.

B. Like Deliberate Acquisition, Intent is Unnecessary

The EEOC, which is charged with enforcing GINA’s employment protection provisions, has decided that the deliberate acquisition of genetic information is not necessary for an employer to be charged with violating GINA’s prohibitions. Thus, an employer who inadvertently acquires genetic information and then uses the said information for purposes of employment discrimination would be found liable under GINA. On November 9, 2010,

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167 See Smith v. City of Jackson, Miss., 544 U.S. 228, 238–39 (2005); see also supra Part II.C.2.
169 See id. at 2512.
170 See id. at 2511–12.
the EEOC implemented rule 29 C.F.R. part 1635, which provides regulations for Title II of GINA, which itself relates to employment discrimination. The rule prevents employers and other entities covered by Title II from requesting, requiring, or purchasing genetic information, and it strictly limits such entities in disclosing genetic information. The regulation incorporates by reference many of the familiar definitions, remedies, and procedures from Title VII and other statutes protecting federal, state, and Congressional employees from discrimination.

The EEOC administrative rule addressed many issues regarding the implementation of GINA. For example, § 1635.1 of the rule clarified the purpose for GINA. The language in this section of the final rule was slightly modified in response to several comments that disagreed with the characterization of Title II as prohibiting the “deliberate acquisition” of genetic information. Organizations such as the ACLU and the Coalition for Genetic Fairness noted that the term “deliberate acquisition” suggested that a covered entity must have a specific intent to acquire genetic information in order to violate the law. The above-mentioned organizations submitted comments to the EEOC arguing that

a covered entity violates GINA by engaging in acts that present a heightened risk of acquiring genetic information, even without a specific intention to do so, such as when they fail to inform an individual from whom they have requested documentation about a manifested disease or disorder not to provide genetic information or when they access other sources of information . . .

According to the preamble to “Regulations Under the Genetic Information Nondiscrimination Act of 2008,” the EEOC determined that covered entities could acquire genetic information in violation of GINA without a specific intent. As a result, the EEOC removed references to “deliberate acquisition” from 29 C.F.R. § 1635.1. In removing the language, the EEOC has recognized the difficulty for a claimant to prove deliberate acquisition of genetic information by the accused. Like showing deliberate acquisition, proving intent to discriminate often is an insurmountable hurdle for plaintiffs. Legal scholars have noted the difficulty: “[S]ince it is rare for a plaintiff to have direct evidence of discrimination in a case alleging disparate treatment, most litigants must rely on indirect evidence to prove their ulti-

172 29 C.F.R. § 1635.8.
173 Before GINA went into effect on November 21, 2009, Executive Order 13,145 had prohibited federal executive branch agencies from discriminating against applicants and employees on the basis of genetic information, and limited access to and use of genetic information. See Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 8, 2000).
175 Id.
mate case that the employer’s actions were the result of discriminatory animus.” Consequently, given the similarities between deliberate acquisition and intent to discriminate, disparate impact should be permitted.

A recent case brought under GINA involved DNA being collected from employers as part of an investigation of workplace vandalism. This case reflects the growing trend that courts may prefer to remain agnostic about the multiplicity of motivations for which an employer might acquire genetic information from an employee, instead recognizing that the mere act of an employer requesting genetic information from employees that is then used for dismissal could violate GINA. Significantly, that case has the distinction of being the first GINA case to proceed to trial and to result in a monetary award. Yet many would argue that the allegations in the case do not squarely fit into the type of harms that GINA was intended to prevent. This case points to the appropriation of GINA to stretch to other areas of worker discrimination involving genetic data. The recognition of this necessary stretch bolsters the arguments for the addition of a disparate impact theory to GINA’s provisions.

C. Easy Access to Genetic Testing Increases Chances for Discrimination

The genomics age has brought both scientific advancements in our understanding of how the human genome works and technological advancements allowing for the affordability of genetic testing. Therefore, many more people may discover that they have genetic susceptibility to specific diseases. This in turn increases the likelihood of wrongful disclosure or capture of an individual’s genetic information and its misuse for the purposes of employment discrimination. Key Supreme Court cases such as Association for Molecular Pathology v. Myriad Genetics, Inc., which forbids patents on human genes, have further cleared the path to a flood of genetic testing. Already, the number of genetic tests available has grown 72% between 2008 and 2012 (from 1,680 to 2,886 tests). In 2011, the genetic

178 See infra Conclusion; see also Lowe, 2015 WL 2058906.
179 See generally Ajunwa, supra note 4 (detailing the advances in genetic testing that makes testing for genetic predisposition to diseases like breast cancer and Alzheimer’s disease more easily accomplished).
180 See id. at 1234 (detailing the prevalence of data breaches, particularly regarding health data, and the types of harms that could arise from such breaches).
181 133 S. Ct. 2107 (2013).
182 See id. at 2111. The Court held that merely isolating genes found in nature does not make them patentable. See id. at 2117.
testing market size amounted to $5.9 billion.\textsuperscript{184} A recent survey indicates that 81.5% of consumers would have their genome sequenced if they could afford it.\textsuperscript{185}

The company 23andMe is now the most visible leader in the provision of genetic testing services.\textsuperscript{186} 23andMe’s mission was to provide a detailed report on about 240 health conditions\textsuperscript{187} and genealogy.\textsuperscript{188} All that is required of the consumers is to register and send for a “spit kit” with which they collect and send a saliva sample. The resulting information obtained from the DNA in the sample is made available to the consumers online. A potential consumer has ample reason to be wary. In fact, a survey of about 22 genetic testing companies reveals that none of their agreements include a provision regarding the redress of inadvertent disclosures of the information entrusted to their care.\textsuperscript{189} It is also of legal concern that recently, a programmer employed 23andMe’s open API to create a screening mechanism for websites that works to grant or deny access to a particular website based on a user’s genetic make-up (focusing on such factors as race, sex, and ethnic background).\textsuperscript{190} Although 23andMe quickly moved to block the programmer from using its API, citing its rules against “hate speech,” that such a screening mechanism is now possible demonstrates how much more facile technology has made genetic discrimination.\textsuperscript{191}

In the digital age, obtaining the genetic information of others has become much easier than most consumers of genetic testing realize. It is now shockingly commonplace for a third party to access an individual’s genetic

\textsuperscript{184} See id.
\textsuperscript{185} See id. at 4.
\textsuperscript{186} See Sarah Zhang, 23andMe Ordered to Halt Sales of DNA Tests, NATURE (Nov. 25, 2013), \url{http://www.nature.com/news/23andme-ordered-to-halt-sales-of-dna-tests-1.14236}, archived at \url{https://perma.cc/7DSU-5WAX} (“23andMe, based in Mountain View, California, is the dominant player in the direct-to-consumer genomics market.”).
\textsuperscript{187} The FDA has temporarily halted 23andMe’s provision of health diagnostic information to consumers. The company now provides raw genetic information related to disease without any diagnostic information. See id. In February 2015, “the F.D.A. approved a test from 23andMe that would be administered to prospective parents to see if they carry mutations that could cause a rare disorder called Bloom syndrome in their children.” Andrew Pollack, F.D.A. Reverses Course on 23andMe DNA Test in Move to Ease Restrictions, N.Y. Times (Feb. 19, 2015), \url{http://www.nytimes.com/2015/02/20/business/fda-eases-access-to-dna-tests-of-rare-disorders.html}.
\textsuperscript{188} 23ANDME, \url{https://www.23andme.com/ancestry/}, archived at \url{https://perma.cc/S7LP-EW8J} (last visited Jan. 18, 2016).
\textsuperscript{190} Pavithra Mohan, App Used 23andMe’s DNA Database to Block People From Sites Based on Race and Gender, FAST COMPANY (July 23, 2015), \url{http://www.fastcompany.com/3048980/fast-feed/app-used-23andmes-dna-database-to-block-people-from-sites-based-on-race-and-gender}, archived at \url{https://perma.cc/R09D-WUB8}.
\textsuperscript{191} Id.
information online. 192 Going beyond the classic hacking case, in which criminals access sensitive data accompanied by identifying information, even information formerly thought to be anonymous has proven penetrable by third parties. In an article in Science, 193 a group of researchers from the Whitehead Institute of Biomedical Research at M.I.T. demonstrated how they had been able to discover the identities of randomly selected people based on online anonymous genetic information collected as part of a voluntary study. 194 The researchers revealed that they had been able to uncover the identities of individuals within entire families, eventually exposing the identities of nearly fifty people, including relatives who had not taken part in the study. 195 Similarly, other researchers have discovered through their work that RNA expression can be used not only to identify an individual but also to uncover other information about the person, such as weight, diabetic profile, and HIV status. 196 This easy access to genetic information holds dire implications for incidences of genetic discrimination. The greater protection that disparate impact theory affords is necessary to extend GINA’s reach to cases in which the plaintiff is unable to obtain actual evidence of genetic discrimination.

D. Facialy Neutral Testing Causes Disparities

Moreover, although GINA does not include race as a protected category, it is important to contemplate that facially neutral genetic testing, in which the employer evinces no racial animus, may nonetheless result in racial disparities in employment. Consider the case of Stephen Pullens, a black man who was forced to resign from the Air Force Academy when blood tests revealed that he was a carrier of the recessive gene for sickle-cell anemia. 197 Pullens was a former state champion hurdler and a mountain climber who claimed to have never had any problems at high altitudes (a problem associated with the sickle cell gene). However, based on an Air Force Academy policy, the Air Force summarily disqualified Pullens from flying. 198

Pullen’s case is a classic example of the intractability of genetic determinism; even in the presence of contrary evidence, the Air Force held firm
to its belief that Pullens’ genetic makeup was his destiny. Although he had no experience of problems in high altitudes, the Academy believed that, as a carrier for the sickle cell trait, Pullens’ medical status was predetermined, and he could not escape his “destiny” of problems with high altitude. It is important to note that although the sickle-cell gene is prevalent in people of sub-Saharan decent, it can also be found in some Indian and middle-eastern populations.\textsuperscript{199} However, sickle cell was perhaps the first “racialized” genetic disease in America, as it became associated with people of African descent.\textsuperscript{200} Similarly, other genetic conditions have become correlated to racial and ethnic groups. For example, mutations in the BRCA genes,\textsuperscript{201} which are known to be a risk factor for breast cancer, have been predominantly detected in the Ashkenazi Jewish population.\textsuperscript{202} Accordingly, some argue that Ashkenazi Jewish women have been singled out as being “mutant” or “high risk” for breast cancer.\textsuperscript{203} These genetic categorizations hold troubling implications for employment discrimination.

Consider, also, the case of college athletes. In spring 2010, the National Collegiate Athletic Association (“NCAA”) started implementing its first mandatory genetic screening program for athletes.\textsuperscript{204} Ostensibly, the NCAA’s objective was to protect athletes with the sickle cell trait (“SCT”) from sudden death during exercise and physical conditioning. The screening program came on the heels of a settlement obtained against the NCAA by the family of a nineteen-year-old football player sickle cell carrier who died after conditioning wind sprints.\textsuperscript{205} Proponents of the screening claim that during exercise, “exertional sickling” can occur in athletes with SCT, triggering fatal muscle breakdown. However, there is some scientific debate over this theory, with opponents noting that some deaths ascribed to “exertional sickling” could also have resulted from cardiac disease.\textsuperscript{206} The new NCAA mandate is that all Division I college athletes must undergo SCT testing or sign a waiver releasing schools from liability.\textsuperscript{207} Thus, there exists the impression that the new genetic screening program is ultimately about limiting legal liability.\textsuperscript{208}

\textsuperscript{200} Id. at 35.
\textsuperscript{201} See NAT’L CANCER INST., supra note 7 (“BRCA1 and BRCA2 are human genes that produce tumor suppressor proteins.”).
\textsuperscript{202} See Lee supra note 199, at 34–35.
\textsuperscript{203} Id.
\textsuperscript{204} See Genetic Screening in NCAA Has Potential to Be Discriminatory, CINCINNATI.COM (Sept. 8, 2010), http://archive.cincinnati.com/article/20100909/EDIT02/9090364/Genetic-screening-NCAA-has-potential-discriminatory, archived at https://perma.cc/JQ97-WLEC.
\textsuperscript{205} Vence L. Bonham et al., Screening Student Athletes for Sickle Cell Trait - A Social and Clinical Experiment, 363 NEW ENG. J. MED. 997, 997 (2010).
\textsuperscript{206} CINCINNATI.COM, supra note 204.
\textsuperscript{207} See Bonham, supra note 205, at 999.
\textsuperscript{208} See id.
A group of authors from the legal and medical fields writing in *The New England Journal of Medicine* concluded that the NCAA genetic screening program has “the potential for unintended consequences.”\(^{209}\) The authors note that in the 1970s, mass screenings for SCT were conducted with “the aim of benefiting individual health and assisting carriers in making reproductive decisions” but that those programs were “thought to do more harm than good.”\(^{210}\) The authors also point to a military screening program for SCT that led to discrimination against carriers who were “banned from performing certain duties.”\(^{211}\) Furthermore, the authors argue that there is an issue of whether screening is truly the answer to the problem of student athlete deaths or whether “changing the practice and culture of college athletics” is the real solution.\(^{212}\) The authors also express concern that screening could lead to stigmatization that might “alter a student athlete’s self-image” or “affect his or her employability in professional sports.”\(^{213}\)

Other critics echo the concern that SCT testing is a slippery slope to employment discrimination. As one legal scholar has remarked, does the slope “now slide from protection of the athlete who has [SCT] by sitting them out, to maybe losing a scholarship, to maybe not being recruited at all?”\(^{214}\) The medically accepted correlation and the layperson’s categorization of certain diseases as endemic to certain racial groups should prompt concern regarding the potential for genetic testing to serve the purposes of covert racial discrimination. A disparate impact clause specific to GINA would allow another litigation opportunity for a plaintiff who is unable to obtain redress under Title VII.

### IV. Answering the Critics

There are three anticipated criticisms to the call for a disparate impact theory of action for GINA. The first is that carriers of genetic mutations do not represent a special class and therefore should not be granted the level of protection afforded by the disparate impact theory of action that special classes enjoy. The second has to do with the GINA’s identity crisis, that is, whether GINA is an anticlassification law or an antisubordination law. The third criticism is that a disparate impact theory does not recognize the employer’s interest. In this section, I show that (1) carriers of a genetic mutation may be considered a special class (even if one that is in waiting); that (2) GINA has no identity crisis, and, akin to Title VII, Congress may choose to endow GINA with both anticlassification and antisubordination proper-

\(^{209}\) Id. at 998.
\(^{210}\) Id.
\(^{211}\) Id.
\(^{212}\) Id.
ties; and that (3) the employer, with the help of affirmative defenses, may still vindicate its interests even after the addition of a disparate impact clause.

A. Non-Special Special Class?

Some scholars might be leery of the idea of strengthening GINA any further, because they argue that the protected class under GINA is a nebulous one. Jessica Roberts has noted: “[W]e are all potential members of a genetic underclass. . . . Moreover, since we all have multiple genetic flaws, individual people could be members of more than one genetically disadvantaged group, depending on which tests are developed and which conditions related to those tests become stigmatized.” Other scholars, however, have interpreted “class” a bit differently and have noted that the absence of a disparate impact theory under GINA would mean that some people would lack legal avenues through which to remedy unlawful discrimination. Phillip Vacchio and Joshua Wolinsky state: “The lack of a disparate impact theory as a cause of action under GINA could potentially prevent a class of individuals who were denied jobs based on their genetic information from litigating directly against the employer.” Thus, the idea is that the protected class is not everyone or even anyone who has a genetic defect; rather, it is all individuals who would want to bring a claim for employment discrimination based on genetic information and can meet certain burdens of proof. It is important to understand that a disparate impact theory of action does not mean an automatic win for the plaintiff; the plaintiff still needs to establish a clear pattern of discrimination based on the trait in question.

Note that this construction of a protected class is akin to the one for the ADEA. After all, all human beings have the potential to age. The odds of living to be forty years old, at which time one joins the class protected by the ADEA, has vastly improved for all human beings. Thus, to follow Roberts’ argument, almost everyone would be a potential member of the protected class for ADEA. But this fact did not prevent the enactment of the ADEA, and it did not prevent the Supreme Court from later reading it to imply a disparate impact theory of discrimination. The same protection should be afforded to those who have suffered employment discrimination as a result of their genetic propensity for disease.

Some might still argue that the ADEA and GINA are different. Everyone ages, the changes that come with aging generally are visible to employers, and age discrimination affects each victim more or less in the same way. Therefore, everyone justifiably could be considered part of a cohesive pro-

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215 Roberts, supra note 74, at 631.
tected group protected by the ADEA. On the other hand, each person has a unique genetic makeup, and thus genetic discrimination may vary and result in a class with too many differences. Accordingly, it becomes more difficult to see why everyone should benefit from the disparate impact claim.

The rebuttal to this argument is that the ADA and ADEA are quite similar. First, although everyone ages, each person will age differently based on environmental and other factors. Second, most age discrimination is deterministic—that is, it is based on the chronological age rather than actual age presentation. For example, a policy may ban the hiring of anyone over thirty years of age, regardless of the individual’s appearance. Age discrimination is similar to genetic discrimination because the latter is based on the propensity for genetic disease, rather than the actual manifestation of the disease. Although genetic profiles may differ, the variation is irrelevant because the individual was denied or dismissed from employment on the basis of their genetic potential for future disease. The specific disease, which the individual does not currently have, is irrelevant.

B. Antisubordination vs. Anticlassification

Much has been made of the dichotomy between antidiscrimination laws reflecting antisubordination values and those reflecting anticlassification values. Roberts, Areheart, and others have written extensively on the topic. For example, police departments typically have a maximum age cut-off. See, e.g., N.J. DEP’T OF PERSONNEL, MUNICIPAL POLICE OFFICER MAXIMUM HIRING AGE INFORMATION SHEET (Mar. 16, 2005), available at http://www.state.nj.us/csc/about/publications/pdf/2005hir ing_age.pdf, archived at perma.cc/HY4M-8UT4. But see Youth, Fitness No Longer Police Prerequisites, ASSOCIATED PRESS (June 8, 2007), http://www.nbcnews.com/id/19116778/ns/us_news-life/b/youth-fitness-no-longer-police-prerequisites/#.VpLcNRFOLzI, archived at perma.cc/U4J5-HU45 (“Police departments around the country are relaxing age and fitness standards, . . . easing . . . requirements to relieve shortages in their ranks and find officers who are wiser, more worldly, and cool-headed in a crisis.”).

218 See Roberts, supra note 74, at 627–28. Roberts states:

These two versions of the antidiscrimination principle employ differing accounts of the meaning of equality. The antisubordination principle roughly holds that covered entities should not act in a way that reinforces the social status of subjugated groups. Antisubordination would, therefore, permit affirmative action designed to improve the status of a disadvantaged group and forbid facially neutral policies that perpetuate lowered group status, even absent the intent to discriminate. Its complement, the anticlassification principle, maintains that covered entities should not consider certain classes of forbidden traits under any circumstance, adopting a formal equal treatment model of equality.

Roberts argues that the protection of genetic information could be viewed in “either antisubordination or anticlassification terms,” meaning that “an antisubordination-based law would seek to prevent the formation of a genetic underclass,” while “an anticlassification-based statute would prohibit any decision—positive, negative, or value-neutral—about individuals based on their genetic information.” Both Roberts and Areheart decry what they perceive as GINA’s anticlassification stance. Areheart argues that “GINA . . . [represents] a turn toward anticlassification principles and a possible turn away from antisubordination norms.” He bases his arguments on the fact that GINA does not have a disparate impact clause. Of course, the addition of a disparate impact clause to GINA would address Professor Areheart’s concerns. And in parsing extant antidiscrimination laws such as Title VII, it becomes evident that the antisubordination versus anticlassification debate is an unnecessary one. As Roberts herself notes, “Title VII includes both anticlassification and antisubordination protections.” For example, Title VII both prohibits the use of race and gender in employment and allows for disparate impact suits for when purportedly benign classifications result in a harsher impact on those protected categories. There is no reason why GINA could not follow a similar model. GINA need not be considered solely an anticlassification or antisubordination law.

C. What about the Employer’s Interests?

It is true that the employer has a reasonable interest in employing individuals who are healthy enough to do the job. But employers cannot deny individuals the opportunity to earn a livelihood based merely on a future potential for increased healthcare costs that may never occur. The question here is how the law should instruct an employer’s behavior when the employer is confronted with a potential employee who has the genetic potential for a disease. Older employment antidiscrimination laws offer employers the opportunity to provide defenses against allegations of discrimination—notably, the bona fide occupational qualification (“BFOQ”) defense and the business necessity defense. Accordingly, this Article proposes that the disparate impact clause allow for BFOQ and business necessity as affirmative defenses.

220 Roberts, supra note 74, at 630.
221 Areheart, supra note 75, at 709.
222 Roberts, supra note 74, at 642.
223 Professor Roberts does ultimately propose this in her article. See id.
BFOQ operates as an affirmative defense when an employer must discriminate against candidates who are unsuitable for the job because of the tasks required by the position. Both Title VII and the ADEA allow for BFOQ exceptions. For example, under the ADEA, whether age is a BFOQ will depend on the facts in the case. To establish a BFOQ defense, the defendant must show that (1) the age limit is reasonably necessary to the essence of the business, and that (2) either (a) all or substantially all individuals over the specified age would be unable to perform the duties of the job or (b) it is highly impractical to determine the fitness of older employees on an individualized basis.

Although BFOQ generally is used for a facially discriminatory policy because it involves an employer’s admission of the alleged practice, GINA, could permit a similar defense for disparate impact claims. Employers could rely on a BFOQ defense if, and only if, they could prove the two prongs of the affirmative defense.

Notably, race is not allowed as a BFOQ, and some scholars might argue that genetic profile, which is similarly deemed an immutable characteristic, should not be allowed as a BFOQ. Nonetheless, BFOQ should remain available for genetic discrimination claims. There is little danger in allowing a BFOQ defense to genetic discrimination because the genetic profile of an

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225 The BFOQ for Title VII reads:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .


The BFOQ for the Age Discrimination in Employment Act reads:

It shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.


226 See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); see also Monroe v. United Air Lines, Inc., 736 F.2d 394 (7th Cir. 1984); see also 29 C.F.R. § 1625.6 (2015).

asymptomatic individual rarely would render that individual unable to carry out the duties of the job.228

2. Business Necessity

The affirmative defense that business necessity dictates the employment practice is available in traditional antidiscrimination disparate impact claims and should be available in GINA claims.229 While an employer’s self-protective instinct might be to exclude a genetically “impaired” employee from consideration, it could in fact be feasible for the employer to reasonably accommodate the employee. Plaintiffs would be given an opportunity to demonstrate that an alternative employment practice could meet the employer’s legitimate needs without a similar discriminatory effect.230

Consider the recent case of Ryan Clark, a player for the Pittsburgh Steelers.231 Although Clark knew that he had the SCT, he was unaware of the severity of the risk when he played in Denver in 2007. At that high altitude, Clark’s blood began to sickle,232 negatively affecting his spleen. In the following weeks, doctors had to remove Clark’s spleen and gallbladder, and Clark feared that he would die.233 He lost more than 30 pounds and did not play again that season.234 Based on the incident, the Steelers’ coach, Mike Tomlin, decided to keep Clark out of a January 2012 playoff game in Denver, rather than to risk his health and life—a decision that Clark welcomed with relief.235 Tomlin’s decision illustrates how an employer could protect its business interest without sacrificing the interests of the employee. The coach recognized that Clark’s value to the team outweighed any benefits derived from forcing him to risk his life or dismissing him altogether.

CONCLUSION

Employment discrimination is a many-headed hydra that the law must continue to valiantly battle. Although genetic testing and human engineering were inconceivable during the promulgation of traditional antidiscrimination laws, scientific advancements have created a liminal space between opportunities for employment discrimination and the reach of legal

231 See Battista, supra note 228.
232 See id.; see also R.L. Green et al., The Sickle-Cell and Altitude, 4 BRIT. MED. J. 593, 593 (1971).
233 See Battista, supra note 228.
234 See id.
235 See id.
protections. Consider the recent case of the “devious defecator” that made headlines because it revealed that genetic testing had become so affordable as to become yet another invasive tool of surveillance available to employers. The facts of the case detail a mystery regarding the culprit responsible for deposits of feces around the workplace. The employer, Atlas Logistics Group Retail Services—a grocery distributor in Atlanta, Georgia—requested that two employees, Jack Lowe and Dennis Reynolds, submit DNA samples in the form of cheek swabs in 2012. Atlas then sent these employees’ DNA samples to a lab for genetic testing. The tests revealed that Lowe and Reynolds’ samples did not match the DNA found in the fecal matter. In 2013, the workers brought suit against Atlas under GINA. And on June 22, 2015, a federal court jury in Georgia awarded $2.25 million to the two aggrieved employees. The verdict marked the first time that a case brought under GINA had resulted in a money award.

What the “devious defecator” case highlights is that genetic testing has become so ubiquitous that employers may seek to wield it for employment discrimination in idiosyncratic ways. It is worth noting, however, that there was a “smoking gun” in the “devious defecator” case: The employer intentionally and overtly demanded that its employees undergo genetic testing, the results of which could result in employment termination. Many would-be plaintiffs seeking to bring a traditional GINA case may not have access to such overt evidence, and therefore, a clause allowing a disparate impact theory of action is a necessary addition to GINA.

Genetic discrimination vis-à-vis employment has proven to be a concrete threat, but newer antidiscrimination laws such as GINA have not quite met the challenge. Although genetic testing can afford knowledge and confer agency, the government must remain alert to its potential misuses, which can engender greater inequality, particularly in the field of employment. Moreover, while the U.S. government has become hyper-vigilant in blocking any effort to discriminate on the basis of visible physical difference, Congress should recognize the growing deterministic social attitudes towards

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238 See id.

239 See id.

240 See id.

241 See Gilbert, supra note 236.

242 See id.

243 When describing the case to Nature, John Conley, a genetics law professor, said: “This is an application of the law that no one thought of in a million years. . . . But the ruling is not controversial. You can’t use genetic testing for dismissal purposes.” Id.
genetic testing and genetic disease. With widespread use of genetic testing
and the ease of access to the genetic data it obtains, Congress must prevent
the insidious creation of a genetic underclass that is denied participation in
the liberal economy. GINA should no longer be thought of as merely pre-
emptive; rather, Congress should strengthen it with a disparate impact cause
of action to ensure that workers are truly protected from genetic discrimina-
tion in employment.
Is Black Marriage Queer?

In the opening pages of the introduction to *Wedlocked: The Perils of Marriage Equality*, Katherine Franke proposes to stage a “queer” encounter between and exploration of “the experiences of freedom of newly emancipated people in the immediate post–Civil War period and [those] of lesbians and gay men today” (7). The goal, writes Franke, is to “better understand how the gay rights movement today has collapsed into a marriage rights movement” and what some of the “costs” of that movement strategy might be by looking back at “an earlier time when marriage rights intersected with the rights of freedom, equality, and dignity” of another “marginalized population: newly emancipated people in the mid-nineteenth century.”

My thoughts in these pages on the “queer” potential and possibilities of “black marriage” respond to a provocation in Franke’s final introductory paragraph, which announces the “central question” (21) with which *Wedlocked* wrestles. Readers who are familiar with the book may recall that this question is prompted by an observation (which I believe to be entirely correct) that while their successful campaign for marriage rights
"[elevated] the civil status of gay people" in the United States, the institution of marriage has emphatically not "played the same role" in the lives of Americans of African descent (21). In Franke's blunt terms, "marriage has by and large served as a test" that African Americans have been and "are doomed to fail." "Through these failures," she continues, the "stain of race—as much moral as biologized—has been written and rewritten on black bodies" (19; my emphasis). For Franke, the central question then becomes: "how does a right to marry help us better understand the stubborn, even indelible, nature of racial stigma, particularly when compared with the stigma of being gay?" (21; my emphasis).

Note the shift here in accent and emphasis. Within the course of a few pages, Wedlocked moves from its initial stated preoccupation with what the postbellum experience of a formerly enslaved and unmarrageable people in the American conjugal order can teach today's gay and lesbian community about "the perils of a politics of equality and freedom made real through marriage rights" (Franke 19) to a very different field of investigation. Inverting the terms and reversing the pedagogical relationship with which it began, this second narrative of marriage in America looks to the lessons we should draw from today's gay and lesbian movement and the success of the "freedom to marry" campaign regarding the history and present pertinence of the "stubborn, even indelible" racial "stigma" whose longue durée has denied, and continues to deny, African American people the "dignity of self-definition" that allowed lesbian and gay Americans "to redefine what it means to be gay" (21; my emphasis).

What accounts for this redefinitional divide? Wedlocked offers two separate explanations, each of which gestures in different theoretical directions. The first, more explicit and sustained line of interpretation tells an "economic" story centered on the idea-image of "racial capital." In an intriguing formulation, Franke contends that the divergent fates of lesbigay and black experience in the American conjugal order stem in part from the "social reputation" that the marriage equality and gay and lesbian movements "enjoy as white" (198). Put another way, because the public face of the gay and lesbian marriage equality movement has been imaged and imagined as white, the campaign has benefited from American society's "possessive investment in whiteness" (Lipsitz 2) and the "racial endowment" effects (Franke 13) connected to the reputational asset that Cheryl I. Harris has incisively denominated "whiteness as property" (1713). The racial privileges and dividends of this reputational "capital in whiteness" (Franke 198) are assets that the gay and lesbian marriage movement could put to
productive, transformative use. By contrast, the straight African American community has yet to accumulate comparable “sexual capital” from the “social reputation” it “enjoys as heterosexual” (Franke 198). Indeed, argues Franke, “the same-sex marriage movement is itself racialized” in ways that have not only benefited it but also contributed to and reinforced “the ongoing subordination of people of color” of every sexual orientation, while simultaneously diminishing and constraining the sexual and reproductive rights of American women (12).

I cannot possibly do justice to the dense, complexly plaited historical, conceptual, and normative arguments Wedlocked advances to support the story it tells about (white) lesbian and gay success and (heterosexual) African American failure. Let me confine myself, then, to a cursory comment or two about the “curious” (Franke 51) assumptive architecture that subtends Franke’s account of race, sexuality, “sexual race,” and the meanings of “black marriage” in American conjugal politics. My interest is in how and why the book’s “queer pairing” (6) of the experiences of formerly enslaved black people in the period after the Civil War and of formerly criminalized gay men and lesbians after marriage equality is nested in a “logical space” (to use Richard Rorty’s term, 13) whose vision of what black marriage is or might become is, in fact, curiously unqueer.

Let me explain what I mean by returning to the thought train with which Franke ends the book’s introduction. I noted earlier that Wedlocked offers two distinct explanations for the persistent inability of straight African Americans to use marriage and marriage rights to “rebrand blackness in a way that sanitized racist stereotypes and coercive forms of racialized discipline” (61). I have already mentioned Franke’s racial capital narrative, which attributes the Freedom to Marry campaign’s successful sexual rebranding strategy to the social reputation it enjoyed as a movement made up of, and led by, white people. Although it is less fully developed than her economic interpretation, Franke argues that there is a second reason straight African Americans have failed to leverage marital ideology and institutions or their social reputation as heterosexuals to craft a revised conception of race in general, and of blackness in particular. We might describe this second explanation as a “semiotic” story, since it presses focus on the idea-image of “racial meaning” and representation.

In my remaining pages, I want briefly to tease out the theory of racial representation and meaning that is advanced—or perhaps less advanced than simply assumed—in the final sentence of the introduction to Wedlocked. What, Franke asks, is it about black marriage that makes it
(in contrast to lesbigay marriage) such an ineffective vehicle for "elevating the status" (21) of African Americans? She traces the source of the problem to the "definitional indignity" that has historically denied African Americans access to the means of individual and collective self-representation. Unlike sexuality, she suggests, "the signature of race is a mark that African American people have had little hand in writing or rewriting" (22).

An air of ambiguity about the nature of the discursive disenfranchisement that makes it difficult if not impossible for African Americans to "re-represent" race and racial meaning attends this and related passages. Is the central claim here a historical claim that African Americans have "never been allowed" to participate in the public discourse of making race and black marriage mean (Franke 202)? This would seem to be the thrust of such qualified claims as the assertion that "for the most part marriage for African Americans has been a vehicle for reinforcing their inferiority and for eliciting familiar responses that assign a badge of inferiority" or the contention that "marriage has been and largely remains a kind of test that the African American community is seen as failing" (202). In contrast, other passages in Wedlocked suggest a less historical and more categorical line of argument, which attributes the discursive inability of African Americans successfully to refigure the meaning of race and black marriage to qualities that inhere in the very idea-image of race—or more precisely, of blackness—as such. How else is one to understand Franke's insistence that the right to marry reveals the "stubborn, even indelible, nature of racial stigma" or the thesis that the "signature" of race "is not one written by black people, but its mark is truly 'theirs' in the sense of belonging to them, as being a property of their blackness?" (21, 200; my emphases).

At stake here are not merely two very different conceptions of the meanings of race and racism in America. Depending on how one reads it, Wedlocked may be said to advance two distinct, contradictory visions of the prospects and potential uses of black marriage as a venue and vehicle for empowering black agency and enabling intimate relational resistance to the u.s. racial state and civil society. The notion that racial stigma is "indelible" or that the signature of race is a "property" of black bodies implies a theory of racial meaning that is only one step to the side of the semiotic view that construes race as an "unpassable symbolic frontier" (Hall 131) and an eternal, unchanging same. Put another way, to lose sight of the "writtenness" of race and racial meaning is to risk forgetting something we all by now surely know: race is a "discursive construct" and a "sliding signifier" (Hall 52) whose meanings can be unwritten and, indeed, rewritten to produce
countermeanings and counterdiscourses. The world of race, “like all worlds of meaning,” is a world where discourse “can never be finally fixed,” a world in which racial signs and signifiers are “open to an infinite sliding,” to “crossing,” contamination, disruption, and destabilization by other signs and “other signifiers—[for instance,] of class, gender and sexuality” (Hall 171). To be faithful to its aspirations, then, a queer critical theory of black marriage must refuse to restrict its field of vision to what black marriage was in the nineteenth-century past, or even to what it is in our twenty-first-century present; it must also be willing to reflect speculatively on what black marriage might become in a twenty-second-century future. Similarly, in taking up the question of how black intimate alliance and the black intimate imagination can be mobilized to forge new, more democratic forms of sexual and racial citizenship, a critically queer engagement with the politics of black marriage must declare its independence from the ideological terms and institutional terrain of “law and rights-based advocacy” (Franke 61).

One potentially productive site for the speculative, queer, Afro-futurist reflection on black marriage I am urging here can be found in the domain of culture and the arts where, as Stuart Hall once noted, “things get said in ways in which they can’t get said in any other domain” (Hall and Schwarz 155). Consider in this connection the extraordinary body of work that African American filmmakers have produced in the last few years on black intimacy in America. Narrative films such as Mudbound, Fences, Birth of a Nation, Fruitvale Station, and Moonlight, to name a few, tell stories and paint portraits of black love, sex, gender and sexuality, marriage, family, and kinship that imagine and represent, figurally, the hopes and fears and dreams and desires and dangers and delights of African American erotic and intimate life beyond the binary boundaries of normative whiteness and nonnormative blackness, of white supremacy and black inferiority that center the account of black marriage in Wedlocked.

To my mind, one of the more interesting aspects of these recent cinematic figurations of African American eros and intimacy is the way even the most conventional of these films manage to create aesthetic and imaginal space that positions black lives in the marital narrative with unexpected and even “queer” effects. Take the case of the Disney blockbuster Black Panther, in which director Ryan Coogler brings the Marvel comic book world of an imaginary African nation called Wakanda to three-dimensional life. Black Panther tells the story of Prince T’Challa, who becomes the king of Wakanda and superhero Black Panther after his father is murdered while giving a speech at the United Nations. T’Challa’s nemesis is Prince N’Jadaka, a former
u.s. black-ops soldier and the bastard son of T'Challa's late uncle, who was conceived in the late twentieth century when his father was assigned to Oakland, California, as a secret agent.

Thematically, *Black Panther* is an allegory about the epic struggle within the Black Atlantic between two warring visions of the politics of belonging: the nativist, nationalist, ethnic identity of T'Challa and the globalist, diasporic, racial identity of N'Jadaka. Narratively, the film is a domestic family drama of the struggle to the death of two brothers and those brothers' sons. Some gay and lesbian press coverage has faulted the movie version of *Black Panther* for not including a subplot in the comic series that recounts the romance between two members of King T'Challa's all-female personal guard. However, commentary on the film has overlooked one decidedly queer feature of the world of Wakanda as the filmmakers imagine and represent it. One insistent motif in *Black Panther* is the question of identity that, by tradition, Wakandans put to one another when they meet: “Who are you?” During the course of the film, the denizens of Wakanda address one another by many names: Mother, Father, King, Queen, Prince, Princess, Sister, Brother, Aunt, Uncle, Cousin, Son, Daughter. There are two names, however, by which no Wakandan is called or calls another: Husband and Wife. Indeed, by the end of *Black Panther*, the viewer comes to realize that the institution of marriage may not even exist in Wakanda; the film's scrupulous silence on this score is deafening.

*Black Panther* conjures the queer possibilities of black intimacy and the nonidentity of intimacy and conjugality in the romance between two lover-warriors, the heterosexual couple Okoye and W'Kabi. Throughout the film, W'Kabi and Okoye call one another “my love,” a phrase that figures black intimacy at one and the same time as a mode of address (*my love*) and as a self-interpellative affective signature (*my love*) whose terms resist the identification and institutionalization of marital discourse. In *Black Panther*, the relationship between Okoye and W'Kabi becomes a cinematic point of departure for envisioning black heterosexuality beyond the boundaries of conjugality's constricted codes and conventions. The film invites its viewers to imaginatively enter the *mode de vie* (Foucault et al. 156) of Okoye and W'Kabi's queer, black heterosexual friendship. The story of these two lovers highlights the fluid, fecund possibilities of an amatory amicability “that might be and become just about anything” (Roach 45). The heady mix of mutual attraction and shared estrangement is brilliantly captured in the charged scene toward the end of *Black Panther* when Okoye and W'Kabi find themselves on opposite sides of a pitched battle. Okoye, spear in hand,
commands W'Kabi to stop fighting and throw down his weapon or risk annihilation. W'Kabi asks her, “Would you kill me, my love?” Okoye replies, “For Wakanda? No question.”

The fictional lifeworld of *Black Panther* is, of course, an imaginary domain. Okoye, W’Kabi, and the other citizens of Wakanda inhabit a fairy-tale realm that is far removed from the real, historical world of black marriage on which *Wedlocked* focuses. The imagined queer place from which the film’s alternative vision of black intimacy springs exists only within the four corners of the theater screens on which that vision is projected. Nonetheless, the remarkable reception *Black Panther* has garnered since its release suggests that the racial fantasy it gives us of an “as yet unimagined [form] of individual and collective [black] existence” (Love 181) speaks to a deep yearning to “re-vision” race—or more precisely and in this context, blackness—as something other than, in Franke’s words, a “curse” (19) or a “stain” (19) or a “badge of inferiority” (199) or a “mark” that African Americans ought or ought to want to “cleave” out of race in the same way that she says homosexuals have been able successfully to “cleave the sex out of homosexuality” (6). The sheer taken-for-grantedness of the film’s “unapologetic blackness” has, in the words of one commentator, opened “a door into a radical blackness on the screen” (O’Brien). The power and the pleasures of *Black Panther* lie precisely in its flagrantly fantastical refusal to linger too closely or too long in the world of “actually existing race.”

*Black Panther* may be a fiction, but as an event the film tells us a lot about the work that culture and cultural representation are doing at this vexed moment in the political history of race. First, *Black Panther* reminds us that the brute force and continuing social power that keep Americans of African descent “tethered to an identity that explains and justifies the many forms of inequality they endure” (Franke 62) always travel through the symbolic circuits of culture and the culture industry. Second, the film’s account of the intersecting national and global dynamics that sub tend contemporary race and racism raises hard questions about how people of African descent in the U.S. and elsewhere can effectively forge new black subjectivities and produce “new black subjects” (Hall 293) to interpret and interrupt the cultural and signifying economy within which the racial is imagined and fantasized and “written” in today’s networked world. Third, and finally, *Black Panther* underscores the importance of art and culture for the urgent “imaginai” (Bottici 54) project of seeking and sustaining new, more open modes for engaging and living with cultural difference (Hall and Schwarz 148) in an age of resurgent racial and ethnic conflict.
These large and complicated issues raise questions to which I have no ready answers. Of this, however, I am certain. A queer, critical theory of race must eschew the white mythology of a closed “Americanist” narrative that always and only figures blackness as accreted stain, lack, failure, inferiority, stigma, mark, or curse. This means, in the first place, thinking the question of the Black American and the Black Atlantic together in a way that situates questions of race and racial discourse in a broader diasporic frame. In contrast to Wedlocked’s nationalist focus on black and lesbian marriage in America, Black Panther suggests a different, transnational agenda for queer and race critical comparative research on black marriage. The chief questions that a transnational comparative study of black marriage would pose and try to answer are whether, why, and how bisexual, heterosexual, gay, and lesbian black people around the world experiment with conjugality by crafting spaces within marriage that engage and include intimate relational possibilities outside it. The transnational turn urged here recognizes that what we call “race” operates as a mobile modality in which other identities and categories—such as class, religion, gender, sexuality, ethnicity, nationality, region, and language—are lived, governed, and regulated; it understands, too, that race and racism do what they do at different times and in different places through complex, labile articulations that produce unpredictable consequences and unstable, uncanny, and even “queer” effects. This opening up of race—and with it, of gender and sexuality inter alia—beyond the “national signifier” (Hall 159) is one of the most urgent tasks for a queer, race critical project that aims to understand not only what black marriage has been or is but also what black marriage might become.

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Race, Labor, and the Future of Work

“Automation cannot be permitted to become a blind monster which grinds out more cars and simultaneously snuffs out the hopes and lives of the people by whom the industry was built. Perhaps few people can so well understand the problems of auto workers and others in labor as Negroes themselves, because we built a cotton economy for 300 years as slaves on which the nation grew powerful, and we still lack the most elementary rights of citizens or workers. We too realize that when human values are subordinated to blind economic forces, human beings can become human scrap.”

- Dr. Martin Luther King Jr. Speech to the UAW 25th Anniversary Dinner April 27, 1961

Abstract

Amidst the full-throttle optimism surrounding the promise of automation to revolutionize the workplace and transform society for the better, there are concerns about the potential of such technologies to also widen the gulf of economic inequality. Dr. Martin Luther King, Jr. delivered his now iconic “I have a Dream” speech at the 1963 March on Washington for Jobs and Freedom. Although the March is now mostly remembered for its platitudes on multiracial unity, the true driving force of the March was to explicitly link the economic justice demands of workers to the demand for civil rights for racial minorities. And at the time of his assassination, Dr. King was in Memphis to march with sanitation workers and garbage collectors who had been spurred into action after unsafe working conditions led to the death of their colleagues. In the coming future of work, lax labor protections present a dire situation for workers who are racial minorities. While undoubtedly there are new labor markets and novel work opportunities created by the technological capability for decentralized management and remote work, the rhetoric around automation tends to elide the disparities between those who enjoy its benefits and those who bear the burden of being its draught horses. This chapter examines how race factors into the demographics of the workforce of the gig economy and other precarious jobs that are creating a planetary labor market – opening up new labor markets in developing nations but without the same labor protections as those in economically privileged countries. The chapter observes that racial minorities disproportionately perform the precarious work created by the gig economy and that the jobs at danger for full automation, such as retail and care work, are jobs held by white women and racial minorities. Meanwhile, technological advancements such as automated hiring and wearable technologies also portend that the future of work may have lopsided benefits. Governmental action is necessary to ensure that the future of work is not a dystopia for all workers, but especially for more vulnerable workers of color.


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Introduction

The first Fiver advertisement was bifurcated and each half had a face, on one side was the face of a white man, the on the other was the face of a Black woman. The tagline for the ad on the side with the white face read: “Your project is due ASAP.” On the side with the face of the Black woman, it read: “She’ll be on it by EOD.” The second advertisement was similarly bifurcated, this time, the left half with the white face read: “You’re running low on resources,” the right half with a Black woman’s face read: “She’s a source you can rely on.” The implications of these advertisements were clear: the gig economy now affords opportunities for privileged populations to take advantage of cheap labor, wherever it may be found in the world, thus creating what Professor Mark Graham has termed, “the planetary labor market.” But there was also a subtler implication – the advertisement dictated who should benefit from increased access to cheap labor afforded by technological advancements and who is expected to provide the labor. On one hand, there is the argument that gig economy companies like Fiver are a boon to free market capitalism, offering new opportunities to workers in the global south by connecting them with those able and willing to pay for their labor. On the other hand, there is the question of whether the global south workers in the new world gig economy will receive fair value for their labor or enjoy the standard labor protections that have been won in the United States. Also, as books like The New Jim Code and Algorithms of Oppression make clear, the automated decision-making systems that increasingly dictate access to work are not neutral, rather they bear the history of past decisions tainted by racial prejudice.

Although the United States has earned a reputation for being a land of opportunity, offering economic mobility and a ladder to financial security for hard-workers from any ethnicity, the truth is that the United States has also evinced a history of labor exploitation and exclusion. The history of the United States is marred by over two centuries of enslavement and indentured servanthood. When Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863, it marked a de jure end to slavery, however, the de facto enslavement of people of African ancestry continued. It was not until the 13th Amendment was ratified in 1865 that slavery truly ended in the United States. As the labor market takes larger strides into automation and technological advancements globalize employment opportunities, the preservation of labor protections for racial minorities remains a legal concern. This chapter reviews some of the relevant history of worker rights legal battles within the past 150 years, and describes how emerging AI technologies may worsen labor inequalities.

1865-1871: Black Codes, the 13th Amendment Exception, and Labor Exploitation

The demise of slavery did not end the labor exploitation of formerly enslaved Americans of African descent. As has been noted by the sociologist, W.E.B. Du Bois, “the slave went free; stood a

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7 U.S. Const. amend. XIII, § 1
brief moment in the sun; then moved back again toward slavery.” Douglas Blackmon, in Slavery by Another Name, describes how Redemption was an orchestrated effort coordinated by white merchants, planters, businessmen and politicians to stymie the social and economic mobility of black workers. As a co-author and I have previously noted: “While the Thirteenth Amendment of the U.S. Constitution has been lauded by history books and legal scholars for abolishing slavery, the Amendment has also been read to uphold labor practices that in reality could amount to slavery for a certain segment of the American population—that is, those convicted of a crime.” The 13th Amendment was meant to abrogate slavery, but in, actuality, it provided the legal basis for a continued form of slavery in the penal system. The amendment reads: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

Southern states seized on the exception in the 13th amendment as legal cover for the continued labor exploitation of formerly enslaved people of African descent. Thus, starting in 1865, several southern states passed the Black Codes which were restrictive state laws similar to some laws already passed by Northern States to suppress African American economic activity. The Black Codes were designed to confine the newly freed Americans to the plantations of their former owners and to force them to work for low wages. With the charge of vagrancy, the Black Codes criminalized innocuous behavior, such as unemployment, meaning that freed men and women could now be caught up in the dragnet of the penal system and conscripted for low-wage or unpaid work as part of the convict lease system. In Ruffin v. Commonwealth, the Virginia Supreme Court in 1871 held that a prisoner: “during his term of service in the penitentiary…is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”

The Industrial Revolution in the nineteenth century stoked the rise of prison labor and states started to “lease” inmates to private companies as low-cost labor. This lease system was most prevalent in the Southern states after the end of slavery. Under the lease system, prisoners were compelled to perform low-paid or unpaid labor on plantations, railroads, mines, etc. with the goal of producing financial profit for the firm who leased the labor. The use of prison labor for private gain continues today; as Professor Noah Zatz has observed, “prison industries generate $2 billion in revenue annually.” Although the Black Codes were abolished by the passage of the Civil Rights Act in 1964, as Michelle Alexander notes in The New Jim Crow, a cataclysm of punitive laws starting in the 1970s and truly gaining traction in the 1990s enabled mass incarceration or the “warehousing” of African...
Americans considered surplus in an off-shored labor market. In turn, these incarcerated men and women are conscripted to perform low-wage work for corporations such as Walmart, Victoria’s Secret, and McDonald’s. As sociologists have found, the mass incarceration of mostly young Black and Latinx men serve to delay their entry into the labor market and, subsequently, to curtail their labor market opportunities given the collateral consequences of conviction. Many of those incarcerated are high school dropouts who generally first experience incarceration in their late teens and early 20s, that is, key educational years, and who are then prevented from joining the labor market by their criminal record or find their employment opportunities limited by the collateral consequences of conviction.

1880s-1930s

The late 19th century saw the rise of laws meant to limit economic opportunities for immigrants of color and racial minorities. In the late 1800s, there was an influx of Chinese immigrants to California despite the Chinese Exclusion Act. These immigrants chose to operate laundry services (partly because of employment discrimination in other fields). By 1880, about 89% of laundry workers were of Chinese descent. Later that year, San Francisco passed a law that banned all laundry businesses located in wooden buildings without a permit from the Board of Supervisors. The ordinance stated that the permit was required to reduce fire hazards. Of the 200 Chinese immigrant owned laundry businesses, one permit was granted; however, one in every eight permits were granted for those who were white. In the case of Yick Wo v. Hopkins, Yick Wo, a Chinese immigrant who had operated a laundry business for 22 years within a wooden building before the mandated permit argued that the ordinance was unlawful and racially discriminatory. The case went all the way to the Supreme Court where the court ruled in Yick Wo’s favor and denounced the laundry law. Yick Wo v. Hopkins was on one of the first Supreme Court rulings to disallow racial discrimination in the labor context.

Less than 25 years later, Lochner v. New York was presented to the Supreme Court. While not explicitly about racial labor exploitation or discrimination, the plaintiff’s arguments in the controversial

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18 Bruce Western & Becky Pettit, Incarceration & Social Inequality, 139 Daedalus 8 (2010) (noting the cycle of inequality created by the intergenerational incarceration of Black and Latino males, especially those in their twenties with low education credentials).

19 Devah Pager, Double Jeopardy: Race, Crime, and Getting a Job, 2005 Wis. L. Rev. 617 (2005) (finding that Black male job applicants with criminal records were the least likely to get a callback interview).


Electronic copy available at: https://ssrn.com/abstract=3670785
Lochner case continues to echo today when it comes to the classification of gig economy workers. Joseph Lochner, a baker in New York, violated the state’s Bakeshop Act of 1895, which required businesses to limit workers’ hours and maintain sanitary working conditions. This law limited laborers to work 10 hours a day and more than 60 hours a week. Joseph Lochner argued the law violated people’s right of “freedom of contract,” which he contended allows two parties unfettered freedom to enter into a contract, unrestricted by State and Federal Laws. In 1905, the United States Supreme Court (with a 5-4 majority) ruled in favor of Lochner.

The Lochner decision was ultimately overturned. However, the ghost of the Lochner case lives on as gig economy companies like Uber have conjured up freedom of contract arguments to make the case that their drivers are not employees (who would then be entitled to employment benefits and certain labor protections) but are rather independent contractors. As a large portion of gig economy workers in the U.S. are people of color, designating them as independent contractors despite what some have described as a high levels of managerial control and surveillance, means that they cannot enjoy the same labor protections as their counterparts in traditional industries. Rather, such a designation would only compound their precarious employment situation as gig economy companies may then compel such workers to work long hours or dismiss them without notice.

In response to the Great Depression, the U.S. government took efforts to ameliorate the living conditions of working class people. As part of the New Deal program in the 1930s, the U.S. attempted to help low-wage families by providing welfare packages. However, these welfare packages were not given to people with agriculture jobs or domestic workers. This last fact is important because by the 1930s, the majority of Black men worked in lower paying jobs such as in agriculture or factory work while Black women tended to be domestic workers. Thus, these new benefits rarely fell to African Americans. In fact, as some scholars have noted, the New Deal only served to intensify the inequality between working class white people and working class African Americans. The same was also true of the GI Bill which was created to benefit veterans of World War II in the 1940s, but which ultimately

28 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
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was much more influential in launching white Americans into the middle class and leaving their black counterparts behind because of the unfair manner in which its benefits were doled out.\(^{35}\)

The United States took other legislative steps in the 1930s to protect the labor rights of working class Americans such as the National Labor Relations Act, (NLRA), which was first enacted in 1935, to protect and regulate labor relations such as union organizing, collective bargaining, and the employee right to strike and protest.\(^{36}\) The NLRA also protects employees from exploitation and unfair labor practices because it is in “the national interest of the U.S. to protect the economy.”\(^{37}\) The two most relevant NLRA sections are section 7, which protects the right to self-organization, and section 8, which protects against unfair labor practices.\(^{38}\) A key part of the NLRA is the protection of employees from racial discrimination when seeking to join unions. In the case of NLRB v. Mansion House Ctr. Mgmt. Corp., the Court denied part of a Board order requiring recognition of the union and allowing for collective bargaining.\(^{39}\) This was because of the employer’s allegations that the union membership was discriminating against Black workers, who made up less than 1% of union while the population of people of color in St. Louis was 50%. This case followed the precedent of an earlier case, Independent Metal Workers Union, in which the court had found that a union that excludes workers on racial grounds cannot obtain or retain certified status under the NLRA.\(^{40}\) As the Board had previously noted, a union that discriminates against Black workers denies employment opportunities to those workers.

The Fair Labor Standards Act of 1938 (FLSA), is another federal labor statute that protects workers from exploitation.\(^{41}\) The main purpose of the FLSA is to set federal minimum wage standards and overtime pay for all workers in the United States.\(^{42}\) The FLSA also protects workers from racial discrimination regarding wages. In Bryant v. Johnny Kynard Logging, Inc.,\(^{43}\) Bryant, a Black man, and a log truck driver for 7 years, worked 60-70hrs/week, yet he received no overtime. When he raised the issue to the employer, the employer dismissed his concerns although the white drivers were paid more. Bryant and the other Black workers filed a race discrimination and an FLSA wage violation. After the initial lawsuit settled and case dismissed, Bryant was terminated soon after. Bryant then filed another lawsuit alleging violations of the FLSA. The court held that Bryant had presented sufficient evidence for a prima facie case of FLSA retaliation.

Much like the NLRA, the FLSA definition of “employee” is relatively vague. The Act defines “employee” as “any individual employed by an employer.”\(^{44}\) This lack of specificity continues to pose a problem for gig economy workers many of whom would claim that they perform activities similar


40 Independent Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573, 1578 (1964).


to employees. In 2018, the California Supreme court in *Dynamex Operations West v. Superior Court of Los Angeles County*, overthrew precedent by affirming a three-factor test for determining whether a worker might be classified as an independent contractor. The “ABC” test as set forth in *Dynamex* requires a positive answer to all three questions: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity’s business, and (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Although the California state legislature has codified the Three Factor test in Assembly Bill 5, several gig economy companies have pledged a substantial amount of money to lobby to repeal the law.

1960s-2000s

Perhaps the most significant victory of the Civil Rights Movement in the 1960s was the passage of the Civil Rights Act in 1964. The act explicitly outlaws employment discrimination based on “race, color, religion, sex, or national origin.” Dr. Martin Luther King Jr. was instrumental in the implementation of the Civil Rights Act and fought for equal employment rights. In the Amsterdam News, Dr. King wrote that desegregation would mean little if people lacked the money to buy anything. However, even after the Civil Rights Act, the fight for economic and labor equality for racial minorities persisted. In Memphis, Tennessee in 1968, for example, after unsafe working conditions led to the death of their colleagues, black sanitation workers went on strike and protested for equal benefits and job security. Dr. Martin Luther King Jr. was in Memphis to join over 1300 men, women, and children in a march for equal labor rights when he was assassinated. After months on strike, and Martin Luther King Jr.’s murder, and dozens of people jailed, sanitation workers finally received equal benefits.

Title VII of the Civil Rights Act has proven instrumental in protecting the rights of Black workers. In *Griggs v. Duke Power Company*, the Duke Power Company Black employees could only work in one of the five departments that the company offered—the Labor Department. The company also exhibited large pay disparity by paying the lowest paid workers in other departments more than the

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45 *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018).  
46 *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018).  
highest paid workers in the labor department. Furthermore, the company began requiring a high school diploma for employment in all departments. If employees did not have a high school diploma, the company offered to pay two thirds of this high school training for employees in all departments except the Labor Department. In 1971, the Supreme Court ruled that these disparities violated the Civil Rights Act. Two years later, in McDonnell Douglas Corp v. Green, Green sued McDonnell Douglas Corp for employment discrimination. Green was a Black mechanic and laboratory technician who claimed he was laid off “because of his race.” Green alleged that because he was active in the Civil Rights Movement, the company retaliated and fired him. The Supreme Court ruled in Green’s favor. While Title VII of the Civil Rights Act has been helpful in rectifying labor market discrimination against racial minorities, court cases have demonstrated that the act only protects American citizens. In the case of Espinoza v. Farah Manufacturing Co., the Supreme Court ruled that employers can refuse to hire anyone who is not a citizen of the United States. Given that Espinoza was not a United States citizen, the courts declared that the Civil Rights Act of 1964 was not applicable and his case was dismissed. As some labor scholars have noted, a legal stance that immigrants without permanent status or undocumented immigrants have inferior labor protections could allow for the labor exploitation of millions of people, many of whom are people of color.


Educational and professional divides translate to economic disparities

Professional and managerial positions are some of the highest paid positions in the United States. These highest paid occupations are largely comprised of Asian and White workers whereas only a fraction of Black and Hispanic/Latino employees work in these professions. Fifty-two percent of Asian employees work in management, professional, and related occupations, followed by 41% of White employees work within these professions. Black employees only make up 31% and 23% of Hispanics/Latinos are employed in management, professional, and related occupations. On the other hand, 24% of Black workers and 25% of Hispanic/Latino workers are employed in service occupations as opposed to the 16% of White workers and 17% of Asian workers. Service occupations include healthcare support, protective services, food preparation and service, building and grounds cleaning and maintenance, personal care and service. Less than 20% of employers within service occupations offer paid sick leave, which provides little job security and increases stress on the employees. Many service jobs also have high turnover rates, provide few benefits, and offer no

guarantee of full-time work. This makes it difficult for people who are in service occupations to maintain a steady job when employment hours and opportunities are continually uncertain.

One reason for this occupational divide is the disparity between ethnic groups in higher education. These professional and managerial jobs often require formal education beyond a high school diploma and include job security and benefits (e.g. healthcare benefits, paid time off, maternity and paternity leave, etc.). Most professional and managerial positions require at least a Bachelor’s degree—if not a professional degree (e.g. Master’s degree, Doctorate of Philosophy, Medical Degree, etc.). Many professional and managerial positions require advanced education and often include secure and well-paid jobs, whereas only few service occupations require higher education. Within the United States, only 20% of Hispanics/Latinos and 30% of Blacks have a Bachelor’s degree or higher, whereas 61% of Asians and 40% Whites have a Bachelor’s degree or higher. These disparities have an economic impact - the annual mean wage for workers with a high school diploma is $43,060 in comparison to the average wage of $87,130 for workers with a Bachelor’s degree.

**Automation and Surveillance technology in the workplace**

Today, emerging technologies in the world of work threaten to further widen the economic gulf for workers of color. Enhanced technological capabilities for communication allow for a global gig economy while traditional industries have also turned to automated processes to streamline human resources functions and automated surveillance to enhance productivity. On the other hand, the automation of industry threatens to eliminate job opportunities for racial minorities. There is growing concern that up to half of the labor market will be replaced by automated machines, a phenomenon that would most impact minority and immigrant workers. While the U.S. Bureau of Labor Statistics estimate an overall employment growth of 11.5 million jobs between 2016 and 2026, these jobs will likely be for individuals who need advanced degrees such as computer scientists or engineers or for individuals whose jobs require creative thinking. Jobs that will likely be automated are mainly routinized or organizational work such as secretaries, administrative assistants, cashiers, drivers/truck drivers, manufacturing work, construction, retail salespeople, janitors, cooks, etc.). These routinized jobs are most likely to be held by minorities who also lack an advanced degree. However, much larger than the issue of worker displacement due to automation, is how automated work processes impact the experience of workers in the workplace. Two such areas of automated processes are: 1) automated hiring, and 2) automated surveillance of workers.

**Automated Hiring and Employment Discrimination**

Although hiring algorithms can help reduce time and costs for human resources staffing and applicant selection, hiring algorithms can also serve to increase inequality. Much of automated hiring

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65 ARIANE HEGEWISCH, CHANDRA CHILDE & HEIDI HARTMANN, WOMEN, AUTOMATION, AND THE FUTURE OF WORK, INSTITUTE FOR WOMEN’S POL’Y RES. (2019).
67 ARIANE HEGEWISCH, CHANDRA CHILDE & HEIDI HARTMANN, WOMEN, AUTOMATION, AND THE FUTURE OF WORK, INSTITUTE FOR WOMEN’S POL’Y RES. (2019).
involves the minute quantification of applicants with data that goes beyond job fit or job skills, frequently pulling in social media data. This feature echoes the idea that there are those who are “deserving” of being employed rather just merely capable of performing the job. This is a distinction similar to the “deserving poor” vs “undeserving poor” divide noted by Professor Khiara Bridges; and this genre of distinctions tend to stymie the economic mobility of people of color. Also, automated hiring can increase employment inequality by allowing for the targeting of job advertisements to groups of people who have historically been successful employees in the past. For example, due to algorithmic bias, job advertisements with high-income jobs are presented to white men significantly more often than racial minorities and white women. Other investigators, who described what they found as “a modern form of Jim Crow,” detailed how a former Facebook feature termed “Affinity Groups” in essence allowed advertisers to use demographic data to algorithmically target the audience for Facebook ads. Notably, a now defunct page on the Facebook Business section, titled “How to Reach the Hispanic Audience in the United States,” claimed that it could allow advertisers to reach up to 26.7 million Facebook users of “Hispanic Affinity.” From this specific Affinity Group, advertisers could hone in on bilingual candidates, to “refine their audiences.” One argument is that the feature is helpful for business aiming to increase diversity in their workforce. However, consider that the use of Affinity Groups for job advertisement distribution could also have allowed for unlawful employment discrimination.

In a case against Facebook, the plaintiffs alleged that Facebook Business tools both “enable and encourage discrimination by excluding African Americans, Latinos, and Asian Americans – but not white Americans from receiving advertisements for relevant opportunities.” In an amended complaint, the class action also alleged that “Facebook offers a feature that is legally indistinguishable from word-of-mouth hiring, which has long been considered a discriminatory and unlawful employment practice.” This second allegation is a reference to Facebook’s “Lookalike Audiences” feature. This feature allows employers and employment agencies to provide a list of their existing workers to Facebook, this list is then used to generate a list of Facebook users who are demographically the same as current workers of a given organization. The new “Lookalike Audience” list created by Facebook then become the target population to receive the organization’s employment advertisements for relevant opportunities.”

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68 Ifeoma Ajunwa, The Paradox of Automation as Anti-Bias Intervention, 41 Cardozo L. Rev. __ (Forthcoming, 2020).
69 Khiara Bridges, The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action,” 66 Emory L.J. 1049 (2017).
75 Mobley v. Facebook, Inc (first am. compl.), No. 16-cv-06440-EJD, at *1 (N.D. Cal. 2017).
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ads. The problem is that this feature is certain to replicate historical racial, gender, and other disparities already present in a given labor market.

The newest trend in automated hiring, however, is the automated video interview. This technology allows employers to interview potential applicants with prepared questions and record their tone of voice, facial expressions, and body movements. These captured data are then analyzed by algorithms that assign a score to the candidate. One major concern is that when these algorithms are trained on white male voices and faces, they put applicants of color at a disadvantage. In my testimony to the Congressional Committee on Education and Labor, I identified four problems with automated hiring connected to racial discrimination: First is that the design features of automated hiring platforms could facilitate the covert elimination of applicants from protected categories without a trace; second, automated hiring systems could also allow for the use of facially neutral variables as proxies for legally prohibited racial classification; third, employers could hide behind the shield of intellectual property law to prevent the scrutiny of their automated hiring practices; and four, the worker’s lack of agency to control the portability of applicant data could increase opportunities for repeat employment discrimination, resulting in the algorithmic blackballing of some applicants. Any of these problematic features of automated hiring could enable the creation of a racial economic underclass. This is why I have called for record-keeping and data retention features for automated hiring systems, in addition to mandated audits.

The Racialized Effects of Worker Surveillance

The history of labor in the United States is rife with instances of invasive worker surveillance. For example, the Ford Corporation had a department referred to as the “Sociological Department” which comprised of paid detectives. These detectives spent their time spying on Ford employees to ensure adherence to “Fordliness” and American values. Prior to that, the Pinkerton Detectives were sent to spy on union organizers and break up workers’ attempts at unionization. In the digital age, rather than human detectives, it is now digital devices that can diligently record what employees are doing, how long they are working, and their progress. One argument for this perpetual workplace surveillance is safety. Factory workers who wear wearable devices to “increase their safety” can now record where they were standing, what they were looking at, or if they were doing the correct movements. In addition to corporations being able to use this information to protect themselves...

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81 Ifeoma Ajunwa, Automated Employment Discrimination (manuscript on file).
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from liability when someone is injured while on the job, employers may also deploy these technologies for harassment or for employment discrimination. Furthermore, corporations may also commodify employee data and make a profit on data collected from workers’ behavioral data and health practices.

The surveillance of workers has always been racialized -- as Professors Devon Carbado and Mitu Gulati write in their seminal article, Working Identity, minority workers are burdened with projecting a “working identity” that mirrors what the employer expects of them. This means added work on the part of minority workers to manage stereotypes attached to their race that could result in employment discrimination due to heightened surveillance. Several studies have shown that there is a disparity regarding the intensity of surveillance for Black workers in comparison to their white counterparts. This disparity has dire economic consequences. As Cavounidis and Lang found: “white workers are hired and retained indefinitely without monitoring, black workers are monitored and fired if a negative signal is received.” The authors argue that this heightened surveillance of black workers leads to greater unemployment. This means that “The fired workers, who return to the pool of job-seekers, lower the average productivity of black job-seekers, perpetuating the cycle of lower wages and discriminatory monitoring.” The authors thus conclude that “discrimination can persist even if the productivity of blacks exceeds that of whites.”

Consider one recent striking example of selective employee surveillance effectuated by the now easily accessible technology of direct to consumer genetic testing. In a case that has been referred to as “the mystery of the devious defecator,” Jack Lowe, a forklift operator, and Dennis Reynolds, a deliveryman man, brought suit against their employer Atlas Logistics Group alleging violation of the Genetic Information Non-Discrimination Act (GINA) after the company asked them to take a DNA saliva swab test in 2012 or risk losing their jobs. The compelled DNA tests were part of an investigation the employer was conducting to discover who was defecating on the warehouse grounds. The issue, however, was that the employer had only asked Lowe and Reynolds, two African American

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87 Ifeoma Ajunwa, Jason Schultz & Kate Crawford, Limitless Worker Surveillance, 105 Cal. L. Rev. 736 (2017).
workers to take the DNA test, but not their white colleagues.98 The DNA tests proved that Lowe and Reynolds were not the culprits and the "devious defecator" was never caught. The judge in the case ruled that the genetic data collection was a violation of GINA and a jury trial returned the verdict of $1.75 million in punitive damages against Atlas Logistics Group.99

The Gig Economy in America

Some workers have started to look towards the gig economy. This includes work for such gig economy companies such as Uber, Deliveroo, TaskRabbit, Wag, etc. or as Amazon Turkers – workers who are paid for piecemeal work. Katz and Krueger find a rise in the incidence of alternative work arrangements in the US economy from 1995 to 2015. The percentage of workers engaged in alternative work arrangements—defined as temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers—rose from 10.7% in February 2005 to possibly as high as 15.8% in late 2015. Workers who provide services through online intermediaries, such as Uber or TaskRabbit, accounted for 0.5% of all workers in 2015.100

The attraction of gig economy jobs is that they provide flexible opportunities for work. However, on the other hand, gig economy work offers little job security or benefits. Furthermore, these jobs eliminate opportunities for unionization and for the collective bargaining power that comes along with it.101 The weak regulation of gig economy work can also provide opportunities for racial discrimination to thrive. Niels Van Doorn provides an eye-opening examination of gender and racial exploitation as part of the gig economy.102 Van Doorn finds that three characteristics of platform-mediated labor serve to facilitate exploitation of already vulnerable workers. These characteristics include: “the legal immunity accorded platform intermediaries and clients (especially by Section 230 of the Communications Decency Act), 2) the expansion of managerial control over workers, and 3) an expanded fungibility and superfluidity of the workforce.”103

The Gig Economy in the Global South

The gig economy which grew out of telecommunications and algorithm-management advances in the global North has also gained a foothold in the global south where is it is transforming the labor market. For example, content moderators now comprise part of the “planetary labour market” where workers from the Global South (traditionally less developed countries) compete with

other workers around the world to complete mundane tasks such as comparing pictures with mug shots or determining if social media messages are vulgar or hostile. Technology companies in the Global North employ workers in the Global South to ensure that apps run smoothly and to moderate the content on apps or social media sites. Thus, for the first time, in lieu of humans migrating to fulfill labor demands, the work itself is displaced to the sources of cheap labor supply. This technologically-enabled greater access to lower-cost labor represents new challenges for workers’ rights around the world.

Although workers may now work for large tech companies from wherever they are, many of these workers receive well below the United States minimum wage and are relegated to menial jobs. Tech companies employ people from all over world to clean up developed countries’ “e-trash” such as inappropriate pictures and to monitor content on their platforms. As Gray and Suri argue, this new market obfuscates labor power relationships as it renders invisible the decision-makers controlling online behavior and could create a global lower-class of workers with no job security or benefits.

Joining the global gig economy can have lasting repercussions for the marginalization of workers. For example, although commercial content moderation is mostly invisible labor, one misstep can result in the worker’s dismissal, and black-balling from the gig economy. Without a resume reflecting a traditional work history and without the social networks acquired from traditional workplaces, gig economy workers will struggle to find work outside the gig economy, thus further increasing their marginalization in the labor market.

**Intersectional identities in the future of work**

Professor Kimberlé Crenshaw deployed the term “intersectionality” to describe the interweaving matrix of oppression endured by Black women. Even in the Civil Rights Movement, women were often viewed as supporters of their male counterparts who were “fighters for civil liberties,” rather than fellow activists agitating alongside the men for equal civil and labor rights.

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Women are More Likely to Work Multiple Jobs Than Men

During the marches and congregations, Black women were dissuaded from speaking out about the intersection of racial and gender concerns. For example, during the Sanitation Workers Strike, one prominent slogan was, “I Am a Man!” – a sentence that highlighted that the spotlight was on Black male labor rights rather than labor rights for both Black men and women. Furthermore, sociologists and historians have noted that protest language posited Black men as providers, and dwelled solely on pay inequity hindering the Black man’s ability to provide for his family. This gendered the labor rights language during the civil rights era and left Black women behind in the fight for labor equality.

Current labor trends show not only disparity between racial and ethnic minorities, but also how these labor disparities are further exacerbated by intersectional identities. Whereas men tend to only work one job, women are much more likely to work multiple jobs, and these jobs often pay less to women than their male co-workers. Furthermore, Wilson & Jones have reported that over the past 35 years, women’s average annual hours have increased more than 10% as opposed to men’s average annual hours work increase (5%). These numbers suggest that not only are women working longer hours than they did before, but that they are still not getting paid as much as men (perhaps one reason why more women work multiple jobs than men). While the majority of workers within the service industry are Black or Hispanic/Latino, “men comprise nearly 70% of the workforce in fine upscale dining, where wages and benefits are highest.” Furthermore, more than half of Black and Hispanic/Latino women earn less than the median wage.

Many Black and Hispanic/Latino female workers work in jobs that are the most likely to become automated within the next few decades. Most Black women work as home and health aides, cashiers, customer service representatives, secretaries, administrative assistants, retail salespeople, and housekeepers. The United States Bureau of Labor Statistics estimates that over 1.5 million jobs that employ black women are at risk due to automation. However, Hispanic/Latino women are most at risk for losing their job due to automation. Latinx women are often maids and housekeeping cleaners, cashiers, secretaries and administrative assistants, retail salespeople, customer service representatives, janitors and building cleaners, cooks, home health aides, and waitresses. The United States Bureau of Labor Statistics estimates that over 2.5 million Hispanic/Latino women are at risk

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114 Thomas F. Jackson, From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice (2009).
for losing their jobs. As minority women are more likely to work in secretarial and administrative jobs, which involves data processing and data collection tasks, these routinized tasks could be completed by programmed automated systems. With labor automation as a threat that seeks to eliminate job opportunities for black and Latinx women, large unemployment disparities will likely arise within the next decade unless concrete steps are taken by the government to address the problem.

Conclusion with proposals for a future of work with racial equity

Given the tendency for workers from racial minority groups to concentrate in jobs that are low-income and also more precarious, greater legal protection is necessary to ensure that those workers are adequately compensated for their labor and also that they enjoy the same labor protections as their white counterparts. Thus, I have identified three areas requiring greater legal attention: 1) labor rights for prison workers; 2) labor protections for immigrants and gig economy workers, often times, an overlapping group, and 3) stronger labor protections and social security for all workers.

Labor Rights for Prison Workers

It is an injustice that many prisoners who provide labor to corporations for low pay while behind bars, are summarily denied employment by the same corporations once they are released. Given the disproportionate impact of mass incarceration on communities of color, one proposal then is that to preserve racial equity in the labor market necessitates a law mandating that corporations who make use of prison labor, cannot legally discriminate against the same formerly incarcerated workers. Furthermore, racial impact statements should be required for regulations, such as the collateral consequences of conviction, that seek to attenuate the labor opportunities of the formerly incarcerated. Starting in the 1970s, there were 1,948 separate statutory provisions creating the licensing restrictions for individuals with an arrest or conviction record. Given that the formerly incarcerated are disproportionately people of color, these laws most impact the labor chances of racial minorities. Racial impact statements will enable legislatures to truly reflect on the impact of these laws and to understand whether they are serving society or not.

Nationality-blind labor protections serve all workers

A governmental position that immigrants are excluded from labor protections afforded by the law, also disproportionately harms racial minorities. As Professors Griffith and Gleeson have found, denying full labor protections to workers who are not citizens (as upheld in Espinoza) or who are

126 See, e.g., CO. REV. STAT. ANN. § 24-5-101(1)(a) (2016) (forbidding persons convicted of a felony or other crimes involving moral turpitude from serving as peace officers, educators, positions involving direct contact with vulnerable persons, positions in public or private correctional facilities or juvenile facilities, various state offices, plus more); S.D. CODIFIED LAWS ANN. § 36-9-49(2) (2018) (allowing the state licensing board to deny a nursing license to any person "convicted of a felony"); see also Michael Pinard & Anthony C. Thompson, Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 597 (2006) (noting that the formerly incarcerated "are routinely excluded from many employment opportunities that require professional licenses").
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undocumented, serves to chill legitimate immigrant worker claims or grievances. The labor protections should exist not just for the benefit of a native worker, but for the benefit of all workers providing labor. In fact, a globally recognized labor protection regime is beneficial to native workers as this prevents employers from deploying outside workers to suppress wages. A silenced migrant labor population could also be intimidated into working long hours or in unsafe labor conditions, thus creating an unfavorable work climate for all workers. Race-blind and nationality-blind labor protections are necessary to ensure an equitable and sustainable work environment for all workers.

The inevitability of automation dictates stronger labor protections and social security

Finally, the issue of the automation of work merits legislative attention. As described above, the jobs most in danger of automation are jobs held by racial minorities. Thus, the trend towards automation will most impact minority workers and will likely widen the gulf of inequality as those workers find themselves redundant in an automated workplace. This means that the idea of a universal basic income deserves consideration. As legal scholars like Cynthia Estlund has noted, there is a pressing need to construct a broader foundation of economic security for all, including for workers who can no longer expect to find steady employment. Professor Estlund has thus argued for a three-prong strategy that would include a universal basic income, a federal job guarantee, and a reduction of hours worked to increase employment opportunities for a wider range of people.

Other legal scholars, like Brishen Rogers, however, have argued against a universal basic income (UBI), primarily for its potential to exacerbate racial inequality on the labor market. Professor Rogers notes: “Were a UBI extended to citizens and legal permanent residents but not to irregular migrants and guest workers, employers would have powerful incentives to hire them into the worst jobs and to push to expand the number of such workers in the country, putting downward pressure on overall wages and creating a permanent racialized laboring underclass.” As an example, Rogers points to the Gulf Arab States, which grant a form of UBI to their citizens, but which have also become “entirely dependent on guest worker labor, and many former guest workers in those countries have alleged that systemic and brutal labor abuses are common.”

In addition, Rogers notes that formerly incarcerated citizens are also likely be left out of any governmental UBI scheme, given the collateral consequences of conviction that already deny many public benefits to the formerly incarcerated. As Rogers underscores, this omission is likely to have a racial impact. “I find it very difficult to believe that the U.S. Congress will extend a UBI to formerly incarcerated individuals…In the unlikely event that Congress does… many states would devise ways to ensure that those individuals' pay back the UBI in some fashion. For example, they could devise special assessments to compensate the state for the costs of their incarceration. In either case, the result would again be to create a pool of easily exploitable laborers-and again, a heavily racialized

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one.” Ultimately, Rogers concludes that an UBI is the least desirable solution, a better solution would be strengthening labor protections for workers: “If we want to make it easier for workers to leave jobs, a UBI seems like a clear second- (or third-) best solution, compared to reforms that would give workers clear due process rights and real mobility rights.”

Conclusion

We should not resign ourselves to the inevitability of a singular dystopian future of work as one form of techno-fatalism. The truth is that many different futures of work are possible. On one hand, the future of work brings with it technological advances that could enable greater work productivity. But, on the other hand, technological advances could allow for greater surveillance and more opportunities for discrimination. Both futures are possible but governmental action will determine which one will occur. Adequate legal attention to the capabilities of new work technologies to widen the racial divide and well thought out protective legal measures are what will enable a future where all workers, regardless of race, can thrive together on the mountaintop.