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The Symbiotic Relationship between Privacy Law and Anti-Discrimination Law

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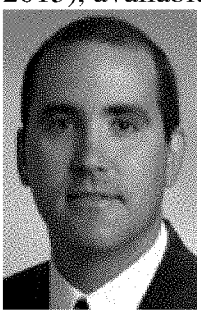
The Symbiotic Relationship Between Privacy Law and Anti-Discrimination Law

http://worklaw.jotwell.com/the-symbiotic-relationship-between-privacy-law-and-anti-discrimination-law/

Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 **Wm. & Mary L. Rev.** (forthcoming, 2015), available at SSRN.



Alex B. Long

Jessica Roberts' upcoming article, *Protecting Privacy to Prevent Discrimination*, explores the pros and cons of enacting privacy protections to thwart discrimination. Using the Genetic Information Nondiscrimination Act (GINA) as her primary example, Roberts argues that the two areas of law may "operate symbiotically rather than separately." Thus, privacy law may be used to further anti-discrimination goals and vice versa.

Roberts' article contains a thoughtful discussion regarding the different principles underlying privacy law and anti-discrimination law. The article also raises interesting issues about the extent to which the right to privacy has, over time, evolved. As originally conceived, the privacy torts and their statutory counterparts sought to further the norm of autonomy. The wrong that resulted from an intrusion upon an area of solitude or the public disclosure of a private fact was the invasion of privacy itself. But Roberts suggests that privacy law may also be used as a means of preventing and addressing more tangible harms occurring in the employment context by working in harmony with anti-discrimination principles.

As an obvious example, Roberts notes that privacy law may alleviate the "challenging burden" a discrimination plaintiff must carry of establishing an intent to discriminate on the part of a defendant. In contrast, privacy law requires a plaintiff to show only "that the covered entity inappropriately obtained, or attempted to obtain, the protected information." Roberts suggests that anti-discrimination law could take a cue from privacy law and specifically prohibit prospective employers from inquiring or otherwise acquiring information about protected characteristics during the interview process, thereby denying employers information that they might otherwise use to discriminate. GINA's ban on inquiry into an individual's genetic information is one example of such an approach. But Roberts suggests the same idea could be extended to other laws to cover situations where a particular characteristic is not always readily perceptible, such as an individual's religion. In this respect, privacy law may "help stop discrimination whenever the nature of the protected status is not completely known to the potential discriminator."

At the same time, Roberts notes that there are potential limitations on the ability of privacy law to address discrimination. Her discussion of the benefits and drawbacks of the approach she describes caused me to think of another potential limitation: the possibility that a court might import anti-discrimination principles into a privacy provision. For example, the Americans with Disabilities Act (ADA) contains numerous restrictions on the ability of employers to inquire into the extent and existence of an individual's disability. For instance, an

employer may not inquire into the existence of a disability prior to making a conditional job offer. On its face, this provision would seem to imply that the wrong is complete upon the asking of the prohibited question, no matter whether the applicant's answer caused the applicant not to be hired. Regardless of whether the underlying norm of the provision is one of autonomy or anti-discrimination, the applicant in this situation would seem to have a strong argument for nominal damages. Yet, there is case law that rejects this view and holds that there must be a "tangible injury"—typically expressed in terms of "an adverse employment action"—before a plaintiff is entitled to damages for a violation of this provision of the ADA. *See, e.g.*, *Cossette v. Minn. Power & Light*, 188 F.3d 964, 971 (8th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594-95 (10th Cir. 1998).

By importing a discrimination framework into what is, on its face, a privacy provision, courts might limit the effectiveness of the privacy provisions in combatting discrimination. None of which is to say that Roberts is misguided. Instead, by raising questions about the ability of privacy law and anti-discrimination law to function in a symbiotic manner, Roberts' article raises a host of fascinating issues and caused me to think more carefully about the potential uses of privacy law in combating discrimination. And at a time when the traditional framework for discrimination claims sometimes feels stagnant, Roberts' article offers fresh insight into the nature of discrimination law and privacy.

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