TORBEN SPAAK

The Idea of a Right to Genetic Privacy

2008-09 NR 2
The Idea of a Right to Genetic Privacy*

TORBEN SPAAK**

1. Introduction

Genetic information, as I understand it, is information about a person’s genes.¹ That is to say, genetic information is information about the biological material, not the biological material itself.² Now it is well known that access to genetic information about a person on the part of other people or institutions may affect that person negatively. First, genetic information is relevant to a person’s health now and in the future, which means that a person with a genetic condition has reason to fear that he will meet with negative reactions from employers,³ insurance companies,⁴ the government, and others.⁵ Second, if, as seems to be the case, genetic information is also relevant to a person’s behavior, we have reason to fear that criminals with a genetic condition may be acquitted on the ground that they were thought not to be responsible for what they had done, and that individuals with a genetic make-up that would likely make them criminals will be rounded up and treated before they have committed any crime.⁶ Third, it is

⁴ For more on this topic, see Kass, Nancy E., The Implications of Genetic Testing for Health and Life Insurance, in Genetic Secrets, supra note 3, pp. 299–316.
⁵ For a brief discussion of ‘genetic stigmatization’ in schools, see Rothstein, Laura E., Genetic Information in Schools, in Genetic Secrets, supra note 3, pp. 317–331, at pp. 324–325.

* This article reports research carried out under the auspices of the Swedish Foundation for Strategic Research (through the ELSA National Research Program). I would like to thank Jes Bjarup, Åke Frändberg, and Adam Green as well as the participants in a seminar at the Center for Bioethics, Uppsala for helpful comments and suggestions. Last but not least, I would like to thank Robert Carroll for checking my English. Needless to say, the author alone is responsible for any remaining mistakes and imperfections.

**Professor in Jurisprudence, Department of Law, Uppsala University.
likely that the result of one person’s genetic test will be of interest to other people (his siblings, for example), and that therefore there will be disputes about who is entitled to know the results of the test.7

Now the question I want to consider in this article is whether the idea of a right to genetic privacy can be a useful analytical tool in the analysis of moral or legal problems that concern genetic information. For example, is an employer or an insurance company or a researcher who gains access to genetic information about a person from a DNA data bank guilty of violating his right to privacy? Is an employer who requires that his employees undergo genetic testing guilty of violating their right to privacy? Does a law that interferes with a person’s decision-making regarding personal, genetic issues violate his right to privacy? And so on, and so forth. Some authors seem to think so, arguing as they do that our access to genetic information about other people ought to be circumscribed with the help of specific genetic privacy laws.8 I, for my part, am going to argue that the idea of a right to genetic privacy, conceived of as a special case of the idea of a general right to privacy, can indeed be a useful analytical tool in the analysis of such problems, provided that we understand that right as a claim-right that covers so-called informational and physical privacy and nothing more.

The article is organized as follows. I consider first the idea of a moral right to privacy (Section 2), and then the idea of a right to privacy as it is understood in American law (Section 3). I then touch briefly on the so-called public-private distinction and its relevance to the idea of a right to privacy (Section 4). Having done that, I inquire whether any of the distinct rights to privacy considered in Section 3 is likely to be a useful analytical tool in the analysis of problems concerning genetic information (Section 5).

2. The Moral Right to Privacy

Privacy is highly valued by most people, but it is especially dear to liberals. As H. J. McCloskey puts it,

We liberals abhor the thought of a society in which there is censorship of letters, unrestricted phone tapping, bugging of private homes and of offices, searching, compulsory questionnaires by the government, employers, etc. /…/ We value privacy, and we believe ourselves to have a right to pri-
I think of the moral right to privacy as a right to a personal, protected sphere. The moral right to privacy thus conceived must not be confused with a right to liberty, however. For one can invade a person’s privacy without infringing his liberty, and vice versa. Thus if I spy on you I invade your privacy, but I do not infringe your liberty; and if I lock you up I infringe your liberty, but I do not invade your privacy. Accordingly, I think of the moral right to privacy not as a liberty-right, but as a claim-right that others not invade my personal sphere.

But scholars do not agree about the correct analysis of the concept of a legal or moral right. Crudely put, there are two competing theories. Under the choice-theory of rights, one person, A, has a claim-right against another person, B, with respect to an action, X, if, and only if, A controls B’s duty to do or not to do X. Under the beneficiary theory of rights, on the other hand, A, has a claim-right against B with respect to X, if, and only if, A is the intended beneficiary of B’s duty to do or not to do X. For the sake of simplicity, I shall therefore say that to have a moral or a legal right to privacy is either to control the duty of other persons not to intrude into one’s personal sphere, or to be the intended beneficiary of the duty of other persons not to intrude into that sphere.

Moreover, moral philosophers disagree about the status of the moral right to privacy. Whereas some argue that it is an independent right, others maintain that it is rather a derivative right. Thus, having analyzed a couple of clear cases of privacy violations – such as a case where A trains a listening device on B’s house in order to hear what B and C are talking about, and a case where D trains an X-ray device on E’s safe (in E’s house) in order to see an object that E keeps in his safe – Judith Jarvis Thomson maintains that the right to privacy is indeed derivative in the sense that it exists only in cases where there is either a personal right or a property right. She puts it as follows:

10 A is at liberty to walk down the road if, and only if, A is under no obligation to refrain from walking down the road, and is otherwise not prevented from walking down the road.
11 A controls B’s duty in the relevant sense if A can waive B’s duty or if A can sue B for violation of his duty. For more on this topic, see Hart, H. L. A., Bentham on Legal Rights, in Oxford Essays in Jurisprudence (second series) (A. W. B. Simpson ed., 1973) pp. 171–201, at pp. 190–196.
The fact, supposing it a fact, that every right in the right to privacy cluster is also in some other right cluster does not by itself show that the right to privacy is in any plausible sense a ‘derivative’ right. A more important point seems to me to be this: the fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster. What I have in mind is this. We have a right to not be tortured. Why? Because we have a right to not be hurt or harmed. I have a right that my pornographic picture shall not be torn. Why? Because it is mine, because I own it. I have a right to try to preserve my life. Why? Because I have a right to life. In these cases we explain the having of one right by appeal to the having of another which includes it. But I don’t have a right to not be looked at because I have a right to privacy; I don’t have a right that no one shall torture me in order to get personal information about me because I have a right to privacy; one is inclined, rather, to say that it is because I have these rights that I have a right to privacy.\footnote{13}

Thomas Scanlon, on the other hand, maintains that there is an independent right to privacy, which is based on a unified theory of privacy.\footnote{14} On Scanlon’s analysis, this theory has two parts: (i) a general account of the interests that underpin the right to privacy, namely “the special interests that we have in being able to be free from certain kinds of intrusions”, and (ii) an account of the structure and foundation of the conventional norms that protect those interests. The conventional norms that Scanlon has in mind include “vague and informal understandings, such as those governing the scrutiny of others in public places and the degree to which it is permissible to listen to, watch, and follow them” as well as “quite explicit social rules, e.g. rules against walking uninvited into other people’s rooms, going through other people’s drawers or suitcases, etc.” Scanlon explains, in keeping with this, that the clearest cases of privacy invasions involve a violation of some norm of privacy as well as “interference with one of the central interests in not being seen, overheard, etc., which underlie these norms.”\footnote{15}

But what might the “special interests” mentioned above be? Jeffrey Reiman maintains that we should be looking for a “fundamental interest, connected to personhood” that can provide the basis for a right to privacy.\footnote{16} Says Reiman:

\textit{Privacy is a social ritual by means of which an individual’s moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes and communicates to the individual that his existence is his own. And this is a pre-condition of personhood. To be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny. And this in turn presupposes that he believes that the concrete reality which he is, and through which his destiny is realized, belongs to him in a moral sense.}\footnote{17}

I take Reiman to be saying that the purpose of the right to privacy is to confer on a person a *moral title to his existence*, and that such a moral title is a necessary condition for *personhood*. True, the notion of a person’s “moral title to his existence” is not exactly crystal clear. Nevertheless, Reiman’s analysis will be of interest in Section 3 when we consider the different types of privacy right recognized in American law and their relation to one another.

3. The Right to Privacy in American Law

American lawyers recognize a right to privacy in constitutional law and in tort law. Let us begin with constitutional law. In the first of the two landmark privacy cases, *Griswold v. Connecticut*, the Supreme Court struck down a Connecticut statute making it a crime to use contraceptives on the ground that it violated the right to privacy. Having reviewed some pertinent cases, the Court stated the following about the *basis* of this right:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. /…/ Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one … The Third Amendment in its prohibition against the quartering soldiers “in any house” is another facet of that privacy. The Fourth Amendment explicitly affirms “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Court had the following to say about the *content* of this right:

The present case … concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship [that is, the marriage relationship]. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms *NAACP v. Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

---

19 Id. at p. 484.
20 Id. at pp. 485–486.
The idea of a right to genetic privacy can be described as primarily a right to decisional privacy. The precise content of this type of privacy right is not clear to me, but I take it that having such a right to privacy involves controlling the duty of other persons not to interfere with one’s decision-making in private matters, or to be the intended beneficiary of the duty of others to not interfere in such a way.

The right to decisional privacy was also before the U.S. Supreme Court in the other landmark privacy case, *Roe v. Wade.* The Court stated, *inter alia,* the following about the basis and content of this right to privacy:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however … the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment … in the Fourth and Fifth Amendments … in the penumbras of the Bill of Rights … in the Ninth Amendment … or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment … These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ … are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage … procreation … contraception … family relationships … and child rearing and education …. This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

Although the Court’s view is that the right to decisional privacy is founded in the Fourteenth Amendment’s concept of personal liberty, I conceive (as we have seen) of the right to privacy as a claim-right, not a liberty-right. To be sure, if the right to decisional privacy is respected the right-holder will typically be at liberty to make the decision he wishes to make. But that liberty will not be part of the right to privacy – it will be a consequence of that right being respected.

Whereas the right to privacy recognized by the Supreme Court in *Griswold* and in *Roe* can be described as a right to decisional privacy, the right to privacy endorsed by Justice Brandeis in *Olmstead v. United States* can be described as a right to physical privacy. This case concerned the permissibility of wiretapping under the Fourth Amendment. The Court found that the government did not violate the Fourth Amendment despite the fact that its agents wiretapped

---

23 Id. at pp. 152–153.
25 The Fourth Amendment provides as follows: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
telephone conversations between individuals suspected of having violated the so-called Prohibition Act. But Justice Brandeis dissented. He stated, *inter alia*, the following:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.26

Turning now to a consideration of the right or rights to privacy in *tort* law, we begin by considering the famous article on that subject by Samuel Warren and Louis Brandeis (1890, 193). The authors did not offer an explicit definition of the right to privacy, but it seems they believed the essence of it was a right to be “let alone” resting on the principle of “inviolable personality.” Having reviewed a number of pertinent cases, they stated the following:

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of a more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an *inviolable personality*.27

The right to privacy as understood by Warren and Brandeis can be described as a right to informational privacy:28 To have such a right to privacy is to control the duty of other persons to not access personal information about oneself, or to be the intended beneficiary of the duty of others to not access such information. But not everyone accepts the analysis put forward by Warren and Brandeis. For example, William Prosser has distinguished the following four types of privacy *tort*, each of which corresponds to a distinct type of privacy right:

1. intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
2. public disclosure of embarrassing private facts about the plaintiff;

28 See Allen, Genetic Privacy, *supra* note 21, at pp. 33–34.
(3) publicity placing the plaintiff in a false light in the public eye; and
(4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.29

We see, then, that there are two types of constitutional privacy right, namely the right to decisional privacy (Griswold, Roe) and the right to physical privacy (Justice Brandeis’ dissent in Olmstead), respectively; and four types of privacy right in tort law, namely the right to physical privacy (which corresponds to tort 1), the right to informational privacy (which corresponds roughly to tort 2),30 the right to “false light” privacy (which corresponds to tort 3), and the right to proprietary privacy (which corresponds to tort 4),31 respectively.

What, if anything, do these five different types of privacy right have in common that warrants the use of the same label – ‘right to privacy’ – in all cases? On Jeffrey Reiman’s analysis, as we have seen, the purpose of the right to privacy is to confer on a person the moral title to his existence, which moral title is a necessary condition for personhood. Edward Bloustein (1964) adopts a similar stance, arguing that there is only one right to privacy in tort law and that it serves to protect and promote human dignity. On Bloustein’s analysis, what unites the four types of tort identified by Prosser is that they all constitute an affront to a person’s dignity as a human being:

An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does. And just as we may regard these latter torts as offenses ‘to the reasonable sense of personal dignity,’ as offensive to our concept of individualism and the liberty it entails, so too should we regard our privacy as a dignitary tort. Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.32

If we assume, in keeping with Reiman’s analysis, that the purpose of the right to privacy is to confer on a person the moral title to his existence, or in keeping with Bloustein’s analysis, that the purpose of the right to privacy is to protect and promote the value of human dignity, we may claim to have precisely such a unified theory of privacy that Thomas Scanlon asked for in his analysis, discussed in Section 2.

30 I use the phrase “corresponds roughly” because on Prosser’s analysis, the right to informational privacy protects a person from public disclosure of a certain type of facts, not from the collection of such facts.
31 For the term ‘proprietary privacy,’ see Allen, Genetic Privacy, supra note 21, at pp. 33–34.
4. Privacy in Public

It is natural to assume that the idea of a right to privacy makes sense only in light of some sort of division between a public sphere, which may be subjected to political control, and a private sphere, which may not. In other words, the so-called public-private distinction immediately comes to mind when one contemplates the right to privacy. Will Kymlicka describes this distinction as follows:

The original public-private distinction [between the political and the social] has been supplemented in the last hundred years by a second distinction, one which separates the personal and the intimate from the public, where the ‘public’ includes both state and civil society. This second distinction arose primarily amongst Romantics, not liberals, and indeed arose partly in opposition to the liberal glorification of society. Whereas classical liberals emphasized society as the basic realm of personal freedom, Romantics emphasized the effects of social conformity on individuality. Individuality was threatened not only by political coercion, but also by the seemingly omnipresent pressure of social expectations. /…/ Romantics included social life in the public realm because the bonds of civil society, while non-political, still subject individuals to the judgement and possible censure of others. The presence of others can be distracting, disconcerting, or simply tiring. Individuals need time for themselves, away from public life, to contemplate, experiment with unpopular ideas, regenerate strength, and nurture intimate relationships. In these matters, social life can be just as demanding a political life.33

But Helen Nissenbaum maintains that the right to privacy – understood as a right to informational privacy – is relevant in the public as well as in the private sphere.34 Observing that “people have become targets of surveillance at just about every turn of their lives”,35 she points out that many people feel moral indignation about the information gathering practices employed in this “surveillance.” And she proposes two principles the violation of which may justify this moral indignation. First, there is the principle of contextual integrity, according to which information that is relevant in one situation may not be transferred to another situation in which it is not relevant;36 and second, there is the principle that not every piece of information is “up for grabs,” according to which information that is already “out there” may not be aggregated, as such aggregation might transform innocent into rather sinister information (1998, pp. 588–589).37

It seems to me that Nissenbaum is on the right track: we may speak of a person’s right to informational privacy not only in the private, but also in the public sphere. And since this is so, we need not assume the validity of the public-private distinction in order to maintain that the right to informational privacy is a

33 Kymlicka, Will, Contemporary Political Philosophy, Oxford 1990, p. 258.
35 Id. at p. 561.
36 Id. at pp. 581–582.
37 Id. at pp. 588–589.
useful concept in the analysis of moral or legal problems that concern genetic information. Clarifying the precise import of this concept, that is, the concept of a right to (genetic) informational privacy – specifically, demarcating its boundaries – is of course going to be a problem. For my part, I fear that Nissenbaum’s principles will yield a right to (genetic) informational privacy that is too inclusive. Also, the “up for grabs” principle seems difficult to apply in practice.

But what about the rights to physical, decisional, “false light,” and proprietary privacy? I believe one could assert a right to physical privacy in the public sphere, provided that the sphere in question is closely connected to one’s body. And I am inclined to hold that the rights to “false light” and proprietary privacy, too, may be relevant in the public sphere, while the right to decisional privacy seems to me to be out of place in that sphere.

5. The Idea of a Right to Genetic Privacy

I explained in Section 1 that I was going to argue in this article that the idea of a right to genetic privacy may be a useful analytical tool in the analysis of moral or legal problems concerning genetic information. But Tony McGleenan – who has considered a similar question, namely whether the right to privacy as understood by American lawyers may be of use to those who deal with problems concerning genetic information in a European context – points to certain problems in this regard:

First, it is not entirely straightforward that a ‘right to be let alone’ … can be interpreted in order to resolve arguments about whether there is a right to know or not to know private genetic information … Privacy is often spoken of as if it were, in itself, an absolute and fundamental human right. It may, however, be a concept which does not possess a sufficiently deep ethical foundation to justify such a privileged position in the hierarchy of rights. A further problem is that there appears to be no particular consensus about the precise objective of privacy laws.38

I do not believe, however, that the issues raised by McGleenan are very serious. First, although Warren and Brandeis spoke of a right to be let alone, we need not define the concept of a right to privacy in terms of a right to be let alone. As we have seen, we might say that A has a right to informational privacy if, and only if, A controls B’s duty to not access personal information about A, or A is the intended beneficiary of B’s duty to not access such information about A. On this analysis, if A has a right to informational privacy, B cannot have a right to know

the relevant information, though $B$ may of course have a right *not* to know such information.\(^{39}\)

Second, the question concerning the depth of the ethical foundation of the right to privacy is of course difficult. My own view, which I shall not defend here, is that the moral weight of the right to privacy is considerable and sufficient to trump most considerations of utility or common good. We should note, however, that a thought-out view of the ethical foundation of the right to privacy is scarcely needed for legislative work to proceed.

Third, I am not convinced that the occurrence of different objectives of different privacy laws is a problem at all. What is the problem supposed to be, anyway? McGleenan does not answer this question.

Now in regard to the question of the usefulness of analyzing problems of genetic information in terms of a right to genetic privacy, I will proceed by considering the relevance to cases concerning genetic information of each of the specific rights to privacy discussed in Section 3 above. I focus on these specific privacy rights rather than on the general right to privacy endorsed by writers such as Scanlon, Reiman, and Bloustein, because I am not fully convinced that there is such a general right to privacy. In doing so, I note that some authors hold that all or almost all the types of privacy right discussed above are relevant in cases concerning genetic information. Anita Allen, for example, states the following:

The genetic privacy concerns today range far beyond informational privacy to concerns about physical, decisional, and proprietary privacy. Briefly, issues of physical privacy underlie concerns about genetic testing, screening, or treatment without voluntary and informed consent. In the absence of consent, these practices constitute unwanted physical contact, compromising interests in bodily integrity and security. Decisional privacy concerns are heard in calls for autonomous decision making by individuals, couples, or families who use genetic services. A degree of choice with regard to genetic counseling, testing, and abortion are requirements of respect for decisional privacy. The fourth category of privacy concern, proprietary privacy, encompasses issues relating to the appropriation of individuals’ possessory and economic interests in their genes and other putative bodily repositories of personality.\(^{40}\)

I believe Allen is essentially right: the rights to informational, physical, decisional, and proprietary privacy all seem relevant in the analysis of moral or legal problems that concern genetic information. I doubt, however, whether the so-called rights to decisional and proprietary privacy are best understood as species of privacy right. As I shall explain, I prefer to think of these alleged privacy rights as a right to autonomy, or at least a right to liberty, and a right of ownership, respectively.

\(^{39}\) As should be clear, knowing that $A$ has a right to informational privacy does not help us determine whether $B$ has a right *not* to know certain things about $A$.

\(^{40}\) Allen, Genetic Privacy, *supra* note 21, at p. 349.
The right to informational privacy is of course the most important type of privacy right in most cases concerning genetic information. For example, one could reasonably argue that an insurance company or a researcher who acquires information about A's genetic make-up from a DNA data bank without A's consent violates A's right to informational privacy. But how does one determine whether a given act of acquiring information violates a person's right to informational privacy? The problem here is that A's right to informational privacy in regard to a given subject matter, X, necessarily comes into conflict with B's right to liberty in regard to X. If A has a claim-right that B not collect certain information about A, then B cannot be at liberty to collect that information. Suppose, however, that B is using the Internet to collect information about a certain movie star. Surely no one would argue that in doing so B violates the movie star's right to informational privacy. But one may of course object that this is because the right to informational privacy concerns only a certain type of information, say Y but not X.

The right to physical privacy may also be relevant, especially in cases where an employer requires that an employee undergo genetic testing. The main problem in such a case is to determine whether or not the employee has consented to undergo such a test. Clearly, an employer who forces an employee to undergo a genetic test will have violated the latter's right to physical privacy. But what if the employer explains to the employee that unless he agrees to undergo a genetic test, his employment will be terminated? I am inclined to argue that since the employee can always choose to quit his job instead of submitting to the test, he has in fact consented if he chooses to stay on the job and undergo the test. Of course, one might object to this line of reasoning and say that the employee does not have much of a choice, as he/she would need to keep his job. But while this may be true in some cases, the relevance of this fact is less clear.

A more general problem, as Judith Jarvis Thomson has made clear (see Section 2 above), is that the right to physical privacy seems to add little to the right of ownership.41 In many cases, one can explain the alleged violation of the right to proprietary privacy by reference to A's ownership of the object in question. For example, A violates B's right of ownership if A somehow intrudes in B's home, or if A forces B to undergo a genetic test. In the former case, B or somebody other than A owns the house where B is staying; in the latter case, B legally as well as morally owns his (B's) body.42 But one may perhaps object that at least in some cases – such as the one involving ownership of one's body – the assumption that a person has a right to physical privacy is less problematic than the competing assumption that he/she owns the object in question.

41 Thomson does not speak of a right to 'physical' privacy, but it is clear from her examples that this is the type of privacy right she has in mind.
42 For more on moral "self-ownership," see Nozick, Robert, Anarchy, State, and Utopia, 1974, Ch. 7; Cohen, G. A., Self-Ownership, Freedom, and Equality, 1995, Ch. 9.
The right to decisional privacy, too, would seem to be relevant in cases concerning genetic information. As we have seen, the right to decisional privacy protects a person’s decision-making in private matters. Accordingly, a statute that interferes with, say, a couple’s decision to have or not to have children (say, in light of the risk that any child of theirs would run the risk of inheriting some sort of genetic condition) would seem to violate their right to (genetic) decisional privacy. But while such a statute would clearly interfere with the couple’s personal, protected sphere, one may nevertheless hold that it would be more natural to view it as a violation of their right to autonomy in the sense of self-determination, or of their right to liberty.

The right to proprietary privacy may also be relevant in some contexts. Anita Allen speaks (in the quote above) about the “appropriation of individuals’ possessory and economic interests in their genes and other putative bodily repositories of personality.” But this analysis complicates the matter unnecessarily, as it seems to depend on the troublesome notion that our personality is somehow anchored in our genes. Why not simply think of it as a matter of ownership? If we do, we might then say that if A owns his genes, B may not appropriate them.

The right to “false light” privacy, finally, does not seem to be relevant in very many cases concerning genetic information. True, there might be a case where A portrays B in a false light by asserting that B has a genetic condition when in fact he has not. For example, A might falsely assert that B is “genetically inferior” on the basis that B is a member of a certain racial or ethnic group, the members of which are “known” to be thus “genetically inferior.”

I conclude that the idea of a right to genetic privacy – conceived of as a special case of the idea of a more general right to privacy – can be a useful analytical tool in the analysis of moral or legal problems that concern genetic information, provided that we understand that right as a claim-right that covers informational and physical privacy and nothing more. For, as we have just seen, the rights to informational and physical privacy are clearly relevant in cases involving genetic information, and they can rightly be said to concern privacy and not something else. The so-called right to decisional privacy, too, is relevant in

---

43 This is Anita Allen’s view. See Allen, Genetic Privacy, supra note 21, at pp. 47–49.
45 For an illuminating analysis of the concept of autonomy, see Dworkin, Gerald, The Theory and Practice of Autonomy 1980.
46 For a defense of the general right to liberty conceived of as a natural right, see Hart, H. L. A., Are There Any Natural Rights?, The Philosophical Review 1955, vol. 64, pp. 175–191.
47 This would seem to be Judith Jarvis Thomson’s view. See my discussion of Thomson’s privacy analysis in Section 2 above.
48 One may of course question whether a group of people, as distinguished from a given individual who is a member of that group, can have a right to privacy, but I will not consider this difficult issue here.
cases involving genetic information, and it also protects important interests. But, as I have argued, in most cases it seems more natural to speak of a right to autonomy, or a right to liberty. The so-called right to proprietary privacy seems relevant in cases involving genetic information, and it clearly protects important interests. I cannot, however, see that it concerns privacy understood as a personal, protected sphere. We would do better to speak of a right of ownership in such cases. The right to “false light” privacy, finally, does concern privacy, but does not seem to be relevant in very many cases concerning genetic information.