

CENTER FOR THE STUDY OF LAW, SCIENCE, AND TECHNOLOGY

December 2000

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University
College of Law
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published for
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The FORUM is
looking for news
about you! Please
submit items such
as births, marriages,
job moves, awards,
etc. to the editor at
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We want to include
your news in
upcoming issues.

A Message from the Director

This issue of the FORUM reaches your hands midway between the two major research conferences organized this year by the Center for the Study of Law, Science, and Technology. On November 17-18, 2000, with the generous co-sponsorship of the Gruter Institute for Law and Behavioral Research, the Center held a Conference on Law, Behavioral Biology and Economics. At this lively colloquium, biologists, economists, psychologists and others engaged in two days of probing exploration of the contributions of economics and biology to a richer understanding of human behavior, and of the ways in which such new perspectives can inform the development of law.

At the same time, the Center has been busy preparing for the third annual ASU-SmithKline Beecham Conference on Genetics and the Law. Our planned topic for the April 19-20, 2001 conference is legal and ethical issues in genetic research on indigenous populations. The program will benefit from an international perspective coupled with a specific focus on the issues as they arise in connection with Native American groups. We remain deeply indebted to SmithKline Beecham for its sponsorship of this important series of research conferences. Papers generated for both of the foregoing programs will be considered for symposium issues of *Jurimetrics: The Journal of Law, Science, and Technology*.

Center-affiliated personnel are a highlight of this issue, in which we profile two new distinguished colleagues, Michael Saks (who has joined the College of Law faculty) and Dena Davis (who is visiting us for the year) and introduce readers to a few of our key colleagues from the sciences and other departments on the ASU campus. We are also pleased to announce that Robert A. Gorman will be a visiting professor during the spring semester, teaching a course in copyright.

He was until recently the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School, where he had been teaching since 1965. He is among the nation's foremost scholars in copyright and the author of several leading copyright textbooks. He is also an expert in labor law and the author (with Archibald Cox and Derek Bok) of a leading textbook in that area.



Daniel S. Strouse
Center Director, Professor of Law

To better attract and serve another key constituency – talented law students with interests in scientific and technical fields – we are devoting increased effort to identifying and recruiting such students, and will shortly publish (and make available on our website, www.law.asu.edu/programs/sci-tech) a comprehensive statement of curricular and other student opportunities to assist us in those efforts. Ongoing Center programs like the Law and Science Student Association and the Speakers Series continue to sponsor accomplished guests and to attract lively and substantial audiences.

Let me close by noting, with special pleasure, the recent *festschrift* issue of *Jurimetrics* honoring long-time Center friend and supporter Lee Loevinger. Not coincidentally, Lee will be a charter member of the Center's new Advisory Board, a group of distinguished individuals from law, business, the sciences, and academe who will convene later in the winter to help us plan and further develop our expanding range of activities.

As always, we welcome your comments and questions.

Dan Strouse

Michael Saks Joins Law School

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Michael Saks, a national expert in law, science and technology, accepted a dual appointment this fall with the ASU Law School and the University's Psychology Department.

Saks, who earned his M.S.L. from Yale Law School (1983) and his Ph.D. from Ohio State University, has spent the last 14 years at the University of Iowa College of Law as the Edward F. Howrey Professor. He has also taught at the law schools of Georgetown University and the University of Virginia.

"I visited here a couple of years ago and I was impressed by what I saw," Saks said from his home in Sedona. "The students I taught were bright and energetic. I found it to be a congenial place, especially with the Center for the Study of Law, Science, and Technology."

According to Center Director Dan Strouse attracting Saks to the faculty and the Center was a real coup.

"Michael's many contributions to the scientific study of law and legal institutions have been enormously influential; his reputation as a creative and prolific scholar of the highest order is richly deserved. Not only does his work add a unique perspective to the Center's law-science studies, but he is, in addition, a wonderful teacher and colleague. We are delighted he has joined us," said Strouse.

Saks spent the fall semester teaching a seminar, *Erroneous Convictions: Their Prevention and Remedy*. In the spring he will teach a class on Law, Science & Litigation. He also spends time with the Psychology Department, where he supervises graduate students and helps with departmental matters.

"What I mostly do when I'm hiding here in Sedona is write articles," he said. "Currently, I'm working on a new edition of a multi-volume treatise."

The treatise is West's second edition of *Modern Scientific Evidence* and one of its co-editors is another ASU law professor, David Kaye. "One of the major reasons for my professional existence is to help judges and lawyers become more science-literate so they aren't bowled over by scientists and what they might say," Saks said. "Society is only becoming more and more scientific and technological."

Saks currently focuses his studies and research in two areas: the behavior of the tort litigation system

and forensic science. "I'm interested in the decision making of the scientists doing such things as handwriting analysis, firearms identification, fingerprint and toolmark analysis, and how the law evaluates their opinions."

As a graduate student, Saks examined the effects of group size on jury decisions. His dissertation was turned into a book entitled, *Jury Verdicts: The Role of Group Size and the Social Decision Rule*. "And that research led me into a whole variety of different projects involving social science and the legal system."

Saks was an editor-in-chief of the journal, *Law & Human Behavior*, and points to ASU's *Jurimetrics* journal as one of the best. "There aren't many law schools that have as their secondary journal a journal on science and the law. It's always good to have people around talking about the different aspects of what you're interested in. ASU has this."

Courts have also recognized Saks and his expertise in the emerging area of law that intersects with science and technology. His research has been cited in several U.S. Supreme Court opinions, including *Ballew v. Georgia* (1978). In that case, his research was used to determine the constitutionality of the petitioner's state criminal conviction in a trial by less than six jurors. The U.S. Supreme Court, in an opinion written by Justice Blackmun, reversed and remanded the earlier decision by the Court of Appeals after reviewing a range of empirical research data.

In the opinion, Blackmun wrote, "We now hold that the five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States through the Fourteenth [Amendment]...The Saks study supports the conclusion that further reduction in jury size threatens Sixth and Fourteenth Amendment interests." *Ballew v. Georgia*, 435 U.S. 223 (1978).

Saks is also the recipient of the "Distinguished Contributions to Psychology in the Public Interest" award given by the American Psychological Association.

So what does he like to do when he isn't grading papers, being cited by the U.S. Supreme Court, or writing a treatise? "My wife and I always try to tear ourselves away from work and go hiking."



Center Faculty News

Andrew Askland published *A Malleable Balance of Market Practices and Fairness Constraints* in the JOURNAL OF BUSINESS ETHICS.

Ira Ellman will make a presentation in March to an AALS Workshop on *Defining the Family in the Millennium*. He was featured in an NBC Dateline show about the law of alimony in December.



Owen Jones will publish *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology* in a forthcoming

issue of the NORTHWESTERN UNIVERSITY LAW REVIEW. His review essay *Rape, Biology, and Law* will appear in an issue of the CORNELL LAW REVIEW. And his essay *Controlling Consequences of Preconception Sex Selection* is forthcoming in the AMERICAN JOURNAL OF BIOETHICS. In October, Jones co-directed the 3rd Annual Scholarship Conference of the Society for Evolutionary Analysis in Law (SEAL), at the Indiana University School of Law. He also gave a talk at the University of Texas Law School, in Austin, as part of the school's colloquium series on *Evolutionary Biology, Justice, and Law*.



David Kaye published the *Reference Guide on Statistics* (with D. Freedman) and the *Reference Guide on DNA* (with G. Sensabaugh) in the Federal Judicial

Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE. He also published *The Propriety of 'Facial Challenges' to Prior Restraint on the Internet* in JURIMETRICS and *Mendel Meets Madison Avenue* on The Gene Trust Project, a commercial venture to acquire DNA samples for genetic research from volunteers via the Internet, www.oncology.com. He spoke on Genetic Proof of Paternity in Criminal Cases at the University of Lausanne, Switzerland.

Sharon Lohr was elected as a Fellow of the American Statistical Association "for the development of methodology, innovative teaching methods and materials for survey sampling, and for statistical consulting in criminology and law."

Jane Maienschein co-edited (with Richard Creath) BIOLOGY AND EPISTEMOLOGY and co-edited (with Michael Ruse) BIOLOGY AND THE FOUNDATIONS OF ETHICS. She published (with Daryl Chubin) *On Staffing Science Policy-Making* in SCIENCE and *Old Wine in New Bottles: On Biocomplexity* in NATURE. She also received the ASU Parents' Association Outstanding Professor Award, 2000 and the History of Science Society's Joseph H. Hazen Education Prize, 2000.

Gary Marchant was the co-author and lead *amicus* in an *amicus* brief joined by 19 other law professors and scientists filed in the U.S. Supreme Court in September in *Browner v.*

American Trucking Associations. He was also a plenary session speaker at the *International Conference on Biotechnology in the Global Economy: Science and the Precautionary Principle* at the Kennedy School of Government, Harvard University in September.

Jonathan Rose published *The Ambidextrous Lawyer: Conflict of Interest and the Medieval Legal Profession* in the UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE and gave a faculty seminar at the University of Minnesota Law School. He will present *Ambidexters and Daffidowdillies: Lawyer Defamation, Legal Ethics, and Professional Reputation* at a University of Chicago symposium on *The History of Legal Ethics* in February.

Michael Saks published (with Victoria Phillips & Joseph Peterson) *Signal Detection Theory and Decision-making in Forensic Science* in the JOURNAL OF FORENSIC SCIENCES; *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification*

Science in the WASHINGTON & LEE LAW REVIEW; and (with Roselle L. Wissler, Patricia F. Kuehn) *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities* in PSYCHOLOGY, PUBLIC POLICY AND LAW. He taught classes in law and science (focusing on forensic science) to judges at Duke Law School, Florida trial judges, Kentucky Public Defenders, Florida Public Defenders, and Florida appellate judges. He spoke to academic conferences at Seton Hall Law School and at the New England School of Law.

Daniel Strouse gave a presentation on Legal and Ethical Issues in Fetal and Embryonic Stem Cell Research, focusing on the NIH's August 2000 end to its ban on funding such research, at the October meeting of the Phoenix Good Samaritan Hospital Interdisciplinary Conference. He also served on a panel exploring ethical issues in assisted reproductive technology at the annual Arizona Ob-Gyn Biomedical Ethics Retreat.

Welcome Dena S. Davis

The Center is pleased to welcome Dena S. Davis as a SmithKline Beecham Distinguished Research Fellow.

Davis, who is a law professor at the Cleveland-Marshall College of Law in Cleveland, Ohio, will spend the academic year at ASU. Her research focus is on ethnic groups and their interests in genetic research. Genetic research has powerful potential for good, but also for harm. Therefore, it is becoming commonplace to insist on group participation and "community consent" in planning genetic research.

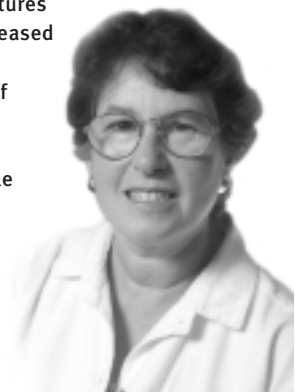
Davis's work looks at ways in which genetic research can pose a threat to group interests. Stigma and discrimination are obvious examples, but there are others. Genetic research can threaten a group's communal narrative; the controversy over the Kennewick Man is a good example.

"I'm interested in the relationship between the interests of the individual who is deciding whether to be a subject of genetic research and the interests of the communities to which that individual belongs," said Davis.

Davis has written in the field of bioethics for more than a decade. She holds a Ph.D. in Religion from the University of Iowa and a law degree from the University of Virginia. In 1998-99, she was a visiting scholar at the National Human Genome Research Institute at the National Institute of Health. While there, she produced a book about the ways in which new genetic and reproductive technologies enable parents to make crucial decisions about the futures of children before they have yet been conceived. The book *Genetic Dilemmas* was released in December 2000.

Additionally, Davis serves as a legal consultant to the Committee on Bioethics of the American Academy of Pediatrics and is on the board of directors of the American Academy of Religion and the Cleveland chapter of the Ohio Civil Liberties Union.

"Being a SmithKline Beecham Fellow is a great opportunity to be free for a whole year to think, write and interact with colleagues," she said. "It is a rare opportunity for which I am very grateful."



The Law and Science Student Association (LASSA) opened the academic year with a social gathering to introduce Center Faculty to incoming students. Members of the Intellectual Property Student Association (IPSA) and the Environmental Law Society (ELA) were also invited. LASSA sponsored the following speakers during the autumn semester:

Susan Patrick, Strategic Communications Manager for the Arizona Government Information Technology Agency (GITA) detailed the tasks and responsibilities of the agency and described recent legislative initiatives.

Gary Marchant, ASU Associate Professor, presented “Genetically Modified Foods: Risk, Benefits and Regulation.”

Lydia A. Jones, Partner at Jennings, Strouss & Salmon, presented “Representing Internet Companies in the New Economy.”

Conference on Law, Behavioral Biology and Economics

The Center co-sponsored, with the Gruter Institute for Law and Behavioral Research, a *Conference on Law, Behavioral Biology and Economics* on November 17th and 18th at the College of Law. The conference explored the intersection of these several disciplines and the emerging field of behavioral economics to assess what they can collectively contribute to a better understanding of human nature and behavior and to a better structuring of society and its legal institutions and policies. Papers were distributed to the invited participants before the conference convened so that the majority of meeting time was dedicated to highly interactive exchanges of ideas in this rich, but relatively uncharted intellectual territory.

“A conference like this enables gains from disciplinary exchange and convergence,” said Owen Jones. “When you can get thinkers from biology, psychology, economics, and law to focus on the same problems in human behavior, good things happen. You make faster, better, and more reliable progress in understanding the many different things that affect behavior relevant to law.”

Papers were prepared by Michael Gazzaniga (Dartmouth-Neuroscience), Russell Korobkin (Illinois-Law), Owen Jones (ASU-Law), Amy Wax (Virginia-Law), Mark Grady (George Mason-Law), Gordon Getty, and Paul Rubin (Emory-Economics). The Conference Steering Committee was comprised of Owen Jones, Daniel Strouse, Laurence Winer and Andrew Askland.

Jurimetrics

Jurimetrics: The Journal of Law, Science, and Technology, is the journal of the American Bar Association Section of Science and Technology Law. It is a refereed journal that is edited at ASU by a staff of professionals and law students. Volume 40, Number 3 was released earlier this autumn and featured articles by Kevin D. Ashley (*Designing Electronic Casebooks That Talk Back: The CATO Program*), by Sander Greenland & James M. Robins (*Epidemiology, Justice and the Probability of Causation*), and by Margo Anderson, Beth Osborne Daponte, Stephen E. Fienberg, Joseph B. Kadane, Bruce D. Spencer & Duane L. Steffey (*Sampling-Based Adjustment of the 2000 Census – A Balanced Perspective*).

Volume 40, Number 4 has just been released and is a *festschrift* to honor Lee Loevinger on the occasion of his retirement from the practice of law following a distinguished career as a Justice of the Minnesota Supreme Court, an FCC Commissioner, an Assistant U.S. Attorney General and a practicing attorney with Hogan & Hartson in Washington, D.C. With the encouragement of the leadership of the ABA’s Section on Science and Technology Law, the issue inaugurates an annual survey issue describing Developments in Science and Technology Law.

Lee Loevinger Jurimetrics Research Award

Oliver Goodenough, Professor of Law at Vermont Law School, was awarded the Lee Loevinger Jurimetrics Research Award. The award was instituted to promote the scientific study of law and legal institutions. “As two of the most pervasive and powerful forces in modern society, law and science inevitably overlap and reciprocally influence each other,” said Lee Loevinger, until recently Of Counsel with Hogan & Hartson, in Washington, D.C. “The discipline that seeks to understand this relationship is jurimetrics. Although the function and the term are often not recognized, what is generally called social progress is largely dependent on the effectiveness of the jurimetrics function.”

The subject of Goodenough’s proposal is *Mapping Cortical Areas Associated with Legal Reasoning and with Moral Intuition*. “The award has had a significant impact on both my determination and ability to carry my research proposals forward,” said Goodenough. “I have been writing and speaking about law and neuroscience for some time, but always speculatively, waiting for someone else to do the research that could confirm or deny the approach.” Goodenough took on a pilot MRI study in early October using non-lawyer subjects and early indications are encouraging. “Of course, a successful pilot poses as many new questions as it answers, but I seem to be embarked on exactly the kind of program that the Loevinger Award encouraged me to imagine.”

Air Pollution, Science, and Regulatory Decision-making

by Gary E. Marchant

On November 7, 2000, the U.S. Supreme Court heard oral argument on the legality of the Environmental Protection Agency's (EPA's) new ambient air quality standards for ozone and particulate matter in *Browner v. American Trucking Associations*. The stakes in this case are enormous, as EPA estimates that its standards could prevent several thousand deaths per year, but would cost over \$40 billion per year, making these the most expensive regulations ever adopted in the United States.

The legal issues in the case are also important. The two principal issues are whether and how EPA must articulate an "intelligible principle" for selecting its standards, and whether EPA must consider the costs as well as benefits of its standards. But a third issue, raised in an amicus curiae brief that I filed with 19 other law professors and scientists, has widespread implications for the role of science generally in regulatory decision-making.

Regulatory agencies have often been criticized for failure to give adequate consideration to "sound science" in promulgating regulations. Yet, too much reliance on science, especially by relying on science to answer questions it is not designed or able to address, is just as dangerous as too little reliance on science. Science is intended to supply an objective description of what is, rather than imposing a normative judgment about what should be. In other words, science describes, it does not prescribe.

Regulatory agencies have strong incentives, however, to exaggerate the scientific rationale for their decisions, because reviewing courts, Congress, the media, and the public all give greater deference to agency decisions allegedly based on "objective" science rather than policy, political or economic considerations. This tendency to cloak policy judgments under the guise of science is referred to in the legal literature as the "science charade."

EPA's recent revision of its ambient air quality standards is a classic example of the "science charade" in action. While science is central to evaluating the health risks of

possible alternative air quality standards, the decision of which alternative standard to adopt must be based on non-scientific, normative criteria. The scientific health data on ozone and particulate matter do not and cannot dictate the level of "acceptable risk" at which the respective standards are set. Indeed, the Chairman of EPA's own Clean Air Scientific Advisory Committee cautioned that the selection of a standard "cannot be based on science," but rather is "strictly a policy judgment."

Yet, in revising its air quality standards, and in defending those decisions in the Supreme Court, EPA relied exclusively on science to justify its selection of standards, and failed to identify any normative or policy criteria for selecting a standard. This science charade is perhaps most vividly illustrated by the juxtaposition of two statements by the EPA Administrator. The Administrator stated in December 1996, at the time the standards were first proposed, that "[t]he question is not one of science, the real question is one of judgment." Four months later, at the height of the controversy over the standards, the Administrator made a 180-degree reversal by stating that "I think it is not a question of judgment, I think it is a question of science."

The National Academy of Sciences recently issued a report noting that "science alone can never be an adequate basis for a risk decision" because "[r]isk decisions are, ultimately, public policy choices." EPA's attempt to use science alone to justify selection of its air quality standards not only represents a fundamental misuse of science in the regulatory system, but also undermines regulatory accountability and candor by failing to identify the true rationale for important regulatory decisions.



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Third Annual ASU-SmithKline Beecham Conference on Genetics and the Law

The third annual ASU-SmithKline Beecham Conference on Genetics and the Law will focus on *Legal and Ethical Issues in Genetic Research on Indigenous Populations*. This topic is a joint research interest for this year's SmithKline Beecham Research Fellows, Dena Davis and Robert Trivers. The conference will also engage the College of Law's Indian Legal Program, the foremost Native American legal program in the country, and draw upon the expertise of Professor Rebecca Tsosie, Director of the ILP, and Visiting Professor John Borrows (from the College of Law at the University of Toronto).

Recent advances in genetic knowledge and applications arising from research initiatives have sparked concern within indigenous populations about issues such as privacy, ownership of "genetic resources," research agendas inimical to their interests, informed consent, potential for group stigmatization, and others. Some ethicists and legal scholars have responded with calls for revision of applicable research protocols to better protect these interests. In addition, genetic research has implications in other legal areas, e.g., implementation of the Native American Grave Protection and Repatriation Act. In Canada and Australia, work is progressing to ensure the participation of indigenous communities in research planning. Iceland's experiment with the development of a national database is rich with implications for other societies. There are also important, if less clearly defined, concerns about threats posed by genetic research to tribal identity and communal narratives. This conference will explore these and related legal and ethical issues; the inquiry will be international, but the most specific focus will be on Native American groups.

Calendar of Events

January 22, 2001

Lydia Loren, Northwestern School of Law of Lewis and Clark College, will present a faculty seminar on *Anonymity, Intellectual Property and the Internet*.

January 23 will be a lunch presentation to LASSA at noon in Room 119.

January 26, 2001

Sonia Sotomayor, U.S. Court of Appeals Judge (Second Circuit), will speak on *Appellate Advocacy*.

12:00 - 1:00 p.m, Great Hall
For further information, call 480.965.2385

January 26, 2001

CLE Professionalism Course

1:00pm - 5:30pm, Great Hall
\$70 for ASU Alumni, \$85 for all others
To register, call 480.965.6405

January 30, 2001

Alumni Lunch with
Justice Sandra Day O'Connor

Camelback Inn
For further information, call Judi Ronnow
at Lewis & Roca, 602.239.7409

February 16, 2001

Symposium on *The Federal Elections Laws and Campaign Finance Reform: Free Speech, Soft Money, Hard Choices*

8:30am - 5:30pm
For further information, call 480.965.6405

February 17, 2001

CLE Professionalism Course

1:00pm - 5:30pm, Great Hall
\$70 for ASU Alumni, \$85 for all others
To register, call 480.965.6405

February 19, 2001

Dan Burk, University of Minnesota School of Law, will present a faculty seminar on *Patenting Speech*.

February 20 will be a lunch presentation to LASSA at noon in Room 119.

March 1-2, 2001

The Merriam Conference on
Current Issues in Legal History

For further information, call 480.965.6405

March 6-8, 2001

Symposium on *Cultural Sovereignty: Native Rights in the 21st Century*

For further information, call Kate Rosier at 480.965.6204

March 9, 2001

Steven Munzer, UCLA School of Law, will present a faculty seminar on *What are 'Male' & 'Female'? Transsexualism & Sexual Identity*.

March 19, 2001

Richard Lempert, Francis A. Allen Collegiate Professor of Law at the University of Michigan Law School, will present *Myths and Reality of Affirmative Action: A Law School's Minority Graduates in Practice*.

4:00pm, Room 119
March 20 he will present a faculty seminar on *Economics and Evidence Law*.

April 5, 2001

Pedrick Lecture

Yale Kamisar, Clarence Darrow Distinguished University Professor, University of Michigan Law School

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