

CENTER FOR THE STUDY OF LAW, SCIENCE, AND TECHNOLOGY

May 2001

Arizona State
University
College of Law
FORUM is
published for
alumni, students,
faculty and friends.

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Attention Alumni:
The FORUM is
looking for news
about you! Please
submit items such
as births, marriages,
job moves, awards,
etc. to the editor at
jodi.weisberg@asu.edu

We want to include
your news in
upcoming issues.

A Message from the Director

The end of the 2000-01 academic year marks several milestones for the Center for the Study of Law, Science, and Technology. Our third annual conference on genetics and the law, held in April, concludes the Center's productive three-year partnership with SmithKline Beecham. We convened a new Advisory Board, comprised of leaders from law, science, industry, and academe, which will provide us with invaluable guidance for years to come. Finally, after 11 years as Director of the Center, this summer I will step down and move to full-time faculty status at the College of Law.

I arrived at ASU in July 1990 as the Center's first permanent Director and an untenured Associate Professor of Law. Key challenges included securing adequate funding for Center activities, and increasing their number and scope; providing coherence for the Center's broad mission; determining what issues to select for study; increasing interdisciplinary collaboration with colleagues from the sciences and other non-law disciplines, both on and off campus; developing opportunities for student involvement in the Center; garnering support from non-university constituencies; and strengthening the Center's connections with the ABA Section of Science and Technology Law, both through the joint publication of *Jurimetrics* and other activities.

More than a decade later, we have built a tradition of major research conferences and symposia (some 16), establishing in the process a strong record of grant support from public and private sources, and completed numerous other specialized projects. A visiting speaker series has attracted many scholars and luminaries. We have hosted 44 distinguished guests from law, science, and industry for presentations to students. Through new and lateral hires, the quality and number of Center-affiliated law faculty – our greatest intellectual resource – has grown greatly, from a foundation already uniquely deep and strong. Our rich law and science curriculum continues to expand. Interdisciplinary faculty activity has increased,

in both research and instruction. *Jurimetrics*, and our relationship with the ABA, are thriving.

Yet challenges surely remain. We often fund projects on a grant-by-grant basis, which complicates long-term planning and short-term flexibility. Student participation has grown, but additional intellectual and professional opportunities for students should be conceived and developed. We can complement the virtues of our broadly-defined mission by striving for greater research continuity, as we did with the SmithKline Beecham grant.

The Center is well-positioned to meet these challenges – and to identify and address others – under very able new leadership and a revised governance model. As the incoming Director, current Associate Director Andrew (Sandy) Askland will be primarily responsible for managing Center operations. Gary Marchant, Associate Professor of Law, will become the first Executive Director and will focus more heavily on policy and planning. Their collaborative leadership, backed by Dean Patricia D. White's consistent and gratifying support for the Center, will ensure continuing growth in our activities and distinction.

As I turn to full-time teaching and scholarship for the first time in my academic career, I hope to remain closely involved in various Center projects. My thanks to colleagues and Center staff, and to all who have helped the Center come this far over the past eleven years – and my hope that you will continue to support our important work. From my vantage point, the Center's future is bright indeed.



Daniel S. Strouse
Center Director, Professor of Law

Dan Strouse

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Genetic Testing and Indigenous People

Focusing on *Legal and Ethical Issues in Genetic Research on Indigenous Populations*, the third annual Arizona State University – SmithKline Beecham Conference on Genetics and the Law was a productive interaction of academics, scientists and Native Americans. The symposium, held at the Scottsdale Hilton on April 19-20, joined two strengths at the College of Law, its Center for the Study of Law, Science and Technology and its Indian Legal Program.

Recent advances in genetic knowledge and applications arising from research initiatives (such as the Human Genome Diversity Project) have sparked concern within indigenous populations about such issues as: privacy, ownership of “genetic resources,” research agendas inimical or indifferent to their interests, informed consent, potential for group stigmatization, group consent.

Such concerns may be ameliorated, at least in part, by improved research protocols, more effective implementation of the Native American Grave Protection and Repatriation Act (NAGPRA), and increased respect for group judgements about their identities and communal narratives.

Starting the conference discussion was the topic of “Scientific Rationales for Population-Specific Genetic Research” with presentations by Michael Zwick (Johns Hopkins), Pilar Ossario (Wisconsin), and Hank Greely (Stanford). Presenting on the “History of Population-Specific Research” were Dorothy Nelkin (NYU) and Malcolm Bowekaty (Governor, Zuni Pueblo).

Participants also considered two instances of population specific research. Einar Stefansson (deCODE) and Bogi Anderson (Irvine) presented opposing views about Iceland’s experiment with a national genetic database. Clifton Bogardus and Charlton Wilson (both of NIH) and Viola Johnson (CEO, Gila River Health Care) described the Pima Indian Diabetes Study. Linda Burhannstipanov (Cal State, Long Beach) and Clifton Poodry (NIH) then

described programs that advance “Genetic Education for Native Americans.”

The conference continued with a session on “Community Respect, Respect for Culture and Institutional Review Boards.” An especially rich subject, this topic featured presentations by Richard Sharp (NIEHS), Charles Weijer (Dalhousie), Dennis O’Rourke (Utah), William Freeman (IHS) and Beverly Becenti-Pigman (Navaho IRB). Providing commentary were Eric Juengst (Case Western) and Aroha Mead (New Zealand Ministry of Maori Development).

Tudor Parfitt (London) and Dena Davis (Cleveland-Marshall) presented on the subject of “Communal Narratives.” Parfitt spoke of his historical research on the Lemba tribe in Africa, while Davis gave insights into the Thomas Jefferson/Sally Heming relationship.

The conference ended with a session on the “Ancient One” (the so-called Kennewick Man) and NAGPRA, with presentations by Marla Big Boy and Rebecca Tsosie (ASU). Providing commentary throughout the symposium were invitees Bette Crigger (Hastings Center), Debra Harry, Jeff Henderson, Wendell Weber (Michigan), Benjamin Wilfond (NIH), Robert Clinton and Shari Collins-Chobanian (ASU), John Borrows (Toronto), Marla Jasperse, Frances Totsoni (Navaho IRB), and Marlene Norris (Gila River Health Care).

This year’s conference was coordinated by SKB Research Fellow Dena Davis, Center Director Daniel Strouse and Center Associate Director Andrew Askland. A lengthier description of the conference and a list of participants and their credentials is available at the Center’s website, www.law.asu.edu/programs/sci-tech. Selected papers and commentaries presented at the conference will be published in a future edition of *JURIMETRICS: THE JOURNAL OF LAW, SCIENCE AND TECHNOLOGY*.



Andrew Askland



Robert Clinton



Dena Davis



Rebecca Tsosie

Center Advisory Board Re-established

The Advisory Board for the Center has been re-established and met at the College of Law this spring. Among the subjects it considered were the refinement of the Center's mission/vision in terms of its research, curriculum and public service activities, the identification of project topics and relevant experts for those topics, and the generation of a publicity/public relations program. Current Board members include: **Bert Black**, Esq., partner at Hughes & Luce, Dallas, TX; **Donna Boswell**, Esq., partner at Hogan & Hartson, Washington, D.C.; **Janet Effland**, Esq., Managing Director, Patricof & Co. Ventures Inc., Palo Alto, CA; **John P. Karalis**, Esq., formerly Vice President and General Counsel at Sperry, Unisys, and Apple, Scottsdale, AZ; **Lee Loevinger**, Esq., former partner at Hogan & Hartson, Washington, D.C.; **Thomas McCormick**, Assistant General Counsel, Dow Chemical, Midland, MI; **Dr. George Poste**, Director, Health Technology Networks (formerly Chief Science Officer, SmithKline Beecham), Gilbertsville, PA; **Professor William Rogers**, Esq., University of Washington School of Law, Seattle, WA; and **Joseph Rosenbaum**, Esq. partner at Greenburg Traurig, New York, NY. The Board will reconvene in the autumn.

CENTER FACULTY NEWS

Andrew Askland published *Slouching Toward Equality: Three Instrumental Justifications* in ETHICS AND JUSTICE.

Ira Ellman spoke at an AALS Workshop on *Families in the New Millennium* in March and presented faculty seminars at the Hastings and Minnesota Law Schools on *Inventing Family Law*. His article *Contract Thinking Was Marvin's Fatal Flaw* will be published in a NOTRE DAME LAW REVIEW symposium issue marking the 25th anniversary of *Marvin v. Marvin*.

Joseph Feller traveled to Jacksonville in February and presented a lecture to federal wilderness managers from the Forest Service, Fish & Wildlife Service, National Park Service and BLM on the Wilderness Act. He also spoke on recent developments in public land management at the American Law Institute/ ABA annual program on Environmental Law in Washington, D.C.

Owen Jones delivered the 20th Annual Dunwoody Distinguished Lecture in Law, titled *The Physics of Law, The Shape of Behavior, The Promise of Biology*, at the University of Florida College of Law in March. Jones also gave a talk on *Law, Biology and Rape* in the President's Community Enrichment Series and delivered the paper *Evolutionary Analysis in Law: Some Objections Considered* at a Brooklyn Law School Symposium on DNA. That paper will appear in a symposium issue of the BROOKLYN LAW REVIEW. Jones also has publications forthcoming in the NORTHWESTERN UNIVERSITY LAW REVIEW and the CORNELL LAW REVIEW.

Dennis Karjala will be on sabbatical next year at the University of Queensland in Brisbane, Australia, where he will be doing research on technology and cyberlaw.

David Kaye spoke on *DNA Evidence and Databases* at a seminar for appellate judges sponsored by the Judicial Division of the ABA, participated in a panel on *DNA: Lessons from the Past, Problems for the Future* sponsored by the U.S. National Institute of Justice and the Brooklyn Law School, delivered a paper on *Statistics, Econometrics and the Dynamics of Daubert* at an invitational conference at the University of Virginia, and reported to the New York State Commission on Forensic Evidence on legal and ethical issues in the collection and storage of DNA information from samples from persons who have not been convicted of a crime. His paper *DNA Databases for Law Enforcement: The Coverage Question and the Case for a Population-Wide Database* will appear in a book edited by faculty at Harvard University's Kennedy School of Government.

Gary Marchant chaired a plenary session and break-out group at the International Council of Chemical Association's Genomics Workshop in Orlando and spoke to the ABA appellate judges seminar on the topic of Genetics and Toxic Torts in Phoenix. His article *Genetic Susceptibility and Biomarkers in Toxic Injury Litigation* was published in the Fall 2000 Issue of JURIMETRICS.

Daniel Strouse published *Foreword: More To Do About Genetic Testing* in the Fall 2000 Issue of JURIMETRICS, a symposium containing papers from the Center's conference last year on regulatory and liability issues arising from genetic testing. With SmithKline Beecham Visiting Fellow Dena Davis, he was recently a guest on a Phoenix radio program exploring bioethical and legal issues arising from cloning and other genetic technologies.

LASSA

LASSA graduates have accepted jobs in the Intellectual Property field with firms and companies throughout the United States. Here is what some of the graduates will be doing.

- **Lucius Lockwood** will practice with Merchant & Gould in Seattle, WA. He also recently won a \$5,000 grand prize in an IP writing contest sponsored by Foley & Lardner in Washington, D.C. The title of his winning paper was *Ready, Set, Patent! How the Supreme Court in Pfaff v Wells Electronics Jumped the Gun*.
- **Christine Meis, Cathy Brixen** and **Laura Sawicki** will be associates in the Intellectual Property group at Quarles & Brady Streich Lang in Phoenix.
- **Judith Shelling** has accepted a position as a Patent Liaison for UNIAX Corporation, a subsidiary of DuPont.
- **Lori Hardaway** accepted a position with Pennie & Demonds.

The Law and Science Student Association (LASSA) enjoyed a productive spring semester. Among its activities were a series of presentations by guest lecturers:

- **Lydia Pallas Loren**, Associate Professor at the Northwestern School of Law of Lewis & Clark College.
- **Joseph Gutman, M.D.**, formerly faculty at the Harvard and UCLA Medical Schools.
- **Michael Saks**, Professor at the ASU College of Law.
- **Dan L. Burk**, Professor and Vance K. Opperman Research Scholar at the University of Minnesota Law School.
- **Dena Davis**, Professor at Cleveland Marshall School of Law and SmithKline Beecham Visiting Research Scholar at ASU.
- **Dennis Karjala**, Professor at ASU College of Law.

Copyright Coup

For Robert Gorman “retiring” to Arizona was more than just a desire to be close to family. And his decision to teach at ASU was based on more than his friendships with professors George Schatzki, Paul Bender and Ralph Spritzer. His respect for professor Dennis Karjala also played a role. “Dennis is a superb copyright scholar and I assumed I could learn from him,” said Gorman. “And I have!”

Gorman, who visited at ASU this semester, and will serve as a professor next year teaching copyright law, is the most recent addition to the Center’s faculty. A renowned scholar and author, Gorman’s credentials are impressive.

He is the co-author of the leading casebook in the field *Copyright: Cases and Materials*, and is currently working on its 6th edition with Jane C. Ginsburg of Columbia University. He is also working on the 2nd edition of his book *Copyright Law* for the Federal Judicial Center, and on the 13th edition of his casebook on labor law, with co-author Matthew Finkin of the University of Illinois.

Gorman received both his A.B. and LL.B. from Harvard. His awards include a Fulbright Scholarship, an honorary Woodrow Wilson Fellowship and the Lindback Award for Distinguished Teaching.

Gorman, who was the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania, has taught copyright law and labor law for 36 years. He has also been a visiting professor at numerous other law schools including the University of Michigan, the University of Texas, Harvard, the University of Iowa, the University of Kansas and New York University.

So could teaching at ASU offer him anything different? “The one thing I really love about teaching at ASU is the small class size,” he said. “I’m accustomed to teaching copyright law to 100 plus students so having 25 students was quite wonderful. I was able to learn all of their names.”



Jurimetrics

The Fall and Winter 2000 issues of JURIMETRICS contain selected papers from last year’s ASU/SmithKline Beecham Conference on Genetics and the Law, which focused on *Legal Liabilities at the Frontier of Genetic Testing*. Volume 41, Number 1 includes articles by Timothy Caulfield (Alberta), *Genetic Testing, Liability, and Regulatory Policy: The Canadian Situation*, Michael Malinowski (Widener), *Separating Predictive Genetic Testing From Snake Oil: Regulation, Liabilities, and Lost Opportunities*, Neil A. Holtzman (Johns Hopkins), *FDA and the Regulation of Genetic Tests*, Richard A. Merrill (Virginia), *Genetic Testing: A Role for FDA?*, Gary Marchant (Arizona State), *Genetic Susceptibility in Toxic Injury Litigation*, and Ralph Cook (Michigan), *The Importance of Test Validity and Predictive Values to Screening Programs*.

Volume 41, Number 2 includes articles by Pilar Ossario (Wisconsin), *Product Liability for Predictive Genetic Tests*, Russelyn Carruth & Bernard Goldstein (Rutgers), *Relative Risk Greater Than Two*, Michael Baram (Boston University), *Genetic Testing for Susceptibility to Disease from Exposure to Toxic Chemicals: Implications for Public and Worker Health Policies*, Richard Sharp (NIEHS), *The Evolution of Predictive Genetic Testing: Deciphering Gene-Environment Interactions*, Dale Hattis & Sue Swedis (Clark), *Uses of Biomarkers for Genetic Susceptibility and Exposure in the Regulatory Context*, and Susan Poulter (Utah), *Genetic Testing in Toxic Injury Litigation: The Path to Scientific Certainty or Blind Alley*.

Center Speaker Series

The Center brings academic visitors to the College of Law to present papers on important contemporary issues in law, science and technology. This year’s guests include:

- **Thomas W. Swetnam**, Professor of Dendrochronology and Director of the Laboratory of Tree-Ring Research at the University of Arizona delivered a presentation on *The Fires of 2000: Shall We Blame Smokey the Bear or Drought?*
- **Lydia Pallas Loren**, Associate Professor at the Northwestern School of Law of Lewis & Clark College, spoke on *Anonymity, Intellectual Property and the Internet*.
- **Dan L. Burk**, Professor and Vance K. Opperman Research Scholar at the University of Minnesota Law School, delivered a presentation on *Patenting Speech*.
- **Dena Davis**, Professor at Cleveland Marshall School of Law and SmithKline Beecham Visiting Research Scholar at ASU, spoke about *Genetic Dilemmas: Parents’ Choices, New Reproductive Technologies, and the Child’s Right to an Open Future*.
- **Steven Munzer**, Professor at the UCLA Law School, delivered a paper entitled *What are ‘Male’ and ‘Female’? Transsexualism and Sexual Identity*.
- **Richard O. Lempert**, Francis A. Allen Collegiate Professor at the Michigan Law School and Professor in Michigan’s Department of Sociology delivered two presentations, one entitled *Myths and Reality of Affirmative Action: A Law School’s Minority Graduates in Practice* and the second entitled *Economics and Evidence Law*.

Owen Jones
Delivers Dunwoody
Distinguished
Lecture

Owen Jones was recently the 20th Dunwoody Distinguished Lecturer in Law at the University of Florida College of Law. At 37, Jones is the second youngest person so honored. The lecture series provides an annual forum for renowned legal scholars to present novel and challenging ideas. Past honorees include Ruth Bader Ginsburg, now of the U.S. Supreme Court, as well as law professors Ronald Dworkin (NYU), Anthony Kronman (Yale), Cass Sunstein (Chicago), and Frank Michelman (Harvard). On March 30th, the day after a banquet in his honor, Jones delivered a public lecture titled *The Physics of Law, The Shape of Behavior, The Promise of Biology*. The lecture will be published in a special issue of the FLORIDA LAW REVIEW, which will feature commentary by scholars from around the world.



Race, Public Safety, and DNA Identification

by David H. Kaye, Edward J. Imwinkelried and Michael E. Smith

When law enforcement authorities began building DNA databases in the early 1990s, only sexual crimes were included. However, many states soon authorized the sampling of DNA from those convicted of other violent felonies or even all felonies. Several states now contemplate expanding their databases to include arrestees.

Each expansion has triggered sharp debate. One important concern is that including individuals on the basis of conviction or arrest generates a racially skewed collection of DNA profiles. This further compromises the criminal justice system's tattered legitimacy in minority communities where public safety is most in disrepair and from which police harvest most arrests.



David H. Kaye is Regents' Professor and Fellow, Center for the Study of Law, Science, and Technology, Arizona State University. Edward J. Imwinkelried is Professor of Law, University of California (Davis). Michael E. Smith is Professor of Law, University of Wisconsin. Professor Smith chaired the Legal Issues Working Group of the National Commission on the Future of DNA Evidence, on which Professors Kaye and Imwinkelried served.

On average, an African-American man faces a 28.5% chance – six times that for a white male – to be imprisoned at some point in his lifetime. In some African-American neighborhoods, virtually all adult males have been arrested, for something, at some point in their lives. Reasons for the disparities range from racial prejudice shaping the discretionary decisions of some police officers and prosecutors, to race-neutral police deployment patterns that lead to more aggressive policing in minority communities than others. But it seems clear that racial minorities are over-represented among arrestees and convicts. If they are or believe themselves to be wrongfully over-represented, construction of huge convict or arrestee DNA databases could exacerbate racial divisions.

A comprehensive DNA database could serve as an antidote. DNA evidence does not care about race. A database profile either does or does not match a crime-scene sample. With a population-wide database, the identity of any matching individual would be known – no matter what the race. When a person is arrested and incriminating crime scene DNA evidence points to another person whose DNA profile is in the database, prompt exoneration and release of the innocent is

likely to follow – no matter what the initial suspect's race or status. If an innocent defendant does go to trial in such a case, the crime-scene DNA evidence and the results of the database search would be available, regardless of the defendant's race, to raise reasonable doubt about guilt.

Thus, the question is whether we must be content to build DNA identification systems that exacerbate racial divisions and deprive us of important public safety advantages, particularly if the threat to privacy can be kept to a minimum. Already, the "profiles" in the databases use only small portions of DNA that reveal nothing about personal characteristics, behavior, or propensities for disease. Like fingerprints, these profiles can serve only one purpose – individual identification.

Of course, a physical DNA sample also contains all of a person's genes. But it should soon become cheap and easy to extract an identifying profile and destroy the sample at the same time. Proper procedures for sampling the DNA and extracting the purely identifying profile would protect everyone's genetic privacy – to the extent we have any when private hospitals and HMOs keep samples of our blood and other tissue together with digital records of information far more sensitive than the random bits of DNA that identify us.

Creating a comprehensive identification database all at once would be prohibitively expensive today. But it is feasible to create DNA identification records prospectively at little cost. It would be easy to extract identification profiles as an adjunct to public health programs that for many years have screened DNA samples from almost all newborns, testing for treatable genetic diseases. In contrast, creating a hodgepodge of DNA databases restricted to convicts and arrestees is sure to compound the racial polarization of our criminal justice system while foregoing the deterrent and investigative capability that a population-wide database would afford.

Viewed in these terms, a population-wide database poses a difficult choice for everyone who is committed to fighting racial imbalances but who also prizes privacy. Like the double helix of the DNA molecule, privacy and equality are intertwined in complex ways. When they are untangled and evaluated, the case for a population-wide DNA database is strong.

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Calendar of Events

April 23, 2001

End of Semester

April 30, 2001

Finals Begin

May 9, 2001

Finals End

May 10, 2001

Graduation Dinner

6:30pm

Sheraton Phoenix Airport Hotel

No charge for graduates.

Additional guest tickets are \$20.

Call 480.965.6181 for further information.

May 11, 2001

Convocation

2:30pm

Gammage Auditorium

Reception at the Law School

immediately following Convocation.

May 11, 2001

Native American Law Students

Association Commencement

Dinner and Ceremony

6:00pm

ASU College of Law, Great Hall

May 29 - June 25, 2001

First Summer Session

June 8, 2001

CLE Professionalism Course

\$70 for ASU Alumni; \$85 for all others.

All proceeds go towards student scholarships.

Call 480.965.3096 for further information.

June 14, 2001

Alumni Reception,

State Bar Convention

5:30pm

The Phoenician

No charge.

July 5 - August 1, 2001

Second Summer Session

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