

It's All in the Genes— Or is It?

Twenty years after DNA tests have come to revolutionize court proceedings in criminal and paternity cases, a “second generation” of genetic tests is poised to offer new insights—and raise thorny ethical dilemmas—for the judiciary.

These tests, which can be used to confirm or predict genetic diseases, traits and behavior, are already starting to be introduced into the courts in civil and criminal cases, according to UMLaw Associate Dean Diane Hoffmann and Dean Karen Rothenberg, whose survey of trial court judges in Maryland appeared in *Science* magazine.

“We asked how often they were getting requests to admit or compel health-related genetic tests, and we gave them hypothetical cases,” explains Hoffmann. “We asked, ‘How would you rule if these cases came to you in the criminal context? The tort context?’” The duo’s findings in *Science* served as a backdrop for a roundtable discussion at the School last March, “Judging Genes: Implications of the Second Generation of Genetic Tests in the Courtroom,” which drew close to two dozen experts from the field of law, ethics, medicine and public policy. The roundtable was co-sponsored by the National Human Genome Research

Institute and supported by the Judge Martin B. Greenfield Fund and the Dr. Richard H. Heller Fund.

“The thing that most excited us,” says Hoffmann, “was this opportunity to bring together judges and scientists and legal academics to discuss the different aspects of these genetic tests and to start to have a dialogue—about the meaning of these tests, the implications for the legal system, and their future usage ... in the medical setting.”

The issues raised are both important and timely, noted participant Judge Andre M. Davis of the U.S. District Court for the District of Maryland. “As the cost of gene testing comes down,” Davis noted, “we’re likely to see clever defense counselors taking steps to use the outer reaches of genetic testing. The question is, can the judge manage the case so the jury is not taken down the primrose path of genetic test results?”

“So far, judges have been cautious,” acknowledged Dean Rothenberg. But, given what she describes as the “love affair” that courts have had with DNA fingerprints, she worries that judges and juries will be too easily swayed by the new tests.

As with the earlier survey, Hoffmann used hypothetical cases as a springboard for discussion throughout the roundtable. In one panel, for instance, participants including Judge Davis considered the case of a hypothetical defendant, whose lawyer argued to admit genetic tests showing he was at increased risk of schizophrenia as part of a “DNA defense.” People with the serious psychiatric behavioral disorder may have trouble differentiating between what is real or imaginary, the panelists learned, potentially impacting their criminal intent to commit murder. But current genetic tests can’t diagnose the illness, just the *predisposition* for it. Equipped with this information, the panelists were asked, would you admit the test results in this particular case?

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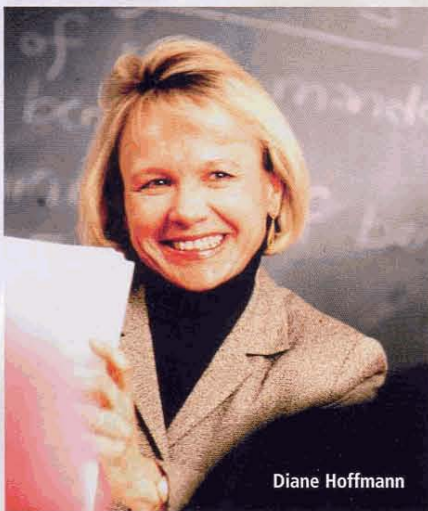
—Judge Andre M. Davis

“These hypotheticals provided real food for thought,” says Hoffmann. “Each was very rich in terms of the detail into the science and legal issues raised.”

Another panel examined whether genetic tests should be admissible in determining life expectancy in tort cases. “That raises some interesting tensions in tort theory,” says Hoffmann. “Part of the purpose of awarding damages in these cases is to compensate people accurately, and having access to [genetic] information could allow better fine-tuning,” she says. “But another goal of the tort system is deterrence”—so that even if factors (like genetics) would lead to a person dying younger, “you are still at fault,” Hoffmann says.

The issue of privacy came to the fore at several points during the roundtable. Several courts have ruled that taking a blood sample or cheek swab for the purpose of getting DNA is simple enough as to generally not constitute a violation of the Fourth Amendment protection against unreasonable searches. But if the DNA is going to be used for more than simple identification, should a different standard be used?

“The standard right now is just ‘How physically invasive is it?’” noted Nita Farahany, associate professor of law at Vanderbilt University Law School. “But the kind of information being obtained should be a factor. It’s a pretty serious invasion of privacy to get information that is content-rich.”



Diane Hoffmann

Confronting. Constitutional Injustice

Annual Schmooze raises tough questions about citizens' role in sovereignty

Days after the Maryland

Constitutional Law Schmooze unfolded at the School in March, organizer Mark A. Graber was still buoyed by the “exceptional variety of perspectives and erudition” that this year’s event inspired.

“We really had some exceptionally stimulating discussions on what the constitutional citizen does in the face of constitutional injustice,” says the professor of law and government. “To what extent should a citizen be loyal to the regime? To what extent should a citizen [work] to correct the injustice? To what extent does one leave?”

In keeping with the tradition of the annual event, formally known as the Maryland Discussion Group on Constitutionalism, the “price of admission” for the nearly two dozen participating speakers was a short 10- to 15-page paper aimed at generating debate and conversation.

Indeed, many of the ideas presented were provocative. Sanford Levinson, of the University of Texas, School of Law, suggested the Constitution itself is a “creator of second-class citizens.”

In her paper examining women’s civic inclusion and the Bill of Rights, Gretchen Ritter described a “popular sovereignty vision” presented in the Bill [of Rights] that “emphasizes the way that social experience and social diversity matter to politics.” Rather than “strip away our religious values, family ties, community commitments, ethnic heritage, and gendered experiences” when stepping into the voting booth or attending a school board meeting, noted the University of Texas faculty member, “this perspective calls upon citizens to bring those values, commitments, and experiences with them and put them into

dialogue with people from other social backgrounds as we seek a larger good.”

Graber, who has been organizing the Schmooze since 2001, says he has seen increasing involvement on the part of the students who attend—approximately 15 students this year. “They weren’t simply watching. They got actively involved in the discussions,” he says, adding, “I’m pleased. After all, they are our future.”

The ideas raised, considered, and

debated at the Schmooze offer a way to find common ground between academics of varied disciplines, says Graber, considered one of the nation’s leading scholars on constitutional law and politics.

“It’s the best community builder—a great way of bridging the law and the political science communities,” he notes. Looking back at the 2008 Schmooze, he says, “I thought we built a lot of bridges.”



Through a Different Lens

The ceremonial courtroom at the School of Law created an ideal backdrop for a compelling conference, “What Documentary Films Teach Us About the Criminal Justice System,” which took place on February 29 and March 1, 2008. The gathering drew academicians, law students, filmmakers, and formerly incarcerated individuals—including the co-stars of *Omar and Pete*, a film by Tod Lending. Participants engaged in penetrating exchanges that examined the effectiveness of the documentary film in the courtroom and the law school classroom.

“All the different types of folks who attended—law professors, filmmakers, advocates, interested community members—recognized the power of documentary films, specifically how these films shape our perspectives and influence law and policy,” says Maryland law professor Michael Pinard, who organized the event together with Professor Taunya Lovell Banks.

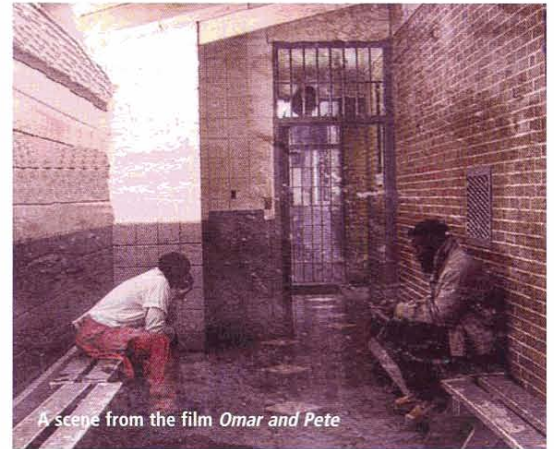
“Everyone took home something that can enhance their practices. Filmmakers, for example, saw how meeting with lawyers and law professors can help shape their work and expose them to issues,” Pinard says. By using documentaries as a teaching tool, he notes, law professors aim to



“better expose students to the humanity of individuals and to broaden notions of advocacy.”

Banks added that law students at Maryland and a few other law schools are making documentaries in class. This year, students in her Law in Film Seminar will be making clemency videos to supplement clemency petitions filed by students in Professor Renée Hutchins’ clinic. “Sometimes pictures are more powerful than words,” she says.

The showing of *Omar and Pete* put the spotlight on the issue of “re-entry” for criminal offenders once they leave jail.



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The film follows the challenges faced by two African American men from Baltimore as they attempt to integrate back into society through the Maryland Re-entry Partnership Program. Programs such as this offer assistance with education, employment, rehabilitation, and housing services.

The film shows that re-entry programs don’t work for everyone. Repeat offenders, for example, are more prone to committing crimes after their release, which is one of the more serious problems such programs are attempting to resolve. That issue came up in the panel discussion hosted by Banks, which included William “Pete” Duncan (film co-star); director Lending; Rada Moss, former director of the Maryland Re-entry Partnership; and Thomasina Hiers, assistant secretary/chief of staff, Maryland Department of Public Safety and Correctional Services.

Maryland Law professor Jerry Deise hosted a discussion surrounding the

showing of *Murder on a Sunday Morning*. The Oscar-winning documentary, which Deise uses regularly in his teaching, chronicles the story of Brenton Butler, a 15-year-old African-American high school student who was wrongfully accused of murdering a woman in Jacksonville, Florida. The documentary showcases a corrupt U.S. criminal justice system, in which racial bias and abuse of power unjustly determine Butler’s fate. Butler was eventually released after the actual perpetrator was found, but questions surrounding the case persist, forcing lawyers to question the legal system’s credibility, Deise said. He left the conference audience with the same question he often uses to provoke debate among his students: “Was justice achieved in this case?”

Support for the conference was provided by a generous grant from the France-Merrick Foundation to the School of Law’s Linking Law & the Arts series.

—Jennifer Hale



Stephen Bright, president and senior counsel of the Southern Center for Human Rights, delivered a Distinguished Visiting Professor lecture entitled "Will the Death Penalty Survive in the 21st Century?"

Eloquent Advocates for Human Rights

In the aftermath of a violent conflict, the resulting tension between peace and justice must be resolved in a way that respects human rights, noted Distinguished Visiting Professor **Sonia Picado** in a lecture at UMLaw last January 23.

"No sustainable peace will be achieved if violators of human rights are granted impunity and justice is not accomplished," said Picado, chair of the Inter-American Institute of Human Rights' board of directors and the first woman in Latin America elected dean of a law school (at the University of Costa Rica).

Picado was one of several Distinguished Visiting Professors who spent time on campus during the 2007-08 academic year through a program that invites distinguished academics—from both legal and non-legal disciplines—to join the School of Law community.

In her lecture, Picado spoke movingly of her experience leading the International Commission of Inquiry on East Timor, which studied human rights abuses there in 1999 in the wake of Indonesian occupation.

Amid awful devastation, people emerged from hiding to tell their stories of bloodshed and abuse to the members of the commission. The commission ultimately proposed that the United Nations establish

an international human rights tribunal consisting of international judges. Today, with East Timor again on the edge of civil war, the proposal should be taken seriously, Picado said.

Earlier in the year, death penalty opponent and activist **Stephen Bright** made his mark as a Visiting Distinguished Professor with an October 17 lecture entitled, "Will the Death Penalty Survive in the 21st Century?" Bright is president and senior counsel of the Southern Center for Human Rights, which provides legal representation to those facing the death penalty and to prisoners challenging unconstitutional conditions in prisons throughout the United States, especially in the South. He has argued the issue in a case before the Supreme Court (*Amadeo v. Zant*), and testified before committees of the U.S. Senate and House of Representatives.

In February, Oxford University professor of criminal law **Jeremy Horder** traveled across the Atlantic to spend time at UMLaw. A highlight of his visit was his February 12 lecture, "Law Reform, Government, and the Law Commission: The Case of Murder."

For information on this year's Distinguished Visitors, see page 49.

Contracts Increasingly Important in IP Litigation

"One consequence of the renewed U.S. Supreme Court interest in patent cases in recent years is an enhanced scrutiny on patent rights generally and, in particular, on the importance of better defining contracts to govern the patent rights among the parties," says Law School Professor Lawrence Sung, director of the School of Law's Intellectual Property Law Program.

To explore this issue, the IP Law Program held the April roundtable, "The New Private Ordering of Intellectual Property: The Emergence of Contracts as the Drivers of Intellectual Property Rights."

Panelists discussed the effect of recent rulings in patent cases *LG Electronics v. Quanta*, *MedImmune v. Genentech*, and *eBay v. MercExchange*, and recommended pertinent jurisprudence to inform prudent business practices in managing patent rights by private agreements.

Guest speakers included Thomas Woolston, CEO of MercExchange; Gregory Castanias of Jones Day; and Professor F. Scott Kieff of the Washington University in St. Louis. Proceedings from the roundtable will be published in a forthcoming issue of the law school's *Journal of Business & Technology Law*.



Lawrence Sung

Accounting for *Change* – Five Years of Sarbanes-Oxley

Five years after enactment of the Sarbanes-Oxley Act (SOX)—established in 2002 to restore the public's lost confidence in the wake of wide-scale scandals at Enron, Tyco, WorldCom and other large public companies—experts gathered at the School last October to assess SOX's impact and chart its future.

"What was great about the conference was that we got a variety of views," says Business Law program director Lisa Fairfax, who organized the two-day gathering of academics, practitioners, and leaders in the business community. "There were a good number of people who counteracted

A good number
countered the view
that SOX has had a
negative impact overall.

the [oft prevailing] view that Sarbanes-Oxley has had a negative impact overall on corporate governance and the market."

Critics of the Act have complained that it has pushed companies to go private, or turn to international markets to sell their securities, in order to avoid the high cost of compliance, says Fairfax. CEOs and

CFOs, the arguments go, are now exposed to potentially crippling liability.

But several conference speakers countered that view. "Those speakers argued that some anecdotal evidence from company boards is that they are paying closer attention [to potential accounting and ethics missteps]," says Fairfax. Moreover, others indicated that compliance costs have been greatly exaggerated by some critics, who have failed to acknowledge that after the initial cost of establishing new accounting safeguards, the ongoing costs of compliance would decline.

And what about the charge that U.S. companies are now taking their securities business overseas? "A few speakers pointed out that some of that is just a coincidence in timing," Fairfax says. "According to them, the other markets have gotten stronger over the past five years, so that now when companies have a choice, they can opt to invest elsewhere."

SOX not only enhanced criminal penalties and sentences for violations of various securities and federal laws, but also played a role in the increased prosecutions of white-collar crime more generally. Toward that end, one panel discussion focused specifically on criminal enforcement efforts, bringing together academics with prosecutors of white-collar crime.

The issue of deterrence came up:



Donald C. Langevoort, co-director of Georgetown University's joint degree in Law and Business Administration and Thomas Aquinas Reynolds Professor of Law, and Christine Edwards '83, a partner in Winston & Strawn's corporate practice group and commissioner on the U.S. Chamber of Commerce's Commission on Capital Markets, were speakers on a panel about SOX and the capital markets.

Wasn't the Enron debacle a cautionary tale in and of itself? Are punitive liability measures really necessary? Linda Thomsen, director of the Division of Enforcement at the Securities & Exchange Commission, countered that many of today's hedge fund directors were mere teenagers when Enron imploded. Thomsen's point, says Fairfax: "Enron is like history to them. It's important to continue enforcement efforts because yesterday's lessons may not be as real to the actors in the market today."

Support for the roundtable was provided by the Norman P. Ramsay Business Law Fund. —SD

Tackling the Challenges of **Diversity** in Legal Hiring

The School of Law hosted law firm attorneys, corporate counsel and legal career professionals from across the nation at an April 4 daylong roundtable on addressing diversity challenges in legal employment. New York City Commissioner on Human Rights Patricia Gatling '82 (pictured) delivered the keynote address. Other alumni panelists included Veta Richardson '86, executive director of the Minority Corporate Counsel Association, and Miles & Stockbridge Chairman John B. Frisch '83.

