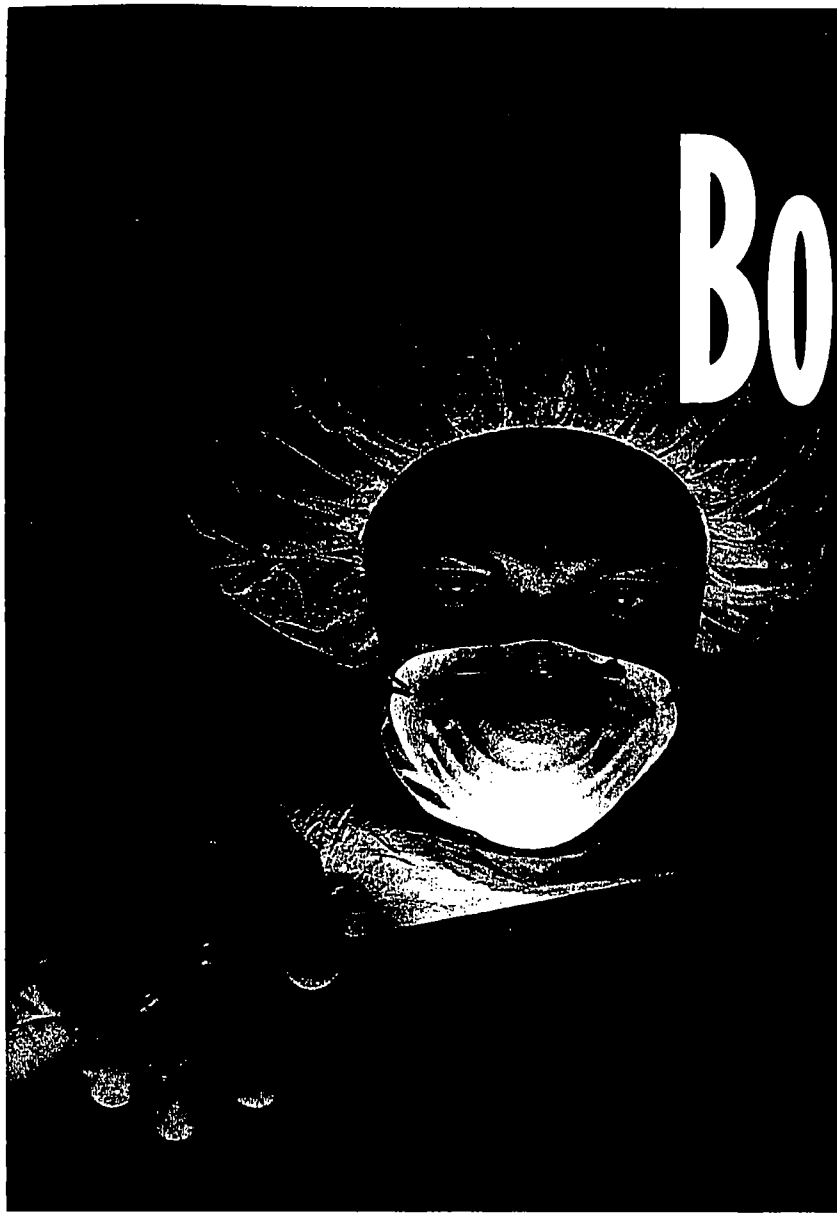
Non-Ed Issue

April 5, 1997

NOTE TO BRUCE REED, ELENA KAGAN, CHRIS JENNINGS, and ELIZABETH DRYE--

Attached is an interesting cover story on genetic testing from the most recent issue of the ABA Journal. This is way out of my bailiwick, but I was surprised to learn that insurers had so much leeway to tailor or refuse coverage based on genetic testing. I know that the question of pre-existing conditions has always been a tough one, but at first blush this seems awfully problematic, as does the possibility that someone might not take a possibly valuable genetic test for fear of insurance consequences. The article made me wonder whether we are doing anything on this front....

-- Bill Kincaid



Body Science

As medical research unlocks the secrets of genetics, the battle over who can have access to your personal life story is just getting under way in courts and legislatures

BY LORI ANDREWS

Predicting the future always has been a human temptation. In one very important sense, we now are close to being blessed—or cursed—with getting our wish.

At an increasingly rapid pace, biological scientists are using genetics research to develop ways for us to learn more about ourselves—more, in fact, than we might ever want to know.

"We used to think our fate is in our stars," observes James D. Watson, who helped unlock the secrets of DNA in the early 1950s and now directs the Laboratory of Quantitative Biology, a major genetics research center at Cold Spring Harbor on Long Island in New York. "Now we know, in large measure, our fate is in our genes."

Strung together in the almost mystical double helix form of DNA, genes are the basic unit of heredity. They are contained in chromosomes carried by every cell in our bodies. Each cell contains DNA carrying the entire human genome, or all the genetic information necessary to build a person.

Because each human's genes are unique, they are a personal map for that person's biological past and future—the traits inherited from parents and the ones to be passed on to children.

Unfortunately, not all the genetic news is good. As scientists learn how to "read" genes, they can predict a growing list of potentially harmful diseases and traits.

The bad news contained in genetic information holds deeply personal implications for each individual, but it also is the reason why third parties, such as insurers, employers, schools, the military and the courts, increasingly want to be in on the secret.

The debate over who should have access to genetic information about individuals is likely to intensify in the near future as the pace of discovery picks up in the genetics

Lori Andrews is a professor at Chicago-Kent College of Law and a senior research fellow at the American Bar Foundation. She is the recipient of a grant from the National Center for Human Genome Research of the National Institutes of Health to develop a policy framework for genetic technologies.

TONY STONE IMAGES/MARK JOSEPH

A medical technician studies DNA sequences. Genetic testing, once limited to detection of rare diseases, is in the works for heart disease, diabetes and cancer.

field. Courts and legislators are sure to be at the center of the controversy.

Much of the spark for that explosion of knowledge about genetics comes from the Human Genome Project, co-directed by the National Institutes of Health and the Department of Energy. In the project, the federal government is spending some $3 billion to support efforts to catalog the entire human genetic blueprint by 2005.

For 20 years, genetic testing has been performed on fetuses. One of the first predictive tests for healthy adults screens for the gene that causes Huntington's disease, a debilitating, fatal neurological disorder. Young, healthy people who test positive for the inherited Huntington's mutation know it will kill them someday.

Such genetic news can be psychologically devastating. Consequently, fewer than 14 percent of people at risk for Huntington's disease decide to undergo the genetic testing that may force them to confront their medical future.

But genetic testing is no longer limited to relatively rare diseases such as Huntington's.

Similar tests are being developed for more common disorders such as heart disease, diabetes and certain cancers. Genetic testing also is being proposed for numerous behavioral disorders such as alcoholism, manic-depression and even "risk-taking" behavior.

People are starting to use genetic information to measure the consequences of major life decisions: where to live, what job to take, what type of insurance to purchase, even whether to bear a child.

No Easy Decision

Deciding whether to undergo genetic testing is not easy.

Women with a strong family history of breast cancer, for instance, are faced with the prospect of learning, through testing, that they inherited a genetic mutation that poses an 80 percent lifetime risk of the disease. But if genetic testing does reveal the breast cancer gene, the woman risks losing the health insurance she may need so badly later on.

"These are not just hypothetical fears," says Nancy Wexler, a clinical psychologist at Columbia University in New York City who has studied families that carry inherited disease. "People who are using genetic testing are losing their insurance. And other people who should avail themselves of genetic testing are losing their lives to save their insurance."

Wexler has a personal stake in her own research. As a member of a team in Venezuela that identified the specific gene for Huntington's disease in 1993, Wexler was zeroing in on what someday may kill her. The disease killed her mother, and Wexler is at 50 percent risk of developing it as well. She has testified before Congress about her belief that people have a right not to know their genetic makeup.

Such decisions about whether to undergo genetic testing are at the heart of the growing legal debate over genetic predictability. Individuals at risk fear that test results may be used against them by employers, insurers, school officials, courts, mortgage lenders, adoption agencies, the military and other entities. At the same time, those institutions claim that individuals are not entitled to deprive them of information that could impact the institutions' own interests.

Genetics is not totally new to the courts—just ask the juries in the O.J. Simpson trials who heard reams of testimony on DNA typing of blood samples. Similar tests also are common in rape and paternity cases.

But those types of cases use genetic factors to link accused parties to incidents that occurred in the past. In the new realm of genetics, the issues are prospective: Do people have a privacy right to their genetic information, or do other parties have a right to demand that it be revealed?

Those questions are arising in a growing number of legal settings: medical malpractice, employment, education, family and civil rights.

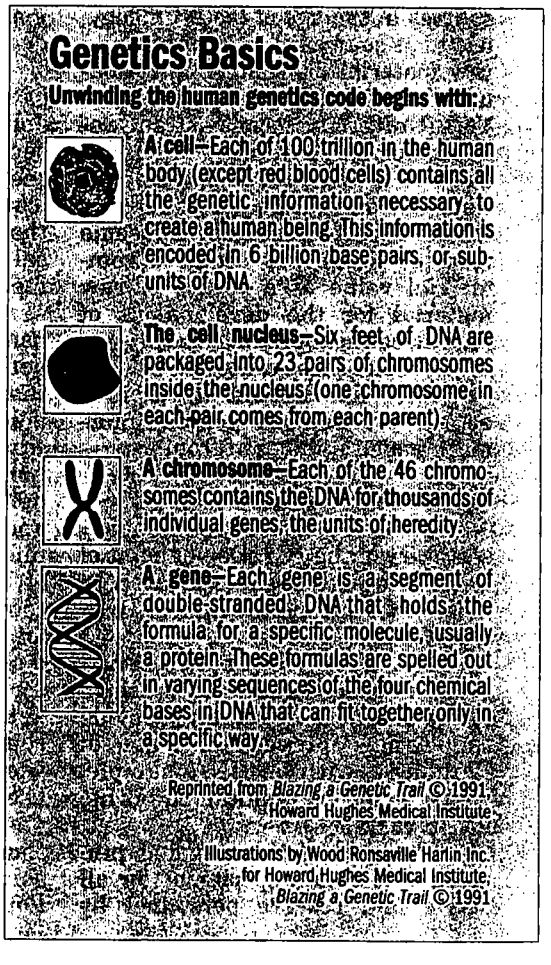
Few laws protect intrusions on genetic privacy despite the personal nature of the information.

"The highly personal nature of the information contained in DNA can be illustrated by thinking of DNA as containing an individual's 'future diary,' " says George Annas, a health law professor at Boston University. "A diary is perhaps the most personal and private document a person can create. Diaries describe the past. The information in one's genetic code can be thought of as a coded probabilistic future diary because it describes an important part of a unique and personal future."

In addition to concerns about privacy, institutional interest in an individual's genetic information raises fearsome ghosts in a century that has witnessed far too many waves of genocide, forced sterilization and stigmatization of entire groups of people on the basis of their supposed genetic inferiority.

Moreover, there are concerns that human genetic materials may come to be viewed as commercial products.

"Blood, tissue, placenta, cell



A federal court ruled that two Marines, Cpl. Joseph Vlacovsky and Lance Cpl. John Mayfield III (shown with attorney Eric Seitz) did not have the right to refuse military DNA testing.

lines and genes are valuable resources in the age of biotechnology, useful as sources of information and raw material for commercial products," says Dorothy Nelkin, a New York University sociologist and coauthor of *The DNA Mystique: The Gene as a Cultural Icon.* "Geneticists rely on routine access to body tissues for their research. And some biopsied tissue has acquired commercial value as a source of raw material for the development of pharmaceutical products."

Despite these concerns, the law generally has upheld third-party access to a person's genetic information on a number of fronts.

Marines on the Genetic Frontline

On Dec. 16, 1991, the deputy secretary of the U.S. Department of Defense quietly issued an obscure memo that opened the largest DNA bank in the world.

The directive required that every member of the U.S. armed forces and all new recruits provide the Armed Forces Institute of Pathology with a DNA sample, which would be maintained on file for 75 years.

The goal of this ongoing program is to obtain specimens for all active and reserve personnel by 2001 for a very simple reason: to make it easier to identify battlefield dead.

In January 1995, two members of the Marine Corps, Lance Cpl. John C. Mayfield III and Cpl. Joseph Vlacovsky, reported for what they expected to be a routine physical. But when they were informed that they were to provide blood and saliva for DNA sampling, they refused.

The two Marines agreed that using DNA to identify remains was benign, but they expressed concern that the military could, at some point in the future, use the DNA samples for some less innocuous purpose, such as the diagnosis of hereditary disease or disorders, and then could disseminate such information.

Mayfield and Vlacovsky were court-martialed for refusing to obey an order from an officer. In subsequent proceedings, the Marines asserted that the collection, storage and use of their DNA violated their rights to freedom of expression, privacy and due process under the U.S. Constitution.

Their strongest argument was that unreasonable searches and seizures are prohibited by the Fourth Amendment—the same provision that protects a criminal defendant, for example, from being subjected to stomach pumping when police see the suspect swallow a bag of cocaine in efforts to destroy evidence.

In September 1995, a federal court ruled in favor of the government in *Mayfield v. Dalton*, 901 F. Supp. 300, holding that its interest in accounting for the fate of soldiers and assuring peace of mind to next of kin overrode the constitutional interest of individual service personnel in being free from searches and seizures.

The ruling allowed the military to court-martial the Marines, but they ended up getting light sentences: a reprimand and seven days' restriction to base. The military's policy of requiring DNA testing of its members has not changed.

Members of the military are not the only people in this country with DNA profiles on record. Some insurance companies are requiring genetic testing as a condition of coverage, and others are dropping insureds or charging them higher rates on the basis of genetic information discovered through other channels.

In one instance, a pregnant woman whose fetus was affected

Framing the Debate

As courts, legislators and other policymakers approach the difficult issues surrounding advances in the science of genetics, they might consider a three-prong policy framework.

• First, legislation, court decisions and other expressions of policy should assure that people have control over what genetic information is generated about them. Legislation in New Hampshire makes this point, for instance, by stating that, except with respect to paternity testing, newborn screening and forensic testing, no genetic testing shall be done without the prior, written and informed consent of the individual to be tested.

• Second, individuals should have control over who has access to their genetic information.

AP PHOTO/HONOLULU STAR BULLETIN, KEN IGE

when she underwent cystic fibrosis testing was informed by her insurance company that it would not pay for the child's health care costs if she chose to complete the pregnancy.

In another case, a woman whose mother had breast cancer was told her own health care coverage would exclude treatment of breast cancer. Even some people who participated in genetics research have subsequently lost their health insurance, including a man who underwent screening for a type of colon cancer as part of a study at the Huntsman Cancer Center at the University of Utah.

Basing Insurance on Genetics

These actions do follow a certain calculated logic. Since it is accepted policy for health insurers to exclude people with pre-existing disorders, genetic testing provides an enormous loophole for classifying numerous diseases or other medical conditions as pre-existing because they have their roots in the genes of prospective insureds.

At first glance, such a policy might seem reasonable, akin to charging smokers higher rates. After all, insurance is based on the concepts of risk-spreading and risk-sharing. When most people's future health risks are unknown, the future health care costs of a group can be predicted on an aggregate, actuarial basis and the costs spread across the whole group.

But with genetics technology beginning to identify which people in a group are likely to develop particular diseases later on, insurance companies have begun to target them for special treatment: higher rates or denial of coverage.

Carried to its extreme, that approach to coverage could make everyone uninsurable, since every human being carries between eight and 12 "defective" genes that might trigger various medical disorders.

Moreover, the insurance industry's developing policies on genetic predictability raise the same privacy concerns for insureds raised by the two young Marines in the face of the military's mandatory DNA screening policy. Many people do not want to be forced to gaze into their biological crystal balls.

In some states, legislators have begun passing bills to prohibit discrimination by insurers based on genetic information.

But the laws passed so far may be too narrow. In Wisconsin, for instance, the legislative protection against insurance discrimination applies only to DNA tests and does not cover tests that analyze proteins contained in genes or information on family histories.

In North Carolina, the law protects only people who carry the gene for sickle-cell anemia (which strikes blacks and, to a lesser extent, some Europeans of Mediterranean descent).

As early as 1989, according to a survey of employers by the congressional Office of Technology Assessment, one in 20 companies conducted genetic screening or monitoring of workers.

And even if employers themselves do not undertake genetic testing, they may receive such information about their employees in other ways. It might be found in medical records submitted by an employee in support of a health insurance claim or reported by the employee's doctor.

"Physicians are increasingly being put into the role of 'double agents,' with dual loyalties to the patient and to the patient's school, employer, potential insurer, relative or child," observes sociologist Nelkin.

Genetic testing by employers has been accompanied by discrimination based on that information.

In the early 1970s, a number of companies discriminated against black employees and job applicants who carried sickle-cell anemia even though that status had no bearing on an employee's current or future health, or on an employee's ability to work since the only significance of carrying the trait was a 1-in-4 chance of passing the disease on to a child if the other parent also was a carrier.

Yet few states have laws banning genetic discrimination in employment. Only six—Florida, Georgia, New Hampshire, New Jersey, New York and Oregon—have statutes explicitly prohibiting genetic testing without consent.

At the federal level, the Americans with Disabilities Act provides some protection against job discrimination for people who carry genes that predispose them to diseases later in life.

The compliance manual of the Equal Employment Opportunity Commission states that under the ADA an employer may not discriminate against a person based on genetic information relating to illness, disease or other disorders. The EEOC indicated, for example, that an employer may not refuse to hire someone just because his or her genetic profile reveals an increased susceptibility to colon cancer.

But the ADA still permits employers to order genetic testing of people who have been offered employment, even without their permission, as long as the information is not used in unfair ways.

This can be accomplished through measures that expand upon state medical confidentiality laws. A statute in Colorado states, "Genetic information is the unique property of the individual to whom the information pertains. Information derived from genetic testing shall be confidential and privileged. Any release for purposes other than diagnosis, treatment, or therapy, of genetic testing information that identifies the person tested with the test results released requires specific written consent by the person tested."

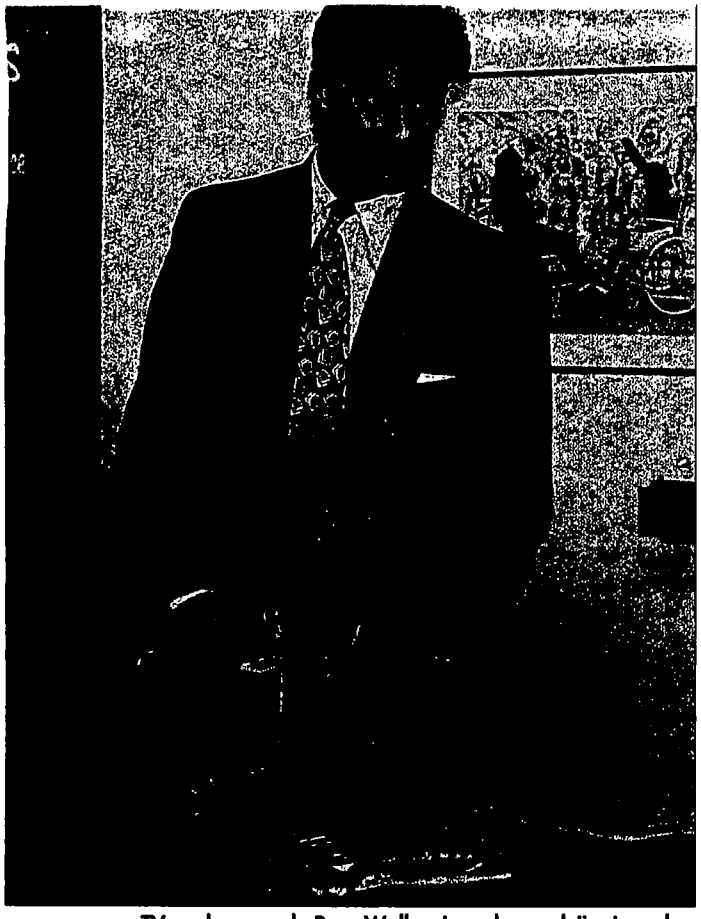
Moreover, those generating or collecting genetic information should explain their confidentiality protections in advance of delivering those services.

Third, discrimination against individuals based on genetic information should be prohibited.

Seven states have laws prohibiting employers from using genetic information to discriminate: Iowa, New Hampshire, New Jersey, New York, Oregon, Rhode Island and Wisconsin. And seven states prohibit insurers from requiring or requesting genetic tests: Georgia, Maryland, Minnesota, New Hampshire, New Jersey, Ohio and Wisconsin.

Nine states prohibit insurers from using information derived from genetic testing to deny coverage or to limit the terms and conditions of insurance: Colorado, Georgia, Maryland, Minnesota, New Hampshire, New Jersey, Ohio, Oregon and Virginia. (The health insurance laws are a hollow victory, though, since they do not apply to self-insured plans, which are used by most large companies.)

—*Lori Andrews*



TV anchor-couple Bree Walker Lampley and Jim Lampley were excoriated for conceiving in light of her disability.

In September 1995, the San Francisco Legal Aid Office filed a class action lawsuit by employees of Lawrence Berkeley Laboratories, a research center at the University of California at Berkeley that receives funding from the U.S. Department of Energy.

The suit, *Norman-Bloodsaw v. Lawrence Berkeley National Laboratories*, No. C95-03220 (N.D. Cal., filed Sept. 12, 1995), alleged that the lab had tested black employees for the sickle-cell gene without their knowledge or consent, and had secretly maintained that information in employee files.

The suit was dismissed on grounds that the secret testing did not constitute an intrusion on employee privacy.

Reading, Writing and Genetic Testing

In U.S. schools, genetics is more than just a subject for science classes.

In a few places, schools are using genetic tests to screen students for a syndrome that identifies borderline retardation. In the future, schoolchildren might be screened to identify genes for dyslexia or other learning difficulties, then receive special assistance to compensate for the genetic flaw.

The problem with such an approach, however, is that even if such genes can be identified (and this is a big "if," given that reputable researchers from respected institutions such as Yale have in recent years claimed to have found genes for complex behaviors only to later have to retract their findings), carrying a gene and manifesting the disorder are two different matters.

Not all genes are completely penetrant; there are many genetic conditions that occur in only a minority of the people carrying the gene. Often the gene indicates only a predisposition to a disorder that needs additional intervention, such as a particular environmental exposure, to be triggered. This means some children may be labeled as deficient because they carry a gene rather than manifest a condition.

The implications are profound. The work of social psychologist Claude Steele at Stanford University indicates that students perform more poorly if they know they are members of a group that traditionally has not been academically strong, a phenomenon known as "stereotype vulnerability."

Teachers' perceptions of students might be affected by such genetic stereotyping, giving lower grades to children identified as having an errant gene even if they are performing normally. That pattern has been identified in psychological studies in which teachers were told that one group of students was better than another when there actually was no difference. The teachers gave the "better" students higher grades and more attention, presumably due to the "halo" effect of a positive label.

The use of genetic screening in higher education is even more problematic. In one case, a man who was at 50 percent risk for Huntington's disease was rejected by medical schools on grounds that it would be a waste of money to train someone who might die young.

For judges with a full load of complex cases, the idea that genetic information might provide some guidance is seductive. Consequently, the use of genetic testing to answer an expanding variety of legal questions is growing, often without sufficient thought to the social context or impact.

In a recent case in Charleston County, S.C., a judge ordered that a woman be genetically tested for Huntington's disease at the instigation of her ex-husband, who was seeking to terminate her parental rights.

This type of case may foreshadow a new kind of battle in custody cases, in which the divorcing parents seek genetic testing on each other to determine who is more predisposed to die sooner from cancer or heart disease. Under this approach, the "better" parent might be adjudged to be the one with the "better" genes.

Genetic testing also could have an explosive impact on personal injury cases.

Under current law, a successful plaintiff in a medical malpractice or other personal injury case generally is awarded damages for future losses on the basis of life expectancy statistics. But savvy defendants may begin to require genetic testing on plaintiffs to find evidence that they have a predisposition to an early death, justifying a reduction in damages.

Forcing parties in custody or personal injury cases to undergo genetic testing could have a strong deterrent effect on parties who fear the consequences of learning unwanted facts about their genetic makeup.

In the South Carolina custody case, the wife was adamantly opposed to being tested for Huntington's disease, even though she faced the loss of her child if she refused. Facing a painful Sophie's choice, she simply disappeared.

The most significant direct legal impact of genetics may be in criminal law, an area in which DNA evidence already is commonplace. But the next step could challenge the very underpinning of the criminal justice system.

Criminal law is based on the idea of free will—that individuals "choose" to engage in criminal acts for which they must be punished.

But as geneticists increasingly claim to find genetic markers for antisocial behavior, the legal system

AP PHOTO

will be forced to reconsider the concepts of criminal intent and guilt.

A Dutch research group says it has found a gene linked to a propensity to aggression. How should the courts rule on a defendant's claim that he murdered because it was in his genes?

Judges already show some willingness to accept genetic defenses. In similar California cases, two admitted alcoholic lawyers embezzled money from their clients, but the one who claimed his alcoholism was genetic got a lighter sentence. In a murder case, the defendant was found not guilty after her violence was linked to having Huntington's disease.

Are All Genes Created Equal?

The great, vague specter of genetics is how it may eventually influence society's view of equality.

Much of the future research in genetics will not be related to disease but will focus on human individual and group traits, such as intelligence, behavior and race. Researchers now claim that they can distinguish between blacks and whites on the basis of differences in just three of the 100,000 genes in each human.

Arthur Caplan of the University of Pennsylvania Center for Bioethics has written, "Will the information generated by the genome project be used to draw new, more 'precise' boundaries concerning membership in existing groups? Will individuals who have tried to break their ties with ethnic or racial groups be forced to confront their biological ancestry and lineage in ways that clash with their own self-perception and the lives they have built with others?"

The potential exists for genetics research to produce findings that could undermine our conceptions of equality of opportunity, and individual and social responsibility.

Already, some physicians and lawyers suggest that people should have a duty to learn their own genetic status and to avoid having children who may be adversely affected by their genetic heritage.

In articles in both medical and Texas legal literature, Margery Shaw, a lawyer and geneticist, recommends that states adopt policies to prevent the birth of children with genetic diseases. She suggests that the prevention of genetic disease is so important that a couple deciding to give birth to a child with a serious genetic disorder should be criminally guilty of child abuse.

Shaw also suggests the imposition of tort liability for not sharing genetic information with relatives or for not undergoing genetic testing.

In the case of *Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811 (1980), a California appellate court stated in dicta that a child with a genetic defect could bring suit against her parents for not undergoing prenatal screening and aborting her.

In 1991, Bree Walker Lampley, a television anchor in Los Angeles, found herself caught up in the intense emotions that these issues can breed. When Lampley, who has ectrodactyly, a mild genetic condition that caused the bones in her fingers and toes to fuse, made public her decision to give birth to a child with the same condition, a radio talk show host and her listeners attacked the decision as irresponsible and immoral.

Lampley, along with several disability rights groups, filed a Federal Communications Commission complaint against the radio station for violating its personal attack rule and failing to present both sides of the issue. The complaint was denied.

Throughout the United States, people seem to have drifted into a mindset that assumes that if genetic information exists, it should be acted on and taken into consideration in a variety of social realms.

In *The DNA Mystique,* Nelkin and co-author Susan Lindee observe how quickly the new genetics has become part of popular culture. Their studies found that genes have been used to explain a wide range of social phenomena, including crime, job success, sexual orientation and adultery.

Nelkin and Lindee speculate on why such explanations are readily accepted by the public: "They can relieve personal guilt by implying compulsion, an inborn inability to resist specific behavior" and they can relieve societal guilt and give society an excuse to cut out social services by deflecting attention away from social and economic influences on behavior.

How genetic research will impact society remains to be seen.

Clearly, the promise of genetics is everywhere, and much fanfare accompanies each genetic discovery.

But less attention is focused on how we will use knowledge gained through genetic testing. When an article in the *Journal of the American Medical Association* heralded the discovery (later disputed) of a genetic marker for alcoholism, 140 newspapers and magazines ran articles praising the advance. Not a single article addressed the issue of what we would actually do if we identified individuals with a genetic propensity toward alcoholism.

The vexing question of how the fruits of genetic research should be used by society is on the table. Scientists are charting the map of the human genome, but the legal system will play a crucial role in determining where that map leads. ■

ABAJ/ROBERT DAVIS

viduals going about lawful business, to dog their footsteps or chase them down the street, to scream or gesticulate in their faces."

While the protesters certainly had a right to chant and hold up signs, Winter stated, "a nose-to-nose confrontation is hardly essential to conveying [their] views."

Rejection of 'Floating Buffer Zones'

But this peaceful-persuasion view of the First Amendment was largely rejected by the Supreme Court. In a split decision, the justices upheld the 15-foot "fixed buffer zone" at the doorway of the clinics but struck down what they called the "floating 15-foot buffer zones" around people and vehicles approaching the clinics.

The first holding was no surprise. Just three years ago, in *Madsen v. Women's Health Center,* 512 U.S. 753, the justices had upheld a 36-foot buffer zone at the entrance to an embattled abortion clinic in Melbourne, Fla. As in the Florida case, the 15-foot protest-free zone at the entrances to the New York clinics was needed to "secure physical access" to the facilities, the Court decided in a 6-3 vote.

Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas dissented from this holding, as they had in *Madsen.*

But the order requiring the sidewalk demonstrators to stay 15 feet from patients and others visiting the clinics, as well to cease and desist their counseling on request, violates the First Amendment, ruled the Court by a vote of 8-1.

"We strike down the floating buffer zones around people entering or leaving the clinics because they burden more speech than is necessary," wrote Chief Justice William H. Rehnquist for the Court. There is no "generalized 'right to be left alone' on a public street or sidewalk," he asserted.

Leafletting on a sidewalk and commenting on matters of public concern involve "classic forms of speech that lie at the heart of the First Amendment," he stated.

A judicial order that keeps most of the protesters at least 15 feet away amounts to a "broad prohibition" on peaceful and protected speech as well as intimidating conduct, the chief justice stated.

During oral arguments in October, the justices had puzzled over how this 15-foot no-protest barrier could be enforced fairly, since the sidewalks near the clinic were only 17 feet wide. If a clinic visitor walked down the middle of the sidewalk, would the demonstrators have to move into the street to avoid violating the injunction? Rehnquist cited this awkwardness and the resulting "lack of certainty" as a reason for invalidating the sidewalk buffer zones.

On the streets and sidewalks, the chief justice concluded, "our citizens must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."

There is no generalized 'right to be left alone' on a public street or sidewalk.

Only Justice Stephen G. Breyer dissented on this issue. Breyer faulted the majority's loose use of the phrase "floating bubble zone," which was not used in the injunction. The injunction's requirement that abortion protesters keep their distance from clinic visitors did not accompany those targets to the grocery store, Breyer pointed out, but applied only in the proximity of clinics.

Rehnquist did not ignore the record of harassment and intimidation at the New York clinics. His opinion describes in detail the demonstrators' "aggressive techniques," including "jostling, grabbing, pushing and shoving women" and "in-your-face yelling."

"In some situations," he ventured, "a record of abusive conduct" might even "justify some sort of zone of separation" between patients and protesters. But it "cannot be sustained on this record," he concluded.

One can only wonder, if this record does not do it, what would?

"This is a strong affirmation of the 'in-your-face' view of the First Amendment," says Professor Rodney A. Smolla, a free-speech expert at Marshall-Wythe School of Law at the College of William and Mary in Williamsburg, Va. "The Court has rejected the notion that listeners have a zone of privacy or that there is a right not to be hassled."

Smolla noted that, in the past, former first lady Jacqueline Kennedy Onassis, among other celebrities, had obtained court orders that required photographers to stay 25 feet away from her when she traveled in public. If such a case were coming up again, the photographer would come to court with a strong First Amendment argument that this type of floating buffer zone is unconstitutional, observed Smolla.

Other legal experts say the decision spells trouble for the new wave of municipal ordinances that seek to restrain aggressive panhandlers.

"This case establishes a First Amendment right to speak, even when people say they don't want to be spoken to," says Erwin Chemerinsky, a professor at the University of Southern California Law Center in Los Angeles.

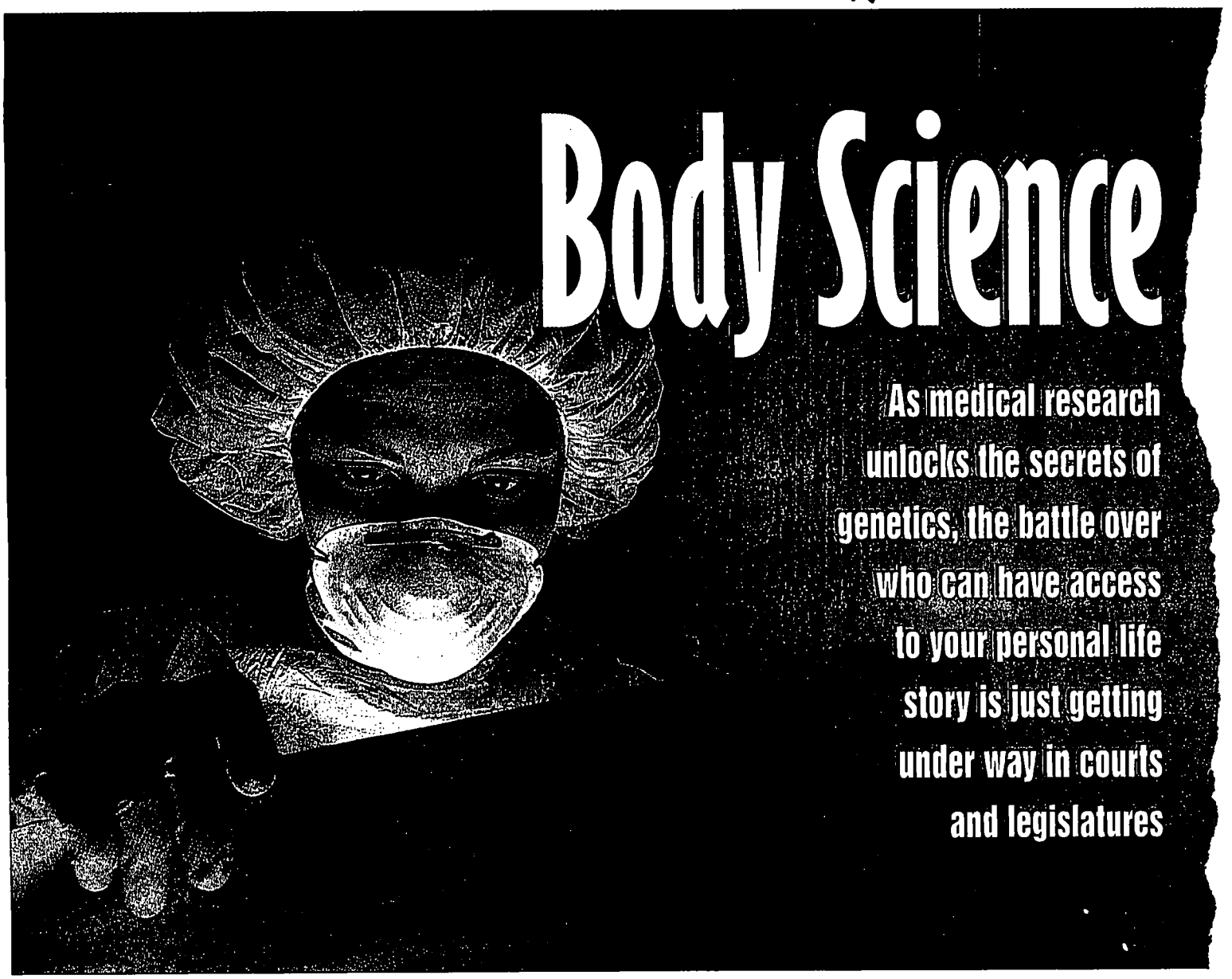
The most immediate impact will be felt in the abortion area. Cities such as Phoenix, Ariz., and Santa Barbara, Calif., have enacted ordinances that require crowds of demonstrators to stand 50 or 100 feet away from people entering health care facilities. These ordinances are being challenged as unconstitutional by anti-abortion activists, and the *Schenck* decision surely gives them a powerful argument.

Jay Sekulow, counsel for the American Center for Law and Justice in Virginia Beach, Va., who represented Schenck before the Court, hails the ruling as "a resounding victory" for free speech. "The First Amendment protects speech you may not agree with or speech you don't want to hear," he says.

On the other side, the NOW Legal Defense Fund stressed that the Court had reaffirmed the validity of fixed buffer zones and left open the possibility that other measures could be taken to protect women from harassment and intimidation near abortion clinics.

In the end, the ruling sends a message that has been heard often from the Rehnquist Court in recent years: The First Amendment's guarantee of freedom of speech stands uniquely strong among the individual rights protected by the Constitution. The outcome in *Schenck* shouts out that point—loud, clear and in your face. ■

Non-Ed Issues



Body Science

As medical research unlocks the secrets of genetics, the battle over who can have access to your personal life story is just getting under way in courts and legislatures

BY LORI ANDREWS

Predicting the future always has been a human temptation. In one very important sense, we now are close to being blessed—or cursed—with getting our wish.

At an increasingly rapid pace, biological scientists are using genetics research to develop ways for us to learn more about ourselves—more, in fact, than we might ever want to know.

"We used to think our fate is in our stars," observes James D. Watson, who helped unlock the secrets of DNA in the early 1950s and now directs the Laboratory of Quantitative Biology, a major genetics research center at Cold Spring Harbor on Long Island in New York. "Now we know, in large measure, our fate is in our genes."

Strung together in the almost mystical double helix form of DNA, genes are the basic unit of heredity. They are contained in chromosomes carried by every cell in our bodies. Each cell contains DNA carrying the entire human genome, or all the genetic information necessary to build a person.

Because each human's genes are unique, they are a personal map for that person's biological past and future—the traits inherited from parents and the ones to be passed on to children.

Unfortunately, not all the genetic news is good. As scientists learn how to "read" genes, they can predict a growing list of potentially harmful diseases and traits.

The bad news contained in genetic information holds deeply personal implications for each individual, but it also is the reason why third parties, such as insurers, employers, schools, the military and the courts, increasingly want to be in on the secret.

The debate over who should have access to genetic information about individuals is likely to intensify in the near future as the pace of discovery picks up in the genetics

Lori Andrews is a professor at Chicago-Kent College of Law and a senior research fellow at the American Bar Foundation. She is the recipient of a grant from the National Center for Human Genome Research of the National Institutes of Health to develop a policy framework for genetic technologies.

TONY STONE IMAGES/MARK JOSEPH

A medical technician studies DNA sequences. Genetic testing, once limited to detection of rare diseases, is in the works for heart disease, diabetes and cancer.

field. Courts and legislators are sure to be at the center of the controversy.

Much of the spark for that explosion of knowledge about genetics comes from the Human Genome Project, co-directed by the National Institutes of Health and the Department of Energy. In the project, the federal government is spending some $3 billion to support efforts to catalog the entire human genetic blueprint by 2005.

For 20 years, genetic testing has been performed on fetuses. One of the first predictive tests for healthy adults screens for the gene that causes Huntington's disease, a debilitating, fatal neurological disorder. Young, healthy people who test positive for the inherited Huntington's mutation know it will kill them someday.

Such genetic news can be psychologically devastating. Consequently, fewer than 14 percent of people at risk for Huntington's disease decide to undergo the genetic testing that may force them to confront their medical future.

But genetic testing is no longer limited to relatively rare diseases such as Huntington's.

Similar tests are being developed for more common disorders such as heart disease, diabetes and certain cancers. Genetic testing also is being proposed for numerous behavioral disorders such as alcoholism, manic-depression and even "risk-taking" behavior.

People are starting to use genetic information to measure the consequences of major life decisions: where to live, what job to take, what type of insurance to purchase, even whether to bear a child.

No Easy Decision

Deciding whether to undergo genetic testing is not easy.

Women with a strong family history of breast cancer, for instance, are faced with the prospect of learning, through testing, that they inherited a genetic mutation that poses an 80 percent lifetime risk of the disease. But if genetic testing does reveal the breast cancer gene, the woman risks losing the health insurance she may need so badly later on.

"These are not just hypothetical fears," says Nancy Wexler, a clinical psychologist at Columbia University in New York City who has studied families that carry inherited disease. "People who are using genetic testing are losing their insurance. And other people who should avail themselves of genetic testing are losing their lives to save their insurance."

Wexler has a personal stake in her own research. As a member of a team in Venezuela that identified the specific gene for Huntington's disease in 1993, Wexler was zeroing in on what someday may kill her. The disease killed her mother, and Wexler is at 50 percent risk of developing it as well. She has testified before Congress about her belief that people have a right not to know their genetic makeup.

Such decisions about whether to undergo genetic testing are at the heart of the growing legal debate over genetic predictability. Individuals at risk fear that test results may be used against them by employers, insurers, school officials, courts, mortgage lenders, adoption agencies, the military and other entities. At the same time, those institutions claim that individuals are not entitled to deprive them of information that could impact the institutions' own interests.

Genetics is not totally new to the courts—just ask the juries in the O.J. Simpson trials who heard reams of testimony on DNA typing of blood samples. Similar tests also are common in rape and paternity cases.

But those types of cases use genetic factors to link accused parties to incidents that occurred in the past. In the new realm of genetics, the issues are prospective: Do people have a privacy right to their genetic information, or do other parties have a right to demand that it be revealed?

Those questions are arising in a growing number of legal settings: medical malpractice, employment, education, family and civil rights.

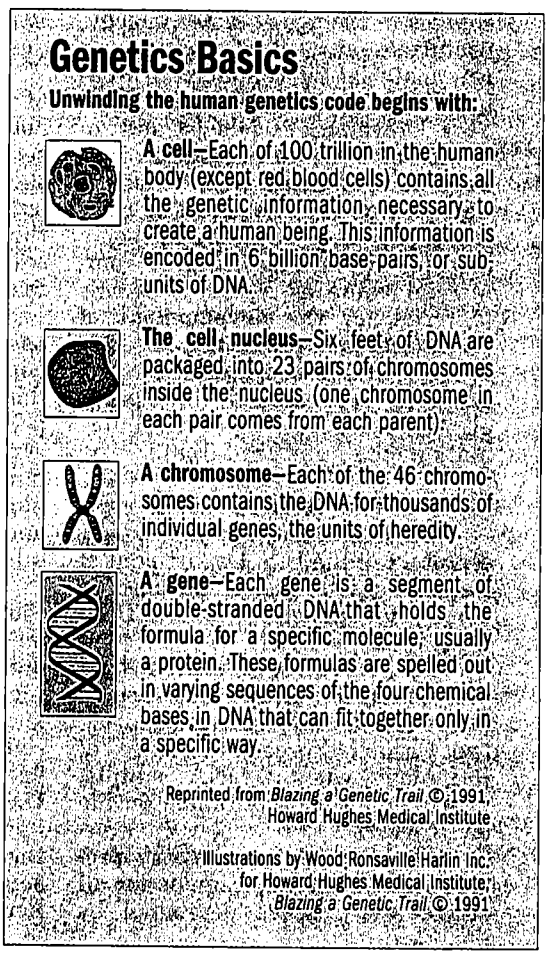
Few laws protect intrusions on genetic privacy despite the personal nature of the information.

"The highly personal nature of the information contained in DNA can be illustrated by thinking of DNA as containing an individual's 'future diary,' " says George Annas, a health law professor at Boston University. "A diary is perhaps the most personal and private document a person can create. Diaries describe the past. The information in one's genetic code can be thought of as a coded probabilistic future diary because it describes an important part of a unique and personal future."

In addition to concerns about privacy, institutional interest in an individual's genetic information raises fearsome ghosts in a century that has witnessed far too many waves of genocide, forced sterilization and stigmatization of entire groups of people on the basis of their supposed genetic inferiority.

Moreover, there are concerns that human genetic materials may come to be viewed as commercial products.

"Blood, tissue, placenta, cell



A federal court ruled that two Marines, Cpl. Joseph Vlacovsky and Lance Cpl. John Mayfield III (shown with attorney Eric Seitz) did not have the right to refuse military DNA testing.

lines and genes are valuable resources in the age of biotechnology, useful as sources of information and raw material for commercial products," says Dorothy Nelkin, a New York University sociologist and coauthor of *The DNA Mystique: The Gene as a Cultural Icon.* "Geneticists rely on routine access to body tissues for their research. And some biopsied tissue has acquired commercial value as a source of raw material for the development of pharmaceutical products."

Despite these concerns, the law generally has upheld third-party access to a person's genetic information on a number of fronts.

Marines on the Genetic Frontline

On Dec. 16, 1991, the deputy secretary of the U.S. Department of Defense quietly issued an obscure memo that opened the largest DNA bank in the world.

The directive required that every member of the U.S. armed forces and all new recruits provide the Armed Forces Institute of Pathology with a DNA sample, which would be maintained on file for 75 years.

The goal of this ongoing program is to obtain specimens for all active and reserve personnel by 2001 for a very simple reason: to make it easier to identify battlefield dead.

In January 1995, two members of the Marine Corps, Lance Cpl. John C. Mayfield III and Cpl. Joseph Vlacovsky, reported for what they expected to be a routine physical. But when they were informed that they were to provide blood and saliva for DNA sampling, they refused.

The two Marines agreed that using DNA to identify remains was benign, but they expressed concern that the military could, at some point in the future, use the DNA samples for some less innocuous purpose, such as the diagnosis of hereditary disease or disorders, and then could disseminate such information.

Mayfield and Vlacovsky were court-martialed for refusing to obey an order from an officer. In subsequent proceedings, the Marines asserted that the collection, storage and use of their DNA violated their rights to freedom of expression, privacy and due process under the U.S. Constitution.

Their strongest argument was that unreasonable searches and seizures are prohibited by the Fourth Amendment—the same provision that protects a criminal defendant, for example, from being subjected to stomach pumping when police see the suspect swallow a bag of cocaine in efforts to destroy evidence.

In September 1995, a federal court ruled in favor of the government in *Mayfield v. Dalton*, 901 F. Supp. 300, holding that its interest in accounting for the fate of soldiers and assuring peace of mind to next of kin overrode the constitutional interest of individual service personnel in being free from searches and seizures.

The ruling allowed the military to court-martial the Marines, but they ended up getting light sentences: a reprimand and seven days' restriction to base. The military's policy of requiring DNA testing of its members has not changed.

Members of the military are not the only people in this country with DNA profiles on record. Some insurance companies are requiring genetic testing as a condition of coverage, and others are dropping insureds or charging them higher rates on the basis of genetic information discovered through other channels.

In one instance, a pregnant woman whose fetus was affected

Framing the Debate

As courts, legislators and other policymakers approach the difficult issues surrounding advances in the science of genetics, they might consider a three-prong policy framework:

• First, legislation, court decisions and other expressions of policy should assure that people have control over what genetic information is generated about them. Legislation in New Hampshire makes this point, for instance, by stating that, except with respect to paternity testing, newborn screening and forensic testing, "no genetic testing shall be done ... without the prior written and informed consent of the individual to be tested."

• Second, individuals should have control over who has access to their genetic information.

AP PHOTO/HONOLULU STAR BULLETIN, KEN IGE

when she underwent cystic fibrosis testing was informed by her insurance company that it would not pay for the child's health care costs if she chose to complete the pregnancy.

In another case, a woman whose mother had breast cancer was told her own health care coverage would exclude treatment of breast cancer. Even some people who participated in genetics research have subsequently lost their health insurance, including a man who underwent screening for a type of colon cancer as part of a study at the Huntsman Cancer Center at the University of Utah.

Basing Insurance on Genetics

These actions do follow a certain calculated logic. Since it is accepted policy for health insurers to exclude people with pre-existing disorders, genetic testing provides an enormous loophole for classifying numerous diseases or other medical conditions as pre-existing because they have their roots in the genes of prospective insureds.

At first glance, such a policy might seem reasonable, akin to charging smokers higher rates. After all, insurance is based on the concepts of risk-spreading and risk-sharing. When most people's future health risks are unknown, the future health care costs of a group can be predicted on an aggregate, actuarial basis and the costs spread across the whole group.

But with genetics technology beginning to identify which people in a group are likely to develop particular diseases later on, insurance companies have begun to target them for special treatment: higher rates or denial of coverage.

Carried to its extreme, that approach to coverage could make everyone uninsurable, since every human being carries between eight and 12 "defective" genes that might trigger various medical disorders.

Moreover, the insurance industry's developing policies on genetic predictability raise the same privacy concerns for insureds raised by the two young Marines in the face of the military's mandatory DNA screening policy. Many people do not want to be forced to gaze into their biological crystal balls.

In some states, legislators have begun passing bills to prohibit discrimination by insurers based on genetic information.

But the laws passed so far may be too narrow. In Wisconsin, for instance, the legislative protection against insurance discrimination applies only to DNA tests and does not cover tests that analyze proteins contained in genes or information on family histories.

In North Carolina, the law protects only people who carry the gene for sickle-cell anemia (which strikes blacks and, to a lesser extent, some Europeans of Mediterranean descent).

As early as 1989, according to a survey of employers by the congressional Office of Technology Assessment, one in 20 companies conducted genetic screening or monitoring of workers.

And even if employers themselves do not undertake genetic testing, they may receive such information about their employees in other ways. It might be found in medical records submitted by an employee in support of a health insurance claim or reported by the employee's doctor.

"Physicians are increasingly being put into the role of 'double agents,' with dual loyalties to the patient and to the patient's school, employer, potential insurer, relative or child," observes sociologist Nelkin.

Genetic testing by employers has been accompanied by discrimination based on that information.

In the early 1970s, a number of companies discriminated against black employees and job applicants who carried sickle-cell anemia even though that status had no bearing on an employee's current or future health, or on an employee's ability to work since the only significance of carrying the trait was a 1-in-4 chance of passing the disease on to a child if the other parent also was a carrier.

Yet few states have laws banning genetic discrimination in employment. Only six—Florida, Georgia, New Hampshire, New Jersey, New York and Oregon—have statutes explicitly prohibiting genetic testing without consent.

At the federal level, the Americans with Disabilities Act provides some protection against job discrimination for people who carry genes that predispose them to diseases later in life.

The compliance manual of the Equal Employment Opportunity Commission states that under the ADA an employer may not discriminate against a person based on genetic information relating to illness, disease or other disorders. The EEOC indicated, for example, that an employer may not refuse to hire someone just because his or her genetic profile reveals an increased susceptibility to colon cancer.

But the ADA still permits employers to order genetic testing of people who have been offered employment, even without their permission, as long as the information is not used in unfair ways.

"This can be accomplished through measures that expand upon state medical confidentiality laws. A statute in Colorado states, 'Genetic information is the unique property of the individual to whom the information pertains. Information derived from genetic testing shall be confidential and privileged. Any release, for purposes other than diagnosis, treatment, or therapy, of genetic testing information that identifies the person tested with the test results released requires specific written consent by the person tested.'

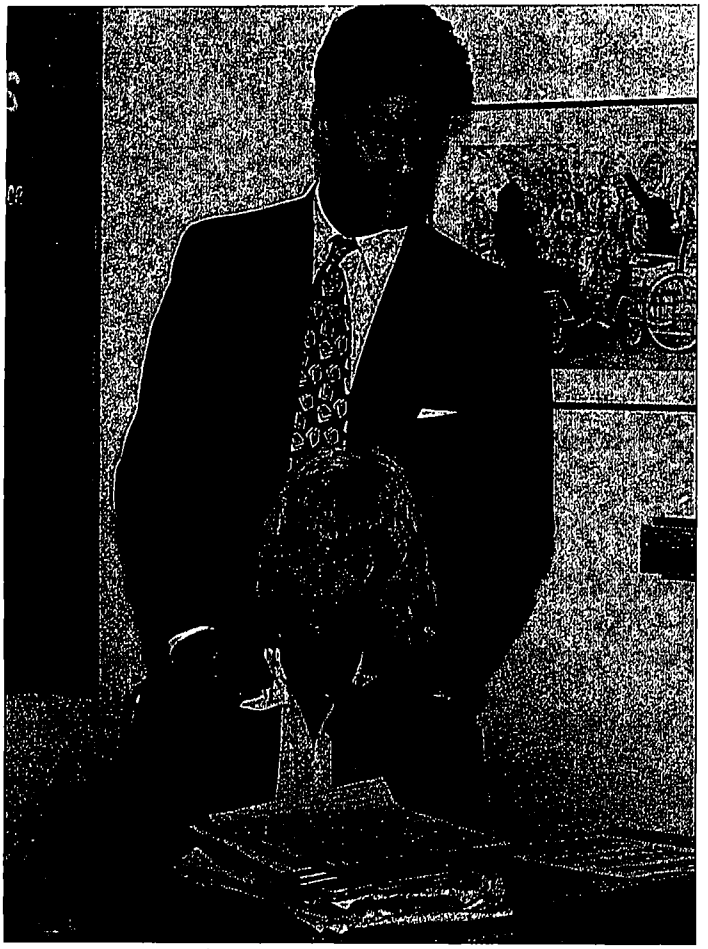
Moreover, those generating or collecting genetic information should explain their confidentiality protections in advance of delivering those services.

• Third, discrimination against individuals based on genetic information should be prohibited.

Seven states have laws prohibiting employers from using genetic information to discriminate: Iowa, New Hampshire, New Jersey, New York, Oregon, Rhode Island and Wisconsin. And seven states prohibit insurers from requiring or requesting genetic tests: Georgia, Maryland, Minnesota, New Hampshire, New Jersey, Ohio and Wisconsin.

Nine states prohibit insurers from using information derived from genetic testing to deny coverage or to limit the terms and conditions of insurance: Colorado, Georgia, Maryland, Minnesota, New Hampshire, New Jersey, Ohio, Oregon and Virginia. (The health insurance laws are a hollow victory, though, since they do not apply to self-insured plans, which are used by most large companies.)

—*Lori Andrews*



TV anchor-couple Bree Walker Lampley and Jim Lampley were excoriated for conceiving in light of her disability.

In September 1995, the San Francisco Legal Aid Office filed a class action lawsuit by employees of Lawrence Berkeley Laboratories, a research center at the University of California at Berkeley that receives funding from the U.S. Department of Energy.

The suit, *Norman-Bloodsaw v. Lawrence Berkeley National Laboratories*, No. C95-03220 (N.D. Cal., filed Sept. 12, 1995), alleged that the lab had tested black employees for the sickle-cell gene without their knowledge or consent, and had secretly maintained that information in employee files.

The suit was dismissed on grounds that the secret testing did not constitute an intrusion on employee privacy.

Reading, Writing and Genetic Testing

In U.S. schools, genetics is more than just a subject for science classes.

In a few places, schools are using genetic tests to screen students for a syndrome that identifies borderline retardation. In the future, schoolchildren might be screened to identify genes for dyslexia or other learning difficulties, then receive special assistance to compensate for the genetic flaw.

The problem with such an approach, however, is that even if such genes can be identified (and this is a big "if," given that reputable researchers from respected institutions such as Yale have in recent years claimed to have found genes for complex behaviors only to later have to retract their findings), carrying a gene and manifesting the disorder are two different matters.

Not all genes are completely penetrant; there are many genetic conditions that occur in only a minority of the people carrying the gene. Often the gene indicates only a predisposition to a disorder that needs additional intervention, such as a particular environmental exposure, to be triggered. This means some children may be labeled as deficient because they carry a gene rather than manifest a condition.

The implications are profound. The work of social psychologist Claude Steele at Stanford University indicates that students perform more poorly if they know they are members of a group that traditionally has not been academically strong, a phenomenon known as "stereotype vulnerability."

Teachers' perceptions of students might be affected by such genetic stereotyping, giving lower grades to children identified as having an errant gene even if they are performing normally. That pattern has been identified in psychological studies in which teachers were told that one group of students was better than another when there actually was no difference. The teachers gave the "better" students higher grades and more attention, presumably due to the "halo" effect of a positive label.

The use of genetic screening in higher education is even more problematic. In one case, a man who was at 50 percent risk for Huntington's disease was rejected by medical schools on grounds that it would be a waste of money to train someone who might die young.

For judges with a full load of complex cases, the idea that genetic information might provide some guidance is seductive. Consequently, the use of genetic testing to answer an expanding variety of legal questions is growing, often without sufficient thought to the social context or impact.

In a recent case in Charleston County, S.C., a judge ordered that a woman be genetically tested for Huntington's disease at the instigation of her ex-husband, who was seeking to terminate her parental rights.

This type of case may foreshadow a new kind of battle in custody cases, in which the divorcing parents seek genetic testing on each other to determine who is more predisposed to die sooner from cancer or heart disease. Under this approach, the "better" parent might be adjudged to be the one with the "better" genes.

Genetic testing also could have an explosive impact on personal injury cases.

Under current law, a successful plaintiff in a medical malpractice or other personal injury case generally is awarded damages for future losses on the basis of life expectancy statistics. But savvy defendants may begin to require genetic testing on plaintiffs to find evidence that they have a predisposition to an early death, justifying a reduction in damages.

Forcing parties in custody or personal injury cases to undergo genetic testing could have a strong deterrent effect on parties who fear the consequences of learning unwanted facts about their genetic makeup.

In the South Carolina custody case, the wife was adamantly opposed to being tested for Huntington's disease, even though she faced the loss of her child if she refused. Facing a painful Sophie's choice, she simply disappeared.

The most significant direct legal impact of genetics may be in criminal law, an area in which DNA evidence already is commonplace. But the next step could challenge the very underpinning of the criminal justice system.

Criminal law is based on the idea of free will—that individuals "choose" to engage in criminal acts for which they must be punished.

But as geneticists increasingly claim to find genetic markers for antisocial behavior, the legal system

AP PHOTO

will be forced to reconsider the concepts of criminal intent and guilt.

A Dutch research group says it has found a gene linked to a propensity to aggression. How should the courts rule on a defendant's claim that he murdered because it was in his genes?

Judges already show some willingness to accept genetic defenses. In similar California cases, two admitted alcoholic lawyers embezzled money from their clients, but the one who claimed his alcoholism was genetic got a lighter sentence. In a murder case, the defendant was found not guilty after her violence was linked to having Huntington's disease.

Are All Genes Created Equal?

The great, vague specter of genetics is how it may eventually influence society's view of equality.

Much of the future research in genetics will not be related to disease but will focus on human individual and group traits, such as intelligence, behavior and race. Researchers now claim that they can distinguish between blacks and whites on the basis of differences in just three of the 100,000 genes in each human.

Arthur Caplan of the University of Pennsylvania Center for Bioethics has written, "Will the information generated by the genome project be used to draw new, more 'precise' boundaries concerning membership in existing groups? Will individuals who have tried to break their ties with ethnic or racial groups be forced to confront their biological ancestry and lineage in ways that clash with their own self-perception and the lives they have built with others?"

The potential exists for genetics research to produce findings that could undermine our conceptions of equality of opportunity, and individual and social responsibility.

Already, some physicians and lawyers suggest that people should have a duty to learn their own genetic status and to avoid having children who may be adversely affected by their genetic heritage.

In articles in both medical and Texas legal literature, Margery Shaw, a lawyer and geneticist, recommends that states adopt policies to prevent the birth of children with genetic diseases. She suggests that the prevention of genetic disease is so important that a couple deciding to give birth to a child with a serious genetic disorder should be criminally guilty of child abuse.

Shaw also suggests the imposition of tort liability for not sharing genetic information with relatives or for not undergoing genetic testing.

In the case of *Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811 (1980), a California appellate court stated in dicta that a child with a genetic defect could bring suit against her parents for not undergoing prenatal screening and aborting her.

In 1991, Bree Walker Lampley, a television anchor in Los Angeles, found herself caught up in the intense emotions that these issues can breed. When Lampley, who has ectrodactyly, a mild genetic condition that caused the bones in her fingers and toes to fuse, made public her decision to give birth to a child with the same condition, a radio talk show host and her listeners attacked the decision as irresponsible and immoral.

Lampley, along with several disability rights groups, filed a Federal Communications Commission complaint against the radio station for violating its personal attack rule and failing to present both sides of the issue. The complaint was denied.

Throughout the United States, people seem to have drifted into a mindset that assumes that if genetic information exists, it should be acted on and taken into consideration in a variety of social realms.

In *The DNA Mystique,* Nelkin and co-author Susan Lindee observe how quickly the new genetics has become part of popular culture. Their studies found that genes have been used to explain a wide range of social phenomena, including crime, job success, sexual orientation and adultery.

Nelkin and Lindee speculate on why such explanations are readily accepted by the public: "They can relieve personal guilt by implying compulsion, an inborn inability to resist specific behavior" and they can relieve societal guilt and give society an excuse to cut out social services by deflecting attention away from social and economic influences on behavior.

How genetic research will impact society remains to be seen.

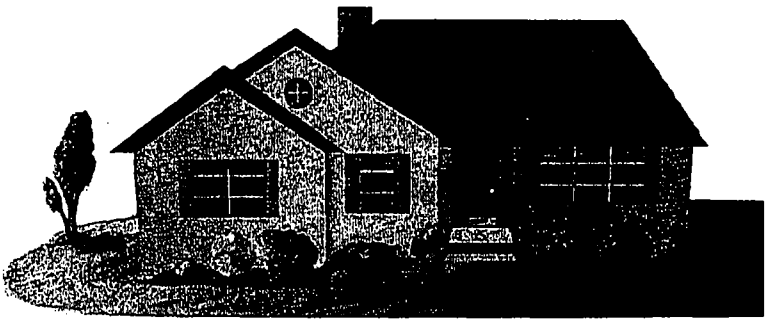
Clearly, the promise of genetics is everywhere, and much fanfare accompanies each genetic discovery.

But less attention is focused on how we will use knowledge gained through genetic testing. When an article in the *Journal of the American Medical Association* heralded the discovery (later disputed) of a genetic marker for alcoholism, 140 newspapers and magazines ran articles praising the advance. Not a single article addressed the issue of what we would actually do if we identified individuals with a genetic propensity toward alcoholism.

The vexing question of how the fruits of genetic research should be used by society is on the table. Scientists are charting the map of the human genome, but the legal system will play a crucial role in determining where that map leads. ■

ABAJ/ROBERT DAVIS

BY LAURA GATLAND



Putting the

A developing legislative movement

call it quits. Many domestic relations

Concerns are widespread about the impact of family breakups on American society. But many lawyers in the divorce field worry that one proposed cure will cause too many of its own ills to do much good.

In an increasing number of states, no-fault divorce, which has been available in every jurisdiction in some form since the 1970s, is coming under legislative attack as a cause of the high rate of divorce.

Simply put, opponents of no-fault, including some lawyers, believe that, in many cases, no-fault makes divorce too easy to resist for couples on the rocks. Without no-fault, goes the thinking, many of those couples would find ways to stay together. Some opponents also claim that no-fault divorces produce unfair settlements for the spouse who did not want to end the marriage.

"No-fault divorce is something that should be repealed because it gives married couples the ability to dissolve their marriages as easily as it would give two high-school students the ability to dissolve their dating arrangement," argues Jeffery Leving, a Chicago lawyer and a leading advocate for men's rights.

But most lawyers practicing in the domestic relations field, while sharing concerns about the social impact of divorce, contend that the no-fault system is not to blame for what ails the 1990s family. They fear that repealing or gutting no-fault laws would return divorce law to the "bad old days" without contributing any significant solution to the real underlying problems.

"You're working on the wrong end of the marriage," says Lynne Gold-Bikin, a domestic relations lawyer in Norristown, Pa., outside Philadelphia, and past chair of the ABA Family Law Section. "If you want marriages to work, you have to work before people make their choices" about who to marry.

The extent of support among lawyers for the current no-fault system is reflected in the results of a survey that was conducted in 1996 by the section.

Nearly 84 percent of the more than 1,400 lawyers responding to the survey conducted by fax opposed a return to fault-based divorces, and 69 percent said they do not believe there is a direct correlation between increases in the U.S. divorce rate and the advent of no-fault laws more than 20 years ago.

" 'Fault' was taken out of divorce 25 years ago to promote harmony and reduce fighting," points out current section chair Ira Lurvey of Los Angeles. "Putting it back in will do little more than return those evils, plus an increased divorce rate. We don't get progress by going back to the past."

For now, the outright repeal of no-fault laws appears to be unlikely. But opposition has not gone away. A number of groups continue

---

Laura Gatland is a free-lance writer in Chicago.

ILLUSTRATIONS BY BRENDA GRANNAN

March 23, 1997

Note to Bruce Reed:

I thought you might find this interesting. Kind of pitiful, huh?

-- Bill Kincaid

ATLANTA CONSTITUTION WEDNESDAY MARCH 19, 1997

Clean sweep: 8 counties approve tax

Low turnout helps measures; DeKalb homeowners get rollback

By Sarah Zimmerman and Ben Smith III
STAFF WRITERS A1

Just before noon at the Publix store at Pleasant Hill Road and Club Drive in Gwinnett County, no one stood in line to vote on the 1-percent sales tax that would bring in $560 million for the county's school system.

But 15 people stood outside Pat's Hallmark in the same shopping center, waiting in line to buy Beanie Babies, the popular bean bag animals that kids crave for their collections.

By 1 p.m., 95 people had voted at the Publix, said poll manager Bob Chambers. By 2 p.m., the Hallmark store had sold out of its 4,000 Beanie Babies.

Tuesday's small voter turnout benefited schools throughout the area, as the 1-percent sales tax for school construction passed in all eight counties. The measure is expected to produce $2.4 billion over five years for school construction.

"This vote is important in so many ways," said Richard Tucker, president of the Gwinnett Chamber of Commerce. "A big message is being sent that county residents realize what we have and want to protect and enhance it."

SALES TAX FOR SCHOOLS

Results of Tuesday's votes to increase the sales tax by 1 cent to finance capital improvements for school systems:

COUNTY	APPROVED	REJECTED
Clayton	☑	☐
Coweta	☑	☐
DeKalb	☑	☐
Douglas	☑	☐
Forsyth	☑	☐
Fulton	☑	☐
Gwinnett	☑	☐
Paulding	☑	☐

First approval since 1986

It also boded well for another measure in DeKalb County, where voters have denied every sales tax proposal to be put to a referendum since 1986. But this time voters approved two on the same night: one for schools and another, called HOST2, to pay for a permanent fund for county construction projects and give homeowners up to a 40 percent cut in their property taxes.

State lawmakers are considering legislation that would pave the way for four metro Atlanta counties to hold votes on the same proposal. Officials with the National Association of Counties have said that other local governments are likely to imitate it.

That's true, too, of the 1-percent sales tax for schools. This was the first time that school systems could ask voters to pay for school construction in this manner since a change to Georgia's constitution was approved in November. Previously, school systems could only count on property taxes, bond referendums and state funding.

So far, 67 school districts throughout the state have asked voters for a 1-percent sales tax. Later this year, school systems in Henry, Fayette and Cobb are expected to hold similar votes.

Tuesday night, school officials were ecstatic with the election results.

"I'm so excited," said Clayton County school board member Joy Cavin. "This is such a sweet victory. Our parents saw the need and they came through to support public education."

Clayton voters passed the measure overwhelmingly, with 65 percent voting yes. But it was a nervous day, said Clayton Superintendent Joe Hairston.

"You have to put your trust and faith in the values of the citizens," he said. "Education is expensive, but ignorance is more expensive."

Closer vote in Coweta

In Coweta, where there was organized opposition to the sales tax measure, the vote was a little closer, with less than 500 people making the difference.

Passage of the measure in Fulton County means more work for people like Bill Edwards, president of the Old National Merchants Association.

"We need to make sure that the things that were promised are actually delivered," he said.