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## Table of Contents - Issue 1

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## CONTENTS

### SYMPOSIUM ON LEGAL DISPUTES OVER BODY TISSUE

SYMPOSIUM EDITORS

DOROTHY NELKIN AND LORI B. ANDREWS

- INTRODUCTION: THE BODY,  
ECONOMIC POWER AND SOCIAL CONTROL *Dorothy Nelkin* 3  
*and Lori B. Andrews*

In this era of biotechnology, human body tissue increasingly serves as a source of information and the raw material for medical products. Recent legal disputes—over the taking of body tissue without consent, the genetic testing of previously-collected samples, the development of tissue-based products, the patentability of human genes, and the distribution of tissue such as umbilical cord blood—raise important implications about the social and legal status of the body. Greater attention needs to be paid by policymakers to the social values surrounding human body tissue.

- THE PROFIT OF SCIENTIFIC DISCOVERY AND  
ITS NORMATIVE IMPLICATIONS *Sheldon Krimsky* 15

The discovery of recombinant DNA techniques for the transplantation of genes across virtually any two species was followed by the rapid commercialization of molecular biology. University-industry partnerships exploded in response to a series of federal policies designed to speed up technology transfer and a decision by the Supreme Court in 1980 that living things are patentable subject matter. The commingling of academic science and entrepreneurship has raised ethical concerns about the patentability of genes, the decline in objectivity on biomedical science, the privatization of knowledge, and increasing conflicts of interest among researchers.

- IT'S NOT JUST HAIR: HISTORICAL AND  
CULTURAL CONSIDERATIONS FOR AN  
EMERGING TECHNOLOGY *Deborah Pergament* 41

History reflects the social, religious and political importance of human hair. Individuals have used hairstyles to flaunt social conventions about gender, race, sexual identity, and social status. Totalitarian governments have regulated hairstyles as a means of social control and dehumanization. Today, advances in technology now make it possible to discover information about an individual's current or potential health status. Judicial decisions and administrative regulations offer individuals limited protection from state or institutional intrusion into the information revealed by genetic hair analysis. This Article argues that the explosion of technologies that use hair to reveal intimate details of an individual's biological identity challenges society

to reconsider the meaning of hair. Ultimately, courts must focus not only on the cultural and social significance of the biological material being analyzed, but also on the potential impact of the genetic information that may be revealed.

**I-DNA-FICATION, PERSONAL PRIVACY,  
AND SOCIAL JUSTICE**

*Eric T. Juengst, Ph.D.* 61

The advent of programs for collecting and storing DNA from convicted criminals for identification purposes in all fifty states raises policy questions about the future of such "i-DNA-fication" practices. Under what circumstances, if any, would it be ethically, socially and legally acceptable to collect and store personally identifying DNA profiles from other classes of citizens, such as unconvicted arrestees, unarrested criminal suspects, unsuspected relatives of suspects, and members of the general population? In this essay, Juengst compares i-DNA-fication practices with the traditional practice of fingerprinting, and uses that comparison to suggest five general principles that should govern the future use of DNA "fingerprinting" by law enforcement institutions.

**GENETIC DIVERSITY AND THE  
POLITICS OF DIFFERENCE**

*Margaret Lock* 83

The Human Genome Diversity Project has encountered worldwide criticism of its activities both by the peoples it proposes to study and scientists. Reasons for this criticism are examined with an emphasis on the wide-spread fears associated with increased commodification of human DNA. It is argued that, in spite of the proposed involvement of communities in research design and the revision of ethical protocols, confrontational biopolitics associated with the procurement of human tissue samples will continue, particularly when indigenous peoples are made into research subjects.

**BABIES' BLOOD: FRAGMENTATION,  
REDEMPTION, AND PHENYLKETONURIA**

*M. Susan Lindee* 113

Scientific and medical interest in human body tissue has long reflected political agendas. The history of the collection of babies' blood for PKU testing shows how the system of manipulation and control of body materials served prevailing political interests in constructing PKU as a compelling public health problem and a public health priority. The Guthrie test offered the prospect of intervention, and, though many questions remained, it led to legislative mandates that effectively closed off other options. The disease, in effect, conformed to available technology and ideas about social management. Lindee uses the details of this case to suggest how bodily materials can become instrumental in the social management of disease.

**THE KENNETH M. PIPER LECTURE**

**RECONSTRUCTING AMERICA'S SOCIAL CONTRACT  
IN EMPLOYMENT: THE ROLE OF POLICY,  
INSTITUTIONS, AND PRACTICES**

*Thomas A. Kochan* 137

This Article examines what is required to rebuild the social contract at work in order to meet the needs and realities of the modern economy and society. Rebuilding a viable social contract will require a comprehensive updating of New Deal policies and institutions. Accordingly, the National Labor Relations Act will need to be expanded to restore the ability of workers to choose whether or not to be represented by a union. Unions will need to offer workers broader options for representation. Corporations will need to be held accountable for addressing the interests of multiple stakeholders. To support worker mobility, labor market policies and institutions will need to be modified. Finally, researchers will need to develop the ideas and evidence to reshape political debates on labor and employment policy issues.

# THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

BETWEEN PRETEXT PLUS AND PRETEXT ONLY:  
SHOULDERING THE EFFECTS OF PRETEXT ON  
EMPLOYMENT DISCRIMINATION AFTER *ST. MARY'S  
HONOR CENTER V. HICKS* AND  
*FISHER V. VASSAR COLLEGE*

*Stefanie Vines Efrati* 153

This Note focuses on the issue of the burden of proof a plaintiff must prove to prevail in an employment discrimination case based on the issue of pretext in the Second Circuit. The issue is whether a plaintiff must prove pretext plus (that the alleged reason given for the employer's actions was a pretext for actual discrimination) and also that actual discrimination took place; or whether it is sufficient for the plaintiff to prove that the employer's excuse is merely a pretext without further proof of the actual discrimination itself.

PAST SEXUAL CONDUCT IN SEXUAL  
HARASSMENT CASES

*Lisa Dowlen Linton* 179

Federal Rule of Evidence 412 addresses the admissibility of past sexual conduct in both civil and criminal cases. This Article considers how Rule 412 affects sexual harassment cases. The author recommends evaluating evidence in three separate categories: nonworkplace conduct, workplace conduct, and conduct involving the alleged harasser. While each category must satisfy Rule 412, the author suggests this approach in order to reach more consistent results in civil cases. The Article also reviews cases that have considered the admissibility of a party's past sexual conduct.

OSHA REFORM: AN EXAMINATION OF  
THIRD PARTY AUDITS

*Anne T. Nichting* 195

Critics argue that the Occupational Safety and Health Act has failed to reduce occupational injury and illness rates because the recent growth in the small business sector now makes it less likely for a limited number of government inspectors to perform workplace inspections. Some of these same critics contend that businesses could reduce occupational injury and illness rates by periodically employing a third party auditor to evaluate whether the workplace was in compliance with occupational safety regulations. Businesses do not presently conduct third party audits because the Occupational Safety and Health Administration has indicated that it might use the information contained in the audit as the basis for issuing citations and fines. As a result of this decision, this Article contends that Congress should enact Senate Bill 1237. This legislation would provide a federal statutory privilege for information contained in third party audits. Enacting this legislation would be advantageous because it would encourage voluntary compliance with occupational safety regulations. The remainder of this Article explores how the proposed legislation would operate and proposes additional questions that Congress should consider.

## STUDENT NOTES AND COMMENTS

OWNING GENES: DISPUTES INVOLVING  
DNA SEQUENCE PATENTS

*John Murray* 231

The growth of biotechnology has resulted in many patent applications claiming gene sequences. Attempts to patent DNA have raised much controversy, with some claiming that DNA patents will slow the development of future products. This Note examines the controversies surrounding attempts to patent the breast cancer susceptibility genes, BRCA1 and BRCA2, and partial gene segments in the form of Expressed

Sequence Tags. The Note argues that patent protection has made considerable private funding available for DNA sequencing and has resulted in improvements in the efficiency of sequencing efforts. The Note concludes that, when applied to DNA sequences, the patent system is achieving its primary aim of promoting new innovation.

*JACKSON V. BENSON*: SCHOOL VOUCHERS—  
OFFERING AN APPLE TO PRIVATE SCHOOLS;  
CREATING A SERPENT FOR  
PUBLIC SCHOOLS

*Jennifer A. Henrikson* 259

This Comment asserts an urgent need for the United States Supreme Court to take a stand on the constitutionality of school voucher programs under the Establishment Clause. The Wisconsin Supreme Court in *Jackson v. Benson* upheld the constitutionality of the Milwaukee Parental Choice Program, which allows a select group of Milwaukee public school students to use publicly funded school vouchers to attend religious schools. Henrikson argues that the Court's denial of certiorari left open the potential for harm to public school education. She proposes that the Establishment Clause inquiry expand to include examining whether the type of aid "realistically" can be separated from religious schools' nonsecular functions. This Comment concludes that the Milwaukee Parental Choice Program has the primary effect of advancing religion because tuition—unlike textbooks and special services—realistically cannot be applied only to the secular programs of religious schools.