

## Legal Aspects of Identity Testing

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### Introduction

- Civil law: Resolution of a conflict about money or obligation. Result: Money judgment or Injunction (Court Order).
- Criminal law: Determine guilt or innocence and punish or rehabilitate.
- Standard and Burden of Proof:
- Civil: Preponderance; Criminal: Beyond reason to doubt.

### Underlying Issues

- How to obtain evidence?
- How to preserve it?
- How much is sufficient?
- How reliable is the evidence?
- Use of the adversary system to determine the facts.(i.e. How to attack the evidence)

### Focus for Today

- Criminal law (identity of the criminal), paternity and newborn screening
- Next time: Civil law including duty to warn, wrongful birth (Reilly chapter 8). And if time, research.
- Issue: What evidence should be allowed to be introduced?

### Criminal law

- Identification of the criminal
- 1. DNA at crime scene
- 2. Can suspects be tested? 4<sup>th</sup> and 5<sup>th</sup> Amendment
- 3. Can DNA be taken from suspects?
- 4. Can suspects volunteer DNA?
- 5. Proper handling of sample.

### 4<sup>th</sup> Amendment

- “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”

## 5<sup>th</sup> Amendment

- No person shall be... compelled in any criminal case to be a witness against himself...
- Issue: How to obtain and introduce samples over the objection of the individual. Ex: Removal of bullet from robbery suspect. Removal of blood sample.

## Daubert vs. Merrell Dow (1993)

- US Supreme Court decision 509 US 579 (1993) held:
- Scientific evidence must be “generally accepted” to be admissible.
- Technique must be scientifically tested; subject to peer review; have known error rate; be accepted/used in the relevant scientific community.

## Death Row Project

- Barry Sheck: The Innocence Project. Cardozo Law School. [www.Cardozo.yu.edu/innocence](http://www.Cardozo.yu.edu/innocence).
- [aclu.org/death-penalty/DNATesting](http://aclu.org/death-penalty/DNATesting).
- Issue: Under what circumstances should a final court decision be reopened?

## What to do if the evidence excludes a suspect?

- Ann Arbor rape case (1995)
- 1. Who should be tested?
- 2. What should be done with test results that exclude an individual? (retain? Return? Destroy?)
- 3. Should we have a universal DNA bank (Reilly at 63). Privacy v. Security.

## Use of DNA to show NGRI

- NGRI=not guilty by reason of insanity.
- GBMI=guilty but mentally ill.
- Reilly at page 87-the Glenda Caldwell case.
- Can DNA be used to show predisposition to crime?

## Mandatory testing of convicted felons

- Should this be allowed?
- Where should DNA be stored? CODIS
- Cold hits: Use of stored DNA to solve crimes
- Which criminals should be tested? Major crimes; all crimes; only crimes involving violence or sexual contact?

## Examples from Mi. law

- DNA Identification Profiling System Act MCLA 28.171. (1994)
- For: Murder, attempted murder, kidnap, rape.
- 2001 amendment added: assault, manslaughter, window peeping, indecent exposure, second convictions.

## Paternity and Newborn Screening

- Where is DNA currently stored?
- Issues:
  - 1. Is testing (i.e. obtaining the DNA) voluntary?
  - 2. How will the DNA be used?
  - 3. How long will it be kept?
- Who will have access? For what purposes?

## Paternity

- Two types of Cases:
  - 1. Proof of paternity for Child support.
  - 2. Putative father sues to prove he is the parent. Lord Mansfield's Rule for married couples. Issue: presumptions in the law for a social policy reason versus clear scientific factual evidence.

## Next Session

- Wrongful birth; duty to warn (Read the Patel and Safer cases), research.
- How to read court decisions?
  - 1. Facts: What are the facts?
  - 2. Issue: What does the Court say it has to decide?
  - 3. Holding: What did the Court decide?

## Next Session 2

- How to read a case continued
- 4. Rational: How did the Court reach its decision?
- 5. Do you agree with the decision? Why/why not?
- 6. What social policy was the Court trying to uphold? Is it good policy?

## DNA Evidence

1. Important and generally accepted tool in criminal cases to identify the guilty party.
2. High reliability (except for identical twins)
3. But if collection or processing methods were flawed then may not be reliable evidence.