

Curbing Misuse of Genetic Information in Light of the Enron Debacle: A Comment on Dean Partlett's Proposal

Dennis R. Honabach*

I. INTRODUCTION

The mapping of the human genome is one of those projects of big science that promises to unlock the door to tremendous breakthroughs in medicine. Its benefits are inestimable! At the same time, however, the mapping of the genome promises to give rise to critical legal issues concerning the use of the information about individuals that can now be gained. For that reason alone, Dean David Partlett's insightful article, *Misuse of Genetic Information: The Common Law and Professionals' Liability*,¹ is particularly timely and noteworthy for any reader, including one such as myself who only occasionally dabbles as a torts professor. His decision to link the problem he addresses to the downfall of Enron Corporation and the ensuing debacle, however, makes it nigh irresistible to me, an occasional torts teacher whose main field is corporate law!²

While there are many areas of possible concern that will come from the unprecedented access to genetic information that will be available in the future, Dean Partlett focuses on one — the inappropriate use of genetic information by others such as employers and insurers. The most common response to the problem of inappropriate use of genomic information, and to other issues arising from the mapping of the genome, has been a call for legislation, often at the federal level.³ Dean Partlett takes a quite different tack. He argues for the use of the common law torts system as a vehicle for addressing the misuse problem. In doing so, he urges policy makers to take note of the responses of other legal systems.

Dean Partlett's proposal is far reaching, bold, proactive, and admittedly incomplete. Many who are skeptical of the efficacy of using

* Dean and Professor of Law, Washburn University School of Law. I wish to thank Gerald Michaud whose generosity makes possible the Annual Ahrens Symposium on Tort Law at Washburn University School of Law.

1. David F. Partlett, *Misuse of Genetic Information: The Common Law and Professionals' Liability*, 42 WASHBURN L.J. 489 (2003).

2. The title of the paper Dean Partlett presented at the Symposium, *Misuse of Genetic Information: The Common Law, Professional's Liability and Enron*, made the linkage between his topic and the Enron debacle more apparent.

3. See, e.g., Kathryn E. Cox et al., *Model Act for Genetic Privacy and Control (MAGPAC)*, 88 IOWA L. REV. 121 (2002); Lawrence O. Gostin et al., *The Nationalization of Health Information Privacy Protections*, 37 TORT & INS. L.J. 1113 (2002); Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225 (2000); Patricia (Winnie) Roche et al., *The Genetic Privacy Act: A Proposal for National Legislation*, 37 JURIMETRICS J. 1 (1996).

tort law to resolve complex social issues — individuals who are likely to come from groups with wildly different viewpoints — may be tempted to dismiss Dean Partlett's proposal. To do so would be a grievous mistake because he presents a well-reasoned brief in support of the use of tort law.

II. AN OVERVIEW OF DEAN PARTLETT'S POSITION

Before commenting directly on the portion of Dean Partlett's paper I find most intriguing, I first present a thumbnail sketch of Dean Partlett's overall paper. My primary focus will be on that portion of his work that most intrigues me — his proposal to use fiduciary principles to protect individuals from the inappropriate release of information about their genes. In his own words, Dean Partlett notes, "it is an apposite time to require of professionals and persons receiving highly sensitive and private information a strict fiduciary obligation placing the duty to the patient or client as paramount."⁴ That is high-sounding stuff, and in the current social climate, it hits a note that may seem a bit out of tune with the times. As Dean Partlett himself recognizes,⁵ his call for building a system of protection against misuse of information based on judicial oversight of a fiduciary duty comes at an odd time given the Enron debacle and other recent developments that highlight just how difficult it can be to fashion an effective fiduciary duty regime.

Dean Partlett's central point is that in the rush to call for a legislative response to the potential problems created by access to genetic information about individuals, commentators have overlooked or underestimated the role that tort law might play. As he notes, tort law — "the journeyman of the law"⁶ — has traditionally played a dominant role in helping legal actors adapt to the needs of a changing world. While recognizing that many now seem to believe that the legislature may have eclipsed the common-law court as the principal institution for fashioning adjustments within the legal system, Dean Partlett cautions that we should not be too quick to opt for a legislative response to the problems arising from the genome project.⁷

Dean Partlett identifies several comparative advantages of the tort system over legislation. He reminds us, for example, that in fashioning tort rules, judges can select from rules evolving in many jurisdictions. Moreover, because judge-made rules are so highly fact dependent, courts can easily abandon poorly conceived rules in favor

4. Partlett, *supra* note 1, at 490.

5. "The optimal use of genetic information is dependent on trust, a rare element of social capital in the era of Enron and related corporate scandals." *Id.*

6. *Id.* at 491.

7. *Id.* at 495.

of more effective rules. Furthermore, the slow pace at which common law builds is itself an advantage for it allows the law to remain open to advances in scientific knowledge. Dean Partlett notes that other common-law jurisdictions have been much slower in abandoning the tort approach.

Dean Partlett then discusses three common-law approaches for dealing with the problems that are likely to arise from the misuse of genetic information. The first problem is in granting the subject individual a property right in her genetic information. Dean Partlett argues that granting a property right is likely to have too little salutary effect against misuse of genetic information. A property right is highly efficient in those situations where one's goal is to encourage the creation of information, as is the case with property rights such as patents and copyrights. Granting a property right may also be useful when one is trying to create appropriate incentives for individuals to protect against the squandering of valuable resources such as clean water or air. Dean Partlett posits that granting a property right to one's genetic information, however, is unlikely to have any positive effect because the individual has little incentive to develop the information for the purpose of exploiting it.

Dean Partlett then discusses a second approach – the development of a broad based privacy right. Although many — indeed perhaps most — commentators see great value in a privacy regime,⁸ Dean Partlett is less convinced. A privacy rule, he maintains, would provide only limited protection to individuals. Genetic information about most individuals, he notes, has little public value. There is little incentive for anyone to attempt to publicize the genetic information of another. Hence, a rule preventing publication of the information is unlikely to be very helpful. Moreover, in those few instances when the publication value of the information is likely to be quite high, such as when the information relates to noteworthy individuals such as prominent politicians, enforcement of a privacy right to protect against such disclosure is likely to run afoul of constitutional protections afforded the speaker.

Concluding that neither the property right nor the privacy approach is likely to be very successful because each fails to protect against the real source of the problem, Dean Partlett turns to a different approach. He champions a tort response based on what he posits as the “natural point of legal attack [in genetic disclosure] . . . the uncovering of the information.”⁹

8. E.g., Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 Nw. U. L. REV. 1497 (2002).

9. Partlett, *supra* note 1, at 498.

Dean Partlett's argument is much too rich to capture in a brief synopsis, but as I understand it, the general outline is as follows: Genetic information about individuals is generally the product of the efforts of professionals — doctors or researchers. Subject individuals permit those experts to uncover genetic information about them only because they have confidence that the doctors and researchers will not misuse the information they gather. It is valuable both to the subject individual and to others that such information be developed. The primary deterrent to gathering such information is the latent fear that once a subject permits someone to ascertain her genetic make-up, she necessarily assumes the risk that the other person — or someone else in the information gathering chain — might leak that information to a party who might use it to make a decision adverse to the subject individual. To insure that individuals continue to possess the level of confidence necessary to allow them to continue to be willing to have their genetic information uncovered, Dean Partlett contends that courts must treat the professionals who gather the information as having a special professional relationship with the individuals whose genetic information is being evaluated. The courts, he contends, should view that special relationship as one giving rise to a "strict fiduciary duty."¹⁰

According to Dean Partlett, judicial recognition of a fiduciary duty running to the individual whose genetic identity is being ascertained will encourage the production of important genetic information because the individual will continue to be confident that genetic information garnered about her will not be exploited for ulterior purposes. Under Dean Partlett's system, an individual would be able to bring a tort action for breach of confidence for the professional's breach of her duty if the professional inappropriately discloses the individual's genetic information. The remedy might include damages or some form of equitable relief.

"Inappropriate use," of course, is a weasel phrase, and it is mine, not Dean Partlett's. Regardless of what system we employ to regulate use of genetic information, someone, or some group of individuals, will need to determine just when a professional possessing genetic information about a person can disclose that information without the consent of the person. It is not difficult to imagine the kinds of cases that are likely to arise. Consider, for example, a situation in which a professional discovers that a subject carries a genetic make-up that, when coupled with her sexual partner's, may lead to horrific birth de-

10. *Id.* at 490. Exactly what Dean Partlett means by the phrase "strict fiduciary duty" is not entirely clear. As corporate lawyers know full well, denominating someone a fiduciary is simply a beginning point in a long and arduous process.

fects. If the subject refuses to permit the professional to share that information with her partner, may the professional nevertheless do so? Dean Partlett posits that the courts operating within the tort system with its evolutionary style provide the appropriate institutional vehicle for making such a determination.¹¹

Dean Partlett would protect individuals from the second evil he identifies — wrongful discrimination — by imposing on end users of genetic information — employers, insurers and others — a tort-based duty not to discriminate inappropriately. He would leave it up to the courts to fashion over time principles to determine when discrimination is appropriate. Again, some individual, or group of individuals, will need to determine which discrimination is appropriate and which is not. Here too, Dean Partlett sees courts functioning within the tort system as superior decision makers.¹²

III. SOME PRELIMINARY COMMENTS

There are several points worth mentioning. First, it is important to note what Dean Partlett is arguing and what he is not. When he champions the use of a tort-based approach to the problems arising from the misuse of genomic information, Dean Partlett is making a process-based argument favoring the use of the incremental, judicial-based system that characterizes the tort system rather than the universal fiat-like system associated with a legislative response. He believes strongly in the superiority of the evolutionary system that is characteristic of a case-by-case common law approach to problems. He recognizes, to be sure, that such a system entails considerable costs — most importantly, the uncertainty that is necessarily created when one cannot even purport to cabin the whole of a problem in a single judicial pronouncement. It avoids, however, the costly errors that arise when there is a “rush-to-judgment” impulse to adopt an inclusive solution based on an incomplete understanding of a problem. In contrast, legislation tends to present exactly the opposite set of costs and benefits. Unlike the courts, the legislature can purport to address the entire problem at once and thus offers a “complete” solution. Its solution, however, may turn out both to be exceptionally misguided and difficult to change.¹³

On these basic points, the relative advantages and disadvantages of judicial versus legislative responses, there is, I believe, common

11. *Id.* at 508.

12. *Id.*

13. For a general discussion of the disadvantages of resorting to legislative solutions, see Francesco Parisi & Nita Ghei, *The Value of Waiting in Lawmaking*, (George Mason University School of Law Faculty Working Papers, 2001), available at <http://www.gmu.edu/departments/law/faculty/papers/docs/01-16.pdf>.

agreement. How one ends up tallying the score when deciding which system is best applied to the problem of the misuse of genetic information is uncertain and varies with the scorer. Many, I think, will side with Dean Partlett.

To be sure, if we were to adopt a tort-based approach to regulating the use of genetic information, the courts will be compelled to wrestle with many knotty questions. The first — given Dean Partlett's scheme — will be to determine just who is to be deemed a fiduciary. Will it be only the doctors and researchers who determine the genetic information of an individual, or will it be anyone who has access to the information, including the data-entry person who input the information into the medical system's records? Will fiduciary status be extended to cover the casual reader who comes across the information by happenstance? Under what circumstances will one fiduciary be saddled with the misconduct of someone else in the information gathering, analysis and storage system?¹⁴

The courts also will need to determine the equally knotty question of when other values trump the value of maintaining confidentiality. The courts have already struggled with that issue in any number of contexts involving a fiduciary's duty to maintain the confidentiality of information.¹⁵ The bar to disclosure cannot be absolute.¹⁶ At the same time, the efficacy of a system of confidentiality is undercut when the beneficiary of that system knows that his sense of comfort is not complete. And it surely will not do in a system based on trust to mis-

14. All of these questions will sound familiar to corporate lawyers in the tortuous path the courts have taken in trying to establish rules for deciding who is and who is not an insider for purposes of SEC Rule 10b-5, which prohibits insider trading. In *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968), Judge Sterry Waterman adopted an extraordinarily broad definition of "insider," deeming anyone who possessed inside information to be an insider and thus subject to the rule's "disclose or abstain from trading" proscription. The overbreadth of that rule quickly became apparent. If applied literally, the *Texas Gulf Sulphur* definition would prohibit analysts who ferreted out non-public information, an exceedingly valuable service if markets are to remain efficient, from trading on their information. Such a result would quickly dry up any interest in engaging in such analysis. Not surprisingly, the courts abandoned that approach. See generally *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. U.S.*, 445 U.S. 222 (1980). The United States Supreme Court replaced the *Texas Gulf Sulphur* definition with one based more closely on the existence of a traditional fiduciary relationship.

15. Most law students become aware of the concept of overriding confidentiality in certain instances in their first year torts course where they study the classic opinion in *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 351 (Cal. 1976), in which the court held that a therapist had a duty in certain circumstances to warn the foreseeable victim of harm perpetrated by his patient.

16. See, e.g., Cass R. Sunstein, *Privacy and Medicine: A Comment*, 30 J. LEGAL STUD. 709 (2001) (noting that the presumption of a medical patient's full authority over personal information gives way when disclosure is necessary to provide good patient care to the individual, when disclosure is necessary to compile useful medical data, when disclosure is necessary to protect others from serious harm, and when disclosure is necessary to prevent harm to the patient); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002) (permitting a lawyer to disclose a client's confidential information if the lawyer believes doing so is necessary to prevent his client from committing a crime that is likely to result in "imminent death or substantial bodily harm").

lead individuals by giving them a false sense of certainty of confidentiality of their genetic information.

Perhaps most troubling, as Dean Partlett notes, will be the thorny issue of determining under what circumstances an individual may waive her right to confidentiality. If the whole essence of the duty of confidentiality is a recognition of the personal autonomy of an individual, the courts must devise a method whereby an individual can choose to release her fiduciary from his duty. Unfortunately, our experience with such questions of waivers based on informed consent has not been a happy one.

My raising of these questions should not be interpreted as a criticism of Dean Partlett's proposal. Indeed, most of these issues will bedevil any proposal to address the problem of misuse of genetic information. I generally concur with the thrust of Dean Partlett's proposal that courts, employing a tort-like approach, are superior to legislatures as vehicles for responding to these issues. But we must keep in sight these issues, for the courts will have to address them.

I think it equally important to emphasize that in advancing his argument Dean Partlett is not, in my opinion, championing the use of any particular version of the tort system as it is now being played out in the United States. Individuals on all sides of the issue should have concerns about the difficult question of juror competence that may undercut the ability of the common-law jury to make appropriate assessments of scientific factual matter. They should also be wary of the ability of jurors to award what might be crushing financial damage penalties on defendants in the form of punitive damage awards. At the same time, everyone should be equally suspect of the effects that many of the so-called "tort reforms" — such as liability caps — may have had on the ability of jurors to appropriately ferret out and sanction what is otherwise certainly tortious conduct.

IV. FIDUCIARIES AND THE DUTY OF CONFIDENCE

As I noted at the outset, one of the most intriguing aspects of Dean Partlett's article is his proposal to employ the doctrine of fiduciary duty as the lever for addressing problems stemming from concerns about misuse of genetic information. Dean Partlett would have the courts impose a strict fiduciary obligation on professionals and other persons receiving genetic information about an individual. The duty would run to the person whose genetic information was known, regardless of the relationship between the fiduciary and others who might have employed her to obtain or analyze the information, such as an employer or an insurance company.

Those of us who ply our trade in the field of corporate law, whether in the classroom, in the board room or from the bench, are quite familiar with the concept of fiduciary duty. It lies at the center point of much of corporate law — the regulation of the relationship between shareholders on one hand and corporate directors and officers on the other. We recognize that while fiduciary duty rules are simple to state, they are agonizingly difficult to apply.

For much of the last century, the legal system left it to courts employing a tort-like process to provide the content for corporate fiduciary rules. To be sure, there have been some efforts at legislative determinations — including efforts that helped fuel the classic Cary-Winter debate over whether the legislatures and courts were racing to the bottom or to the top.¹⁷ Nonetheless, the primary decision makers have remained the courts. Most importantly, there was little in the way of a federal fiduciary code, notwithstanding attempts to have just such a regime enacted.¹⁸

The Enron debacle, and all that has followed since, has suggested to many that our current regime of fiduciary duties has failed miserably in protecting shareholders from overreaching by corporate directors and officers. Not surprisingly, there has been considerable criticism of the current system and numerous calls for reform. I suspect much of that criticism will turn out not to be well founded. The actions of the few rogue actors are probably not indicators of deeply rooted self-dealing. But it seems clear to everyone that the system of fiduciary rules that has evolved over time has not eradicated all forms of fiduciary misconduct.

What is most instructive for our purposes is the response to the Enron debacle — the enactment of the Sarbanes-Oxley Act of 2002. Passed after only four months of sporadic consideration by Congress,¹⁹ Sarbanes-Oxley is a massive, all-encompassing piece of federal legislation intended to correct the deficiencies in the existing fiduciary regime (at least with respect to publicly traded companies). Its main purpose is to restore the confidence of investors who rely necessarily on the faithful management of corporate directors and officers.

17. For an introduction to the “race to the bottom — race to the top debate,” compare William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974), with Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

18. See, e.g., Donald E. Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976); see also RALPH NADER ET AL., *CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS* (1976).

19. For a general overview of the history of the Sarbanes-Oxley Act of 2002, see HAROLD S. BLOOMENTAL, *SARBANES-OXLEY ACT IN PERSPECTIVE* 18-20 (2002). For a primer on the act, see William S. Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002).

Sarbanes-Oxley is a wide-ranging piece of legislation. Among other provisions, it contains rules increasing criminal penalties for some forms of management misconduct.²⁰ It creates a new system of certification of financial statements intended to make top corporate officials who sign filings with the Securities and Exchange Commission (SEC) more diligent in ensuring the accuracies of those filings.²¹ It requires the SEC to fashion new rules regulating the composition of audit committees²² and imposes strong incentives for companies to adopt and implement codes of conduct.²³ These, and other provisions, are likely to have a profound effect on how companies operate — at least in the short run.

Contrast the adoption of Sarbanes-Oxley to combat corporate misconduct with Dean Partlett's proposal for using the tort system to address problems arising from a (possible) failing of confidence.²⁴ Sarbanes-Oxley evidences just what might happen if reformers opt for a legislative response to the problem of maintaining the confidence in the genetic area. While many of Sarbanes-Oxley's provisions represent worthwhile improvements in the corporate governance system, I suspect that on the whole it is bad legislation replete with provisions that are likely to do considerable harm. Let me provide two examples.

The first, in section 307, mandated that the SEC issue rules "in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission."²⁵ Section 307 goes on to require the SEC to adopt rules requiring attorneys to report material violations of securities laws and violations of fiduciary duties to designated parties within the corporation.²⁶ That Congress would attempt to regulate — or even order the SEC to regulate — the professional ethics of attorneys — a matter traditionally left to the states — was

20. *E.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 903, 116 Stat. 805 (codified as amended at 18 U.S.C. §§ 1341, 1343); *Id.* § 906, 116 Stat. 806 (codified as amended at 18 U.S.C. 1350).

21. *Id.* § 302, 116 Stat. 778 (codified as amended at 15 U.S.C. § 7241).

22. *Id.* § 301, 116 Stat. 775 (codified at 15 U.S.C. § 78j-1(m)). The new audit committee rules require that all members of the audit committee be independent directors. The SEC issued proposed rules for audit committees. *See* Standards Relating to Listed Company Audit Committees, Sarbanes-Oxley Act, Release Nos. 33-8173, 34-47137, 68 Fed. Reg. 2638 (proposed Jan. 17, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249, 274).

23. Sarbanes-Oxley Act, Pub. L. No. 107-204 § 407(c), 116 Stat. 790 (codified as amended at 15 U.S.C. § 7265(c)). For a general discussion of the new provision, see Steve Seidenberg, *Compliance Alert: Companies Across the Board Are Re-Examining Their Ethics Policies*, NAT'L L.J., Aug. 26, 2002, at A14.

24. I write "possible" for I know of no evidence to date that suggests that individuals have shied away from genetic testing because they lack faith that medical personnel will keep their genetic information confidential.

25. Sarbanes-Oxley Act, Pub. L. No. 107-204 § 307, 116 Stat. 784 (codified as amended at 15 U.S.C. § 7245).

26. *Id.*

itself quite controversial. It was particularly troublesome that the new rules were to establish standards for disclosure of confidential information. Not surprisingly, the SEC's proposed rules,²⁷ which contained so-called "noisy exit" provisions, set off a veritable firestorm.²⁸

The SEC has since pulled back on its most controversial provisions, including the noisy exit provisions,²⁹ but it is instructive to consider how analogous the issue it confronted is to one that a legislature would face if it attempted to fashion rules regulating the release of genetic information. Unlike the SEC, most legislative bodies would not have access to the resources the SEC possesses in fashioning its rules. Moreover, the legislative process is far more abrupt than the SEC's rule-making process. Legislators rarely have the opportunity to air proposed legislation to the intensive comment and debate process that characterizes SEC rule-making. It is not hard to imagine that had Congress proposed the SEC's noisy exit rules, those rules — good or bad — would now be law.

The second example is section 402 of Sarbanes-Oxley, which bars companies from making personal loans to any director or executive officer.³⁰ Section 402's history illustrates the strange paths legislation may take. It began as a provision that simply would have required the SEC to adopt rules to require disclosure of loans to the company's directors and officers. On the Senate floor, the disclosure provision was deleted and an absolute bar enacted. Just why the change occurred is unclear.³¹

The new provision is apparently intended to curb the excesses that were coming to light as Sarbanes-Oxley was working its way through Congress. Its impact, however, has been felt in a number of areas that do not raise the problems that concerned Congress. For example, some companies have read the new provisions as barring even advancing corporate directors and executive officers legitimate travel expenses. That hardly seems the stuff of breach of fiduciary duty!

27. See Standards of Professional Conduct for Attorneys, Sarbanes-Oxley Act, Release No. 33-8150, 68 Fed. Reg. 6296 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205); Standards of Professional Conduct for Attorneys, Sarbanes-Oxley Act, Release No. 34-46,868, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205).

28. Most practicing lawyers opposed the proposed rules. Most law professors, on the other hand, supported the proposed rules. For the complete text of comments, see Comments to Proposed Rule 33-8150 at <http://www.sec.gov/rules/proposed/33-8150.htm>.

29. See Standards of Professional Conduct for Attorneys, Sarbanes-Oxley Act, Release Nos. 33-8186, 34-47282, 68 Fed. Reg. 6324 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 249).

30. Sarbanes-Oxley Act, Pub. L. No. 107-204 § 402, 116 Stat. 788, amending Section 13 of the Securities Exchange Act.

31. It is interesting to note that most state legislatures have repealed provisions that barred, or restarted the availability of, loans to corporate directors. See, e.g., DEL. CODE ANN. tit. 8, § 143 (2001) (authorizing corporate loans to corporate officers and other employees).

My point — let me emphasize — is not that Sarbanes-Oxley is all bad or that federal legislative response to the Enron debacle was not warranted. Indeed, good arguments can be made on both sides. Now that it has become law, what is important is that Sarbanes-Oxley is likely to control fiduciary duty in publicly-traded corporations for a long time.³² Congressional attention has moved on to other matters. The sunk costs that concern Dean Partlett are likely to have been realized. Even the pressure release valve provided by the SEC's rule-making procedures is unlikely to defuse Sarbanes-Oxley, at least in the near term. None of the insights that might be gained from the incremental system advocated by Dean Partlett are likely to be realized.³³

V. CONCLUSION

As all of the papers in this symposium make clear, the mapping of the human genome promises enormous advances in knowledge about the human condition. At the same time, the genome project will give rise to many complex, often seemingly intractable, legal issues. There is a temptation when faced with such dramatic developments to turn away from tried and true methods for resolving problems in favor of what appear to be modern methods. The allure of legislation as a solution to complex problems has gained momentum throughout the past century, especially in this country. It is not surprising then, that many commentators have urged adoption of legislation to address the problems associated with the spread of genomic information.

In his paper, Dean Partlett makes a compelling argument for not abandoning traditional tort methods for dealing with such issues. His argument is essentially a brief on behalf of the process of tort adjudication. He demonstrates that existing doctrine — particularly the doctrine of a duty of confidentiality arising from a fiduciary relationship — may provide adequate tools for dealing with the emerging problems associated with misuse of genomic information. He cautions that the costs of a premature legislative response may be to freeze the development of the law in a misguided place.

The effectiveness of court-developed fiduciary principles has come under attack recently in a quite different field — the realm of corporate governance. The collapse of Enron and subsequent developments spurred a near universal cry for reform. The response — the enactment of the Sarbanes-Oxley Act of 2002 at the federal level —

32. Indeed, there is reason to believe that it will have a substantial impact on state fiduciary law as well.

33. Admittedly, the courts ultimately will be called upon to interpret both the provisions of the act and the SEC's rules. That decision-making will allow for some fine tuning of the rules, but the general approach will have been frozen as a result of one month of legislative fury!

provides an example of the risks of frenzied law making. It is probably too early to assess whether Sarbanes-Oxley will turn out to be an exemplar of insightful legislative behavior or a stunning example of an ill-fated eagerness to legislate. What is clear is that the law has moved dramatically and that it is unlikely to change soon.

Those who would legislate to regulate misuse of genetic information would do well to keep in mind the developments in American corporate law. I suspect that we in the corporate field would have fared better if we had moved more deliberately in fashioning a response to our crisis in fiduciary law. Those considering ways to address the potential misuse of genomic information would do well to ponder that result and take heed of Dean Partlett's admonition.