

Legal Update

by Toni Blackwood

the motives and future actions of their patients. Where genetic counselling is available, it is a service that attempts to guide couples in decisions that will minimize their risk of conceiving genetically damaged children. Some Catholic facilities that offer fertility services to married couples limit their interventions to the GIFT (gamete intrafallopian transfer) procedure, which has not been specifically condemned by the *Instruction*, and in fact, has been defended by a number of respected Catholic moralists. All institutions will continue to study and probe their pastoral responsibility in supporting the legitimate desire of infertile couples for children through high quality medical care, while observing the essential principles that call for respect for the dignity of human life, the unity and quality of marriage, and the respectful generation of new life within a stable, loving and nurturing family. Part of their service will include commitment to research into the causes and remedies for infertility that will in many cases reduce the need for technological assistance in reproduction.

Finally, the Vatican *Instruction* calls for civil legislation and public policy to assure that society is regulated according to the "fundamental norms of the moral law in matters concerning human rights, human life, and the institution of the family." While it is unlikely that many of the positions enunciated in the document will find their way into U.S. legislation and public policy, it is important that the general message of the Vatican be heard, and that its assumptions, insofar as they are shared by the general populace, be further explored, and that the document itself serve as a catalyst for continued dialogue on the morally grave issues surrounding the origins of human life.

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An Ohio court has held that a viable fetus is a "child" within the meaning of state child abuse statutes, thus enabling the state to prosecute for child abuse the heroin-addicted mother of a child born with drug withdrawal symptoms.

Baby Luciano was born with pronounced drug withdrawal symptoms, and the physician was informed that his mother had admitted to being a heroin addict who had used the drug intravenously within two weeks prior to delivery. Surveying the developing law regarding the extent to which an unborn child enjoys legal protection, the court noted that while the fetus is protected under property, probate and patrimony laws, it is not recognized as a "person" under the state's homicide statutes. The court declined to "award full 'person-child' rights at the time of viability," leaving the issues for "scholars." It confined its holding to the issue before it: whether the fetus could be considered a "child" under the child abuse statutes of Ohio. Borrowing reasoning from *Roe v. Wade*, 410 U.S. 113 (1973), the court determined that "at the time of viability, the state has an interest in the 'child's' care, protection, and physical and mental development." Therefore, the viable fetus is included within the definition of child under the statute, and the allegations of child abuse against the mother were considered to have been established.

In Re Ruiz, 500 N.E.2d 935 (Ohio Com. Pl. 1986).

A prisoner in New York suffering from AIDS has been denied participation in a family visitation program due to the disease.

The Auburn Correctional Facility in New York operates a "Family Reunion Program" which provides for conjugal visits between qualifying prisoners and their spouses in a trailer on the prison grounds. Joe Doe, not eligible for parole con-

sideration until January, 1988, married Jane Doe during his confinement at the facility. Having qualified for the program, he was permitted to spend 48 hours with his wife in November, 1985. The following month, he was diagnosed as having AIDS. His subsequent requests, in which he was joined by his wife, for permission to continue participation in the Family Reunion Program were denied by prison administrators because of his having a "communicable disease."

While noting that its decision was necessarily a "complete bar" to the petitioner's participation in the program due to the incurable nature of AIDS, the court considered that the exigencies of the disease dictated its decision. It considered the crucial point to be the fact that no guarantee exists "that the AIDS virus will not be transmitted. . . regardless of whether (the couple) engage(s) in sexual contact." Noting the probability of transmission only through contact with blood or semen, the court nevertheless admitted concern with the prison authorities' inability to adequately "scrutinize the hygiene of the facilities utilized." It considered the risk of transmission through casual contact "an unresolved question," one which the prison authorities in a state with a disproportionately high incidence of AIDS, dealing with an extremely high-risk prison population, could not afford to answer incorrectly. With a note that the conjugal visit is a privilege and not a marital right, the court refused the petition. A state appeals court affirmed.

Doe v. Coughlin, 132 Misc. 2d 709, 505 N.Y.S.2d 534 (N.Y. Sup. Ct. 1986), **affirmed**, 509 N.Y.S.2d 209 (N.Y. App. Div. 1986).

An ALS patient's right to care by familiar people in a familiar place has been held to outweigh the hospital's interest in determining the conditions of care in the institution.

Beverly Requena was admitted to Riverside Hospital in Boonton, New Jersey, in April, 1985, just after a diagnosis of amyotrophic lateral sclerosis (ALS). She has been on a respirator ever since. That fall, Riverside and St. Clare's Hospital merged into a new entity, run by an order of Roman Catholic sisters. When Mrs. Requena decided that she would refuse to accept feeding by artificial means after her ability to swallow was gone but refused to leave the hospital despite the hospital's policy of requiring such feeding, St. Clare's/Riverside brought suit to have her removed.

The court first detailed Mrs. Requena's condition: fully conscious and alert but unable to move any part of her body except facial muscles. Her decision to refuse artificial feeding was one of long standing, carefully considered, and was accepted by her treating physicians and family. While the treatment she desired was available at another nearby facility, she did not want to suffer the emotional upset of leaving the staff in whom she had trust and affection.

Balanced against these concerns were the staff's right to refuse to participate in Mrs. Requena's requested treatment and the stress they would experience in being forced to do so. Noting that the staff were strong, healthy people who could withstand the situation, while their patient assuredly would not, the court determined simply that it was "fairer" to ask them to give than to ask their patient.

The court presented a sensitive, moving discussion of the conflicting rights and concerns in this case. It distinguished the case from the abortion issue and from suicide. It distinguished artificial feeding from "medical treatment." It made a case for including the treating physician in ethical policy-making decisions and appealed to hospital authorities to withhold a judgmental attitude in their care of "this most needful sister of ours."

In Re Requena, 517 A.2d 886 (N.J. Super. Ch. 1986)

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November 20, 1985) The Board must also submit an annual report to Congress. The report, in addition to identifying what issues were studied, will identify "areas, programs, and practices of medicine and biomedical and behavioral research which have significant ethical implications and which would be appropriate subjects for study." (ibid.)

Several issues have been given priority on the Board's agenda by the law itself. The first item on the agenda is a report on research and developments in genetic engineering (including developments in recombinant DNA technology) which have implications for human genetic engineering. Next on the agenda is fetal research. Fetal research is currently severely restricted. There is, however, a provision that allows for modifying or waiving specific requirements under special conditions. (Title 45, Code of Federal Regulations, Part 46.211) The charge to the Biomedical Ethics Board is to study the nature, advisability, and biomedical and ethical implications of exercising any waiver of the risk standard. And the risk standard that is to be considered by the Board is that of "minimum risk". ("Minimum risk" means risks no greater in probability and magnitude than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.)

One could reasonably speculate that other issues should be looked at by the Board. For example, recent events will force us to consider issues of reproductive technologies. The Baby M case of surrogate motherhood and the Vatican's recent "Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation" both dramatically bring these concerns into public discussion. A gamut of opinions, stances, uncertainties and confusions is being unleashed. It would seem to be an entirely appropriate matter for the Board to consider. But any addition to the agenda must be approved by the entire Board. As of this writing, the Board has not met to set agenda.

There is one more crucial aspect to the law establishing the Board. That aspect is the Biomedical Ethics Advisory Committee, which will really be the working arm of the Board. It is the Committee that will conduct the studies and make the reports legally required of the Board. The Committee may also hold whatever hearings and take whatever testimony it considers appropriate to carry out its assignments.

"The first item on the agenda is . . . genetic engineering."

The Advisory Committee will be composed of fourteen members from outside the federal government. Specifically, there will be four members from biomedical or behavioral research, three from health care providers, five from fields as ethics, law, humanities, health administration, public affairs, etc., and two "laymen" who have no particular expertise, but who in some sense represent the general citizenry. All these persons should be distinguished in their fields. It is not that only "distinguished" persons can fruitfully deliberate about these issues, but it is important that those who are representatively doing so be widely known and trusted as thinkers and statesmen in their respective disciplines. These fourteen will be selected by the members of the Board from a slate of nominees also generated by the Board members.

Current Status

The members of the Board, in accord with the law, are six senators and six representatives, and their numbers are evenly divided between the two parties. The Board selects a chairman and a vice chairman from among its members at the beginning of each Congress. Furthermore, the chairmanship and vice chairmanship