

LAW & HEALTH CARE

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Is The Practice of Health Law Changing?

L&HCP Conducts Study of Health Law Attorneys

by Janet Heald, 3D

It is not surprising that the practice of health care law has changed substantially over the last decade. As the health care system changes, pertinent laws must adapt on a parallel track. No longer is care provided on solely a fee-for-service basis. Managed care is becoming more prevalent every day and the relationships between providers, consumers and health care institutions are growing increasingly more complex.

Today's health care attorneys, for example, need to have knowledge of very specific areas of law such as ERISA, third party reimbursement and the credentialing of managed care panels.

The Law & Health Care Program recently conducted a detailed survey of health law attorneys in an effort to assess the current status of health care law in the Baltimore/Washington D.C. area. To get an accurate picture of the field, attorneys were asked: what issues do health law attorneys encounter most frequently? In what types of practices are these lawyers working?

From the Director

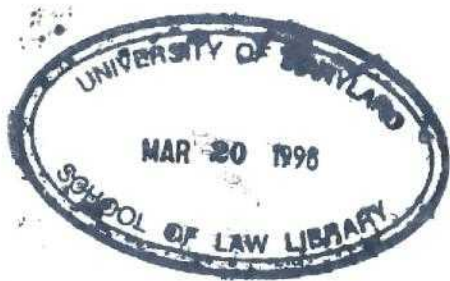
The theme of this issue of the Law & Health Care Program Newsletter is change—how we have incorporated the changes occurring in the field of health law into our Program offerings and our faculty research. Inside are articles on our new *Journal of Health Care Law & Policy*, as well as our recently established *Concentration in Health Law*. Both are valuable additions to the L&HCP and both offer our students yet another resource to prepare them for the "real world" of health law practice. Dolly's birth and the looming possibility of human cloning, will be sure to change a number of aspects of the practice of health law—inside is an excerpt from a paper I presented on human cloning.

We hope you enjoy the issue and have an enjoyable and productive summer!

Karen Rothenberg

One thing was made clear by the survey: attorneys today tend to focus their respective practices on narrower areas in the field of health care law. Ten years ago such specialization was not quite as common, as revealed by a similar survey, the results of which were published in July of 1988.

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Is Health Law Changing?

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L&HCP Professor Diane Hoffmann conducted that survey which was similar to the one analyzed here. Comparing the results of the 1988 survey with the results of the recent survey helps to illustrate the changes which have occurred in the field of health law over the last decade.

The 1996 survey was sent to approximately 800 attorneys, 165 of whom responded, totaling a response rate of 20%. While we can't draw definitive conclusions from the results of the survey, the findings confirm trends that we have noted through our experience and those of our graduates.

The names of the attorneys surveyed were obtained from Health Law Sections of the Maryland and Wash-

ington, D.C. Bars. Of the attorneys who responded, 108 (65%) work in the Washington D.C. area, and 53 (32%) work in and around Baltimore. The other 4 respondents (3%) either did not indicate or do not fit into either category. The 1988 health law survey garnered a response set of 90 attorneys, representative of 46% of the individuals to whom the survey was sent.

The respondents were grouped into five categories: (1) attorneys working in the office of the general counsel (including hospitals, HMOs, insurance companies and research facilities), (2) public interest, (3) government, (4) small to medium firms (40 attorneys or fewer), (5) large firms (over 40 attorneys). It was interesting to note that attorneys in the various categories of practices confronted very different types of health law issues.

Of the respondents who worked in the Baltimore area, 17 (32%) worked in general counsel positions, 1 (2%) worked in public interest, 5 (9%) worked in the government, 18 (36%) worked in small/medium-sized firms and 11 (20%) worked in large firms. Of those who worked in the Washington D.C. area, 17 (15%) worked in general counsel positions, 5 (5%) worked in public interest, 8 (7%) worked in the government, 33 (30%) worked in small/medium-sized firms and 43 (39%) worked in large firms. Respondents were given a list of specific health-related topics and asked to identify whether their practices involved each issue frequently, sometimes or rarely.

General Counsel

Baltimore attorneys working as general counsel most often worked on corporate organization and contracts issues. As for general counsel attorneys from the Washington, D.C. area, topics most often confronted included health insurance issues such as reimbursement and coverage. The 1988 survey indicated that, at that time, attorneys working in general counsel positions most often dealt with

patient issues such as informed consent, right to withhold treatment and AIDS related issues.

Public Interest

As there was only one Baltimore attorney working in public interest, the results cannot be taken as representative. The respondents from the Washington, D.C. area indicated that they most often worked on health insurance reimbursement and coverage. The 1988 survey indicated that public interest attorneys at that time most frequently faced policy-related issues.

Government

Of the respondents from Baltimore, government attorneys indicated they dealt most frequently with managed care issues, such as utilization review, as well as health insurance reimbursement. The attorneys in Washington D.C. responded that they often confronted regulatory compliance questions and health insurance reimbursement issues.

Small/Medium Firms

For Baltimore attorneys, the issue most often seen was corporate organization. In Washington D.C. however, the issues listed as most frequently confronted included regulatory compliance issues and health insurance reimbursement. As for the result of the 1988 survey, attorneys working in small/medium sized firms indicated that malpractice cases were common, as well as patient related issues.

Large Firms

Respondents from Baltimore noted that topics dealt with most frequently included licensing and certification, regulatory compliance issues and health insurance reimbursement. Attorneys in Washington D.C. indicated that corporate issues and regulatory compliance issues were often faced. Back in 1988, respon-

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forwarded to the above address.

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L&HCP Spring Conference: Conducting Medical Research on the Decisionally Impaired

Can someone who is decisionally impaired legally consent to participation in a research proposal to test a new drug for their medical condition? Should surrogates or proxies have the authority to consent for them, and if yes, should limits be placed on that authority? What should those limits be?

The L&HCP and the Attorney General's Office of the State of Maryland co-sponsored a conference on May 28, 1997, "Conducting Medical Research on the Decisionally Impaired," as part of an effort to explore these questions.

The conference was motivated by the formation of a task force established by the Attorney General's Office to look into these issues and determine whether new legislation was needed to provide guidelines for research in this area. In 1995, the Attorney General's Office established a "Working Group" of fifteen lawyers, academic and

government researchers and advocates for the mentally ill. The group formulated preliminary recommendations on conducting research on the decisionally impaired and may seek to have legislation introduced on the topic.

The issue has also provoked controversy in at least one other state. In the recent case of *T.D. v. New York State Office of Mental Health*, regulations governing psychiatric experiments on children and the mentally ill were found to be invalid and unenforceable. On appeal, the court affirmed the lower court decision, struck down the regulations, and forced the cancellation of at least ten private and state-funded research projects.

Drs. Jonathan D. Moreno and James F. Childress, noted experts in the fields of bioethics and biomedical ethics, and Clarence Sundram, founding chairman of the New York State Commission on Quality of Care for the Mentally Disabled were among the speakers at

the conference, as well as other experts in the fields of medical research, biotechnology, ethics, and advocates for the decisionally impaired.

Conference participants:

- discussed the current status of research on the decisionally impaired and the impediments to such research;
- identified areas where there is insufficient protection of research subjects; and
- focused attention on Maryland's effort to provide guidelines for the conduct of such research and obtain feedback on the Maryland Working Group proposal.

Selected conference presentations will be included in the first symposium issue of the *Journal of Health Care Law & Policy* to be published in December 1997 (see article on page 6).

Is Health Law Changing?

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dents working for large firms tended to work with third party reimbursement, certificates of need and employee health benefits, as well as corporate organization issues.

The results of this survey indicate some very definite trends in the area of health care law. In 1996, issues most often seen by health care attorneys included: health insurance reimbursement, corporate organization and regulatory compliance issues. It is worth noting that in 1988, attorneys more frequently dealt with informed consent, confidentiality of medical records and medical malpractice.

What does all this mean for the Law & Health Care Program?

Program Director, Professor Karen Rothenberg responds, "We have always tried to align Program course offerings with the "real world" of health law. Some of the courses we have recently offered include *Insurance Law, Antitrust and Health Care Law, Biotechnology and the Law, The Health Law Practice Workshop, Critical Issues in Health Care*, and a new seminar, *Legal Issues in Managed Care* to be taught by James F. Doherty, Jr. of the Johns Hopkins Health System Corporation. The Program also encourages students to

take advantage of health law practicum and externship opportunities, where students can actually work ten hours a week or more with practicing health attorneys."

Rothenberg adds, "We will continue to review the survey data and consider its implications when making future changes to our Program, but one immediate realization we have come to is that the L&HCP must remain both flexible and responsive to the changing patterns in health care law."

L&HCP Faculty Notes . . .

PROFESSOR KAREN ROTHENBERG

Publications:

"Genetic Information and the Workplace: Legislative Approaches and Policy Challenges," 275 *Science* 1755 (lead author, co-authored with the Committee on Genetic Information and the Workplace of the National Action Plan on Breast Cancer (NAPBC)) (1997)

"Breast Cancer, The Genetic 'Quick Fix,' and the Jewish Community," 7 *Health Matrix* 97 (1997)

"Genetic Discrimination and Health Insurance: A Call for Legislative Action," 52 *Journal of the American Medical Women's Association* 43 (1997)

"Physician-Assisted Suicide in Context: Constitutional, Regulatory, and Professional Challenges," (Introduction, with B. Lo & M. Vasko) 24 *Journal of Law, Medicine and Ethics* 181 (1996)

Selected Presentations:

"Ethical and Policy Issues Raised by Human Cloning," UNDP/UNFPA/WHO/World Bank Special Programme of Research, Development and Research Training in Human Reproduction, Geneva, SW (1997)

"Genetic Discrimination & Health Insurance: State Perspectives," The Program of Dialogue Between Science and Religion, American Association for the Advancement of Science, Washington, D.C. (1997)

"Predictive Genetic Testing: Ethical, Legal and Social Challenges," American Society of Preventive Oncology Annual Meeting, New Orleans, LA (1997)

"Scientific Discoveries in Cloning: Challenges for Public Policy," Testimony before the Subcommittee on Public Health and Safety of the Committee on Labor and Human Resources, U.S. Senate, Washington, D.C. (1997)

"Familial & Societal Risks of Genetic Information: Ethical, Legal & Policy Issues," 4th Joint Clinical Genetics Meeting, Ft. Lauderdale, Florida (1997)

Testimony before the National Committee on Vital and Health Statistics, Subcommittee on Privacy and Confidentiality, Washington, D.C. (1997)

"Understanding the Genetics of Breast Cancer: The Implications of the Discovery of the BRCA-1 and BRCA-2 Genetic Mutations on the Jewish Community," The American Jewish Congress, National Capital Region, Chevy Chase, Maryland (1997)

"From *Buck v. Bell* to the BRCA1 Gene: Predictions and Precautions," Washington University Schools of Law and Medicine and The American Jewish Congress, 19th Annual Constitutional Conference, St. Louis, Missouri (1997)

ASSISTANT PROFESSOR

DIANE HOFFMANN

Publications:

"Emergency Care and Managed Care — A Dangerous Combination," 72 *Washington Law Review* 315 (1997)

"How Close is Close Enough? Family Relationships and Attitudes Towards Advance Directives and Life Sustaining Treatment," (with S.I. Zimmerman & C. Tompkins) *Journal of Ethics, Law & Aging* (1997)

Book Review, reviewing Jonathan D. Moreno, *Deciding Together: Bioethics and Moral Consensus* (New York, NY: Oxford Univ. Press, 1995), *Journal of Ethics, Law & Aging* (1997)

Selected Presentations:

"Overview of State Laws Governing Research on the Decisionally Impaired," Conducting Medical Research on the

Decisionally Impaired Conference, University of Maryland School of Law, Baltimore, MD (1997)

"Legal and Ethical Issues in Genetics," (guest lecturer), University of Maryland School of Medicine, Baltimore, MD (1997)

"From Right to Refuse Treatment to Right to Receive Treatment," Washington County Hospital Ethics Committee (1997)

"Care At The End of Life," (panel member), and Nursing Home Interest Group (workshop leader), West Virginia Network of Ethics Committees Symposium, "Moving Beyond 'There's Nothing More We Can Do' To Providing Quality Care at the End of Life" Morgantown, W VA (1997)

"Mediating Bioethical Disagreements in Long Term Care," (mediator), ABA, Commission on Legal Problems of the Elderly, Dispute Resolution Demonstration Project, Washington, D.C. (1997)

Appointments:

Washington Area Bioethics Network, Board of Directors (1997)

University of Maryland Masters Program in Applied Ethics, Advisory Board (1997)

Commission on Bioethics, American Association of Homes & Services for the Aging (1996)

Associate Professor

DAVID A. HYMAN

Selected Presentations:

"Consumer Protection and Managed Care, Ethics in the Evolving Health Care Market," (guest lecturer), Johns Hopkins University School of Public Health, Baltimore, MD (1997)

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Faculty Notes

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"Patient Dumping: Lies, Damned Lies, and Anecdotes," The Tenth Anniversary of EMTALA: Legal and Policy Issues, Case Western Reserve University School of Law, Cleveland, OH (1997)

"Consumer Protection and Managed Care, Johns Hopkins University, Robert Wood Johnson Clinical Scholars Program, Baltimore, MD (1997)

"Managed Care and the Future of Psychiatry," University of New Mexico Dept. of Psychiatry Grand Rounds, Albuquerque, NM (1997)

"Managed Care and the Future of Emergency Medicine," Cook County Hospital Grand Rounds, Chicago, IL (1997)

"Consumer Protection (?) and Managed Care: Addressing Drive-By Deliveries and Restricted Access to Emergency Care," Institute of Government and Public Affairs, University of Illinois, Champaign, IL (1997) and University of Utah Law School, Salt Lake City, UT (1997)

Health Care Finance Seminar, (guest lecturer), University of Illinois Law School, Champaign, IL (1997)

"Lawyers and Insurers: The Struggle for Control and the Power to Regulate," (commentator), American Association of Law Schools Annual Meeting - Joint Program of Sections on Insurance Law and Professional Responsibility, Washington, D.C. (1997)

"Consumer Protection (?) and Managed Care," University of Maryland School of Dentistry, Baltimore, MD (1997) and Program in Medicine, Arts, and the Social Sciences," University of Chicago, Chicago, IL (1996)

"Consumer Protection (?), Managed Care, and the Emergency Department,"

George Mason University Law School, Faculty Workshop Series, Arlington, VA (1996) and MacLean Center for Clinical Medical Ethics, University of Chicago, Chicago, IL (1996)

"Achieving Quality in Managed Care: The Role of Law," Institute for Health Law, Loyola University Chicago School of Law, Chicago, IL (1996)

"Dumping EMTALA: Emergency Care in a Managed Care Anti-Dumping World," National Meeting on M.D./Ph.D. Education and Research in the Humanities and Social Sciences, Chicago, IL (1996)

"Ethics in the Evolving Health Care Market," (guest lecturer), Johns Hopkins University, School of Public Health, Baltimore, MD (1996)

VISITING ASSISTANT PROFESSOR JOAN O'SULLIVAN

Publications:

"New Guardianship Rules of Procedure," *The Elder Law Extra, Elder Law Section Newsletter*, Maryland State Bar Association, Winter (1997)

"What Should You Advise Older Clients about Medicare HMOs?" *Bar Bulletin*, Maryland State Bar Association (1997)

"Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice," (with Leviton, S., Weimer, D., Herr, S., Colbert, D., Deise, J., Reese, A., and Millemann, M.) 3 *Clinical Law Review* 109 (1996)

Selected Presentations:

"Guardianship After the New Rules," (panel member), Maryland Institute for Continuing Professional Education of Lawyers, Rockville, MD (1996) and Maryland Institute for Continuing Professional Education of Lawyers, Baltimore, MD (1997)

"The Comprehensive Geriatric Assessment," (with Baltimore Veteran's

Administration Medical Center Geriatric Evaluation Management Unit Team), GGEAR Geriatric Imperative Minimester, Baltimore, MD (1997)

"Health Care Decision Making: Legal and Ethical Issues," GGEAR Geriatric Imperative Minimester, Baltimore, MD (1997)

Report on Maryland Long Term Managed Care Committee, Maryland House of Delegates, Environmental Matters Committee (panel member), Annapolis, MD (1997)

"A Method for Teaching Geriatric Assessment within a Bio-Psych-Social-Legal Approach to Geriatric Care," (with Baltimore Veteran's Administration Medical Center Geriatric Evaluation Management Unit Team) Educational Leadership Conference, Association for Gerontology in Higher Education, Boston, MA (1997)

"Guardianships," Judicial Institute of Maryland, Crownsville, MD (1997)

"Who Decides When You Can't?" Senior Solutions Conference, Sheppard Pratt Conference Center, Towson, MD (1996)

"Legal and Financial Issues," Getting Through the Maze Caregiver's Conference, Alzheimer's Association, Greater Washington Chapter, La Plata, MD (1996)

"Family Decision Making under the Maryland Health Care Decisions Act," Baltimore County Interagency Professional Practice Group, Towson, MD (1996)

Program news . . .

The Journal of Health Care Law & Policy

The *Journal of Health Care Law & Policy* (JHCLP), a new law review for the interdisciplinary discussion of leading issues in the health law and health policy fields, will begin publication during the upcoming fall semester. The first issue, to be published in December 1997, will be a symposium issue generated by the L&HCP conference, "Conducting Medical Research on the Decisionally Impaired" (see article on page 2).

Professor Karen Rothenberg will serve as faculty editor and advisor for the Journal, which was established in partnership with the L&HCP. The Journal staff includes Editor-in-Chief, Carla McGregor, MPH, Managing Editor, Jean-Marie Sylla, Jr., Senior Articles Editor, Marilyn Levitt, and Executive Editor, Eric DeVito, CPA. The Journal editorial board is comprised of 23 members, and 20 new staff members will be added in the fall semester selected through a school-wide petitioning process.

The JHCLP will be written by legal

scholars, health law attorneys, policy makers and law students, and will compliment the philosophy of the Law & Health Care Program by addressing topics related to education and research on emerging medical, health policy and law-related issues.

A second JHCLP symposium issue will be published in the spring of 1998 and will be based on an academic workshop to be hosted by the L&HCP on October 8, 1997 on emerging issues raised by disclosure of genetic information. Alta R. Charo, Associate Professor of Law & Medical Ethics at the University of Wisconsin Law School and a member of the National Bioethics Advisory Commission will open the meeting by



The editorial staff of the Journal of Health Care Law & Policy

presenting the Rome lecture, an endowed lecture dedicated to the memory of activist and humanitarian Stuart Rome. Following Professor Charo's presentation, entitled "Forensic Fortune Telling: Genetic Essentialism and the Future of Law," experts from across the country will present their "works in progress."

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Program news . . .

Concentration in Health Law

Students graduating in May 1998 will be the first class to be formally recognized for completion of the Law & Health Care Program's *Concentration in Health Law*.

To be awarded this designation, students must earn 17 credits through the Program's three basic components—the classroom component (core courses, seminars and other health law courses), the experiential learning component (health law clinic, health law Cardin, externships, practicums and the *Health Law Practice Workshop*), and the research and writing component (satisfied by writing a substantial research paper on a topic related to health care law or editorial staff work for the new *Journal of Health Care Law & Policy*.)

The Law & Health Care Program at the University of Maryland School of Law has been in existence for over a decade. It was founded to provide specialized education for the attorney or health care professional who must deal with increasingly complex health law issues and who must consider those issues from both a legal and interdisciplinary perspective.

Since the Program's inception, professional interest in law & health care has continued to expand and Program courses are in high demand. In recent years the L&HCP has been consistently ranked as one of the top five health law specialty program in the *U.S. News & World Report* survey of the nation's best law schools.

Students completing the requirements for the *Concentration in Health Law* will be awarded a certificate denoting a level of expertise and specialization that will be recognized by the health law community throughout the country.

Concentration in Health Law Requirements

Classroom Component: (at least 6 credits required)	Credits
Core courses (required) - Health Care Law	2
Law & Medicine	2
Seminars and Courses - at least one health law seminar or one additional health law course as listed in the Law & Health Care Program (L&HCP) Course Offerings memo	2 or 3
Experiential Learning Component: (at least 3 credits required)*	
Health Law Clinic**	7 or 8
Health Law Cardin (Legal Theory and Practice)	3
Externship (up to 8 of the maximum 13 credits allowed for externships can be applied toward the required certificate credits)	8
Health Law Practicum	2
Health Law Practice Workshop (required when taking Health Law Practicum or Externship)	2
Research and Writing Component:	
Completion of a substantial research paper on a topic related to health care law. May be satisfied by writing prepared for a seminar or independent study in health law (i.e., research project, health law moot court, a health law writing competition), or the new <i>Journal of Health Care Law & Policy</i> . Up to 2 credits for researching and writing a paper (not written in conjunction with a seminar) may be used to satisfy the total credits required.	
Total Credits Required for Concentration	17***

* With special permission of the Director of the L&HCP, students who are unable to participate in any of the listed **Experiential Learning Component** options, may be able to satisfy this requirement through alternative means.

** May also be satisfied by enrollment in the AIDS and Disability clinics.

*** Although neither Administrative Law nor Business Associations can be used to satisfy the 6 credit Classroom Component requirement, up to 3 credits may be used to satisfy the total credit requirement.

Is Human Cloning Intrinsically Wrong?

by Karen Rothenberg, JD, MPA

Over the last few months, L&HCP Director, Karen Rothenberg has had several opportunities to address the legal, ethical and social implications of human cloning. Below are excerpts from her testimony before the U.S. Senate and from her presentation at the World Health Organization/World Bank Special Programme of Research, Development and Research Training in Human Reproduction held in Geneva, Switzerland.

Dr. Ian Wilmut's announcement that he had successfully cloned an adult mammal inspired ethicists, scientists, lawyers, theologians and journalists to create colorful scenarios in an effort to ethically fathom Dolly's significance. We have imagined cloning as (1) a foreign despot's technique for creating a master race; (2) a greedy entrepreneur's technique for producing "celebrity" embryos for sale; (3) a bereft parent's technique for replacing a dying child; (4) a desperate patient's technique for creating organs or tissue to harvest; and (5) a narcissist's technique for ensuring his immortality.

I suggest that we step away from some of these more fantastic scenarios and that we instead delve more deeply into the unique moral problems presented by cloning. Although prior innovations in reproductive and genetic technology have challenged our basic understanding of "natural" processes, unique features of adult cell cloning radically test three concepts basic to our humanness.

(1) **Interdependence:** Adult cell cloning requires only one progenitor. Theoretically, a child could be conceived and carried by one person. A woman could have one of her adult cells fused with one of her own unfertilized eggs from which the nucleus had been removed. The

resulting embryo could be implanted in her womb and carried to term.

This scenario is unique to adult cell cloning. It is disquieting because it undermines our concept of human beings as fundamentally interrelated, our concept of human interdependence. The fact that the propagation of the species takes two—whether in a test tube or a bedroom—humbles us because it means that practically and symbolically human survival is dependent upon human connectedness.

(2) **Indeterminateness:** In adult cell cloning, we may choose which adult cell to clone based on knowledge of the "expression" of that cell's genetic material in a living, breathing person. Unlike reproductive technology involving only embryos, the cloning of adult cells permits us to see a grown manifestation of the genetic material we are cloning. That knowledge makes genetic selection possible. It creates a choice as to whether to clone the genetic material of person A or person B, Mother Teresa or Madonna, Jesse Jackson or Jesse Helms.

Such choices are impossible to fathom—they undermine our concept of human beings as diverse and created with indeterminate genetic possibilities.

(3) **Individuality:** Adult cell cloning opens the possibility of creating an infinite number of genetically identical persons. Because the nucleus of every cell in a human body contains the same genetic material, this "raw material" is in infinite supply. Theoretically, the genetic material of any one person could be cloned virtually an infinite number of times.

While variations in gestational environment and upbringing ensure that the cloning of identical genetic material does not result in identical persons, the theoretical possibility of creating hundreds of genetically identical

humans is undermines our conception of a human being's individuality.

Given these distinctive features of adult cell cloning, a discussion of the ethical implications must make sense of the challenges these features make to our humanity, that is, to our sense of **interdependence, indeterminateness, and individuality**. Hopefully, we will be able to draw into focus the core ethical question: on what grounds is the potential benefit of a scientific innovation outweighed by its potential injury to our concept of what it means to be human? Beyond the hyperbole and fantastic scenarios, that is the ethical dilemma Dolly presents.

Various public policy questions emerge from the ethical challenge human cloning poses for our society:

- Fortunately, human cloning will not proceed for some time. The technique would require subjecting unconsenting humans to the unknown effects of "aged" DNA and risk of harm to future children. Nor is there any public support, even from the biotech industry, for moving forward with human cloning at this time. What are the appropriate public policy approaches regarding humans while the technology is just emerging in animals?

- Governments have formulated numerous policy responses to emergent reproductive technologies and genetic therapies. For example, the 1994 Report by NIH's Human Embryo Research Panel articulated ethical considerations to determine what types of research, including cloning, were unacceptable for federal funding. Also, Congress condemned as unethical a market for human organs and fetal tissue. What policy guidelines developed in these other contexts are applicable to cloning?

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IN THE HEALTH LAW CLINIC

The law school offers, as part of its regular curriculum, a clinical law program in which faculty members who are practicing attorneys supervise law students in the representation of actual clients. For those students with a general interest in health law, the clinic represents clients in cases involving health care for children, legal issues of the handicapped, mental illness, AIDS and the elderly.

by Joan O'Sullivan, JD

The moment in which a law student connects a legal theory learned from a book with an actual problem presented by a client is a wonderful teaching moment. The student may see the light when she realizes that a life estate with powers of alienation, a dry, confusing subject studied a year or two ago in property class, has relevance for her elderly client who wants her children to have her home after she dies, but not before. Or it might happen when the student realizes that a fine point learned in a criminal procedure course several semesters ago is a solid defense for his client accused of driving while intoxicated.

In the Health Law Clinic, those enlightening moments occurred in nursing home rooms this past semester. Instead of the traditional live client clinic, Professors Diane Hoffmann and Joan O'Sullivan taught a course called *Health Care for the Elderly Poor*, which combined a traditional seminar format with externship placements in the District of Columbia. This course was designed to be part of the law school's legal theory and practice menu. In those courses, traditional theoretical courses are integrated with a practice experience. They satisfy Maryland's requirement that all full time day students take at least one experiential course which serves the

poor during their law school careers.

Some of the students enrolled in *Health Care for the Elderly Poor* integrated substantive law involving nursing home regulation and elder abuse as they worked with the Washington, D. C., long term care ombudsman. Others applied information gleaned from lectures on Medicare, Medicaid and managed care to their duties at the National Senior Citizens' Law Center, under the supervision of Vicki Gottlich.

Students Carla McGregor and Janet Heald worked with Charles Marquardt, a D. C. ombudsman for long term care. Marquardt, formerly an attorney with the Legal Counsel for the Elderly, uses a practical, hands-on technique in his role as patient advocate. He believes in the direct approach—that is, going from room to room, or wheelchair to wheelchair, introducing himself to residents, and asking how they like the nursing home, how they are being treated, and if they have any complaints. He makes great use of the sniff test—using his sense of smell to detect unclean conditions, residents who have not been washed or changed, or residents whose pressure sores are being neglected.

At first, the law students had trouble connecting this approach to their roles as lawyers. After all, what did smell have to do with the law? Was this appropriate lawyerly behavior? In the long run, how did it help a person to report to the nurses station that she needed changing, and was it really necessary for a lawyer to do this? They were also put off by the hostile attitude such behavior engendered in

the staff. Why were they unfriendly and unhelpful? Were they hiding something? Why were some so uncooperative and others so forthcoming? It was all a bit bewildering and seemed far removed from the clean world of legal textbooks where problems had neat solutions provided by the appellate courts.

As time went on, however, the work's basis in law became clearer. For one student it happened when she encountered a frail elderly woman who was distraught because she had been summarily removed from her private room to a double room. Her room, where she had lived for two years, was her home, and she had been evicted without warning or a chance to object because the nursing home suddenly needed an isolation room. She had been placed with a roommate who had to be turned every two hours, and she was getting no rest. She exhibited "transfer trauma" in the flesh: she was angry, hurt, and distrustful. She said she felt she was going to die.

For the student, this was an enlightening moment. She remembered that the District of Columbia statute allows relocation to another room only for specified reasons, and that the resident has to be given oral and written notice at least seven days before the transfer, and that the resident has the right to a hearing. She knew that the nursing home had violated the woman's rights and that the resident had a valid complaint and law to back her up. She was ready to do battle.

However, a solution was not quite that simple, and the student got another lesson, one in attorney-client relationships. The client was uncertain about what she wanted to do. She waffled on whether to file a complaint or not. She

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Student Health Law Organization (SHLO) News

The Student Health Law Organization finished an active spring semester with a Health Law Reception, held on May 1, 1997, for members of the Health Law Section of the Maryland State Bar Association and a number of local judges. About seventy-five people attended the event, which was co-sponsored by the L&HCP and the Office of Career Services.

Earlier during the semester SHLO held two career-oriented events: a Career Fair attended by seventeen law

firms, government and public interest organizations who staffed booths and distributed information on their respective companies; and a Career Panel, during which four attorneys described the practice of health law from their various perspectives. The panelists included James F. Doherty, Jr., Johns Hopkins Health System; Edward Goodlander, Blue Cross/Blue Shield of Maryland; Carolyn Jacobs, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC; and Kathleen McDermott, U.S. Attorney's Office.

SHLO also sponsored a number of "brown bag" lunches during which representatives from a variety of legal and medical professions discussed the practice of health law within their specific organization.

SHLO officers for the 1997-98 academic year are: Chris Coffin, President; Dan Gaskill, Vice-President; Dan Alexander, Secretary; and Mike Imber, Treasurer.

Human Cloning

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- Prenatal genetic testing presents couples with difficult questions when serious genetic disorders are discovered in utero. Genetic testing may force a kind of "genetic accountability" on women and devalue the lives of people with disabilities. Cloning escalates the genetic screening and genetic selectivity now available. How does cloning fit within the continuum of genetic selectivity already in practice?

- Cloning presents particular ethical and policy dilemmas when combined with genetic engineering. Because cloning permits us to know a full grown "expression" of the genetic material, when combined with genetic engineering it allows us to "tinker" with perfecting a person to a degree not previously possible. How should policy decisions regarding adult cloning affect governmental policy regarding genetic engineering and enhancement?

- Adult cloning affects men and women differently. Theoretically,

men are not necessary to "conception" by cloning; women are. This fundamental reorientation of sex roles from procreation to replication has far reaching consequences for gender roles, and reproductive and parental rights. How should public policy take account of gender differences in how the cloning technique operates?

- Adult cell cloning upsets our notion of familial relationships. Creation of a child by cloning requires the contribution of DNA material, an unfertilized egg and a ready womb. Is there a father and if so, who should he be? By what criteria will we determine the claim of parental status of each of the contributors to the cloning process?

- Cloning may involve the use of a surrogate. In the United States, surrogacy is unregulated on the federal level and remains subject to a confusing patchwork of state statutes and contract principles. Given that the absence of uniform regulation of new reproductive technologies has resulted in such confusion, do the particular features of adult cloning call for governmental guidance?

- In addressing public health matters,

governments may choose to criminalize behavior or to subject it to a regulatory scheme, or both. If cloning is to be subject to governmental control, by what criteria would it decide what approach would be most effective?

- While governments can prohibit public funding in many areas of reproductive technology and human embryo research, private research and much clinical practice proceed without regulation. Unfortunately, prohibitions may result in an absence of monitoring the state of research and safeguarding the quality of clinical practice in the private arena. Does cloning present particular issues that require regulatory activity in the private sphere?

- Countries today operate within a global economy. Dr. Wilmot already has patented his technique for its commercial potential. Any solution one country adopts regarding adult cloning will have international implications. What mechanisms and models are present to work toward an international consensus on issues related to adult cloning?

Spotlight on . . .

HEALTH LAW PRACTICUMS AND EXTERNSHIPS: The Women's Legal Defense Fund

by Janet Russell, 3D

Despite having a graduate degree and work experience in the field of public health, I wasn't certain when I came back to school for a law degree that I wanted to practice health care law. I spent my first summer at the University of Maryland at Baltimore (UMAB) working for the Baltimore state's attorney's office and my second working for a Maryland appellate judge. I thought that an externship in the health law field would help me make a decision about health care law, and I settled on one that focused on managed care with the Women's Legal Defense Fund (WLDF) in Washington, D.C.

WLDF is an advocacy group concerned with women's economic opportunity and security, reproductive freedom and access to affordable, high-quality health care. The deputy director for Women's Health Programs—my supervising attorney—is a champion of women's interests in the fast-developing and heated debate now going on in Congress on how to address the dangers of the national move from fee-for-service to managed health care.

My experiences at WLDF have been varied and interesting. One of my tasks was to evaluate the standards developed by such bodies as the National Committee for Quality Assurance and the Joint Commission on Accreditation of Healthcare Organizations to determine whether accreditation provides meaningful information about the quality of care offered by approved managed care plans. In addition, my supervisor and I met with

congressional staffers and representatives of other advocacy organizations to address a range of women's health issues. From time to time I attended meetings designed to keep legislators and health care advocates abreast of pertinent research or pending legislation in the area of women's health and managed care. I also participated,



Janet Russell

with my supervisor, in strategy sessions held with like-minded advocates to promote a unified voice on issues of importance to women and families.

Occasionally, the externship brought me into heady company—I heard the First Lady speak at the White House in support of federal legislation sponsored by Representatives. DeLauro, Dingell, Roukema, and Senator Hollings, that would guarantee a minimum 48-hour hospital stay for women who have had a mastectomy. (Some managed care plans require women to leave the hospital hours after the surgery, while they are still groggy from the anesthesia.) Also in attendance were U.S. Health and Human Services Secretary Shalala, Senators Bryan, Ford, Hollings, and Kennedy, and representatives of groups working to advance the quality of women's health under

The Law & Health Care Program's Health Law Practicum Program provides an opportunity for students interested in health law to obtain credit by working for organizations and government agencies dealing with health care issues. Students spend 10 to 20 hours at their placement and additional hours throughout the semester in the classroom participating in a health law practice workshop. Placements have included the American Nurses Association; FDA; Johns Hopkins Hospital, Office of the General Counsel; Med-Chi of Maryland; Medlantic Healthcare Group; National Health Law Program; NIH; U.S. Senate Special Committee on Aging; University of Maryland Medical System, Office of the General Counsel; and the Office of the Attorney General, General Litigation Unit and Medicaid Fraud Unit.

The Program has also offered seven full semester externships—The National Health Law Program externship in Washington, D.C.; The University of Maryland externship, located in University Hospital's General Counsel's office; Blue Cross/Blue Shield of Maryland (BCBSM), The Federal Trade Commission, The Health Care Access and Cost Commission; the NIH General Counsel's Office; and the Women's Legal Defense Fund in Washington, D.C.

managed care.

I was also present for the Senate vote on the joint resolution to release international family planning funds, and was there when Senator Leahy and Vice-President Gore thanked the advocates for their efforts in effecting release of the funds.

As much as I have enjoyed the excitement of participating in these newsworthy events, what I have most appreciated is working closely with an effective attorney advocate. Whatever direction my career takes, I am sure my externship experience will stand me in good stead.

In The Health Law Clinic
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was hesitant about returning to her old room, because she was afraid they would just move her again. Without the resident's consent, the law student could not make her arguments. She listened to her client, counseled her, and left at the end of the day with a new appreciation for the limits of the law and the concept of client centered decision making.

Another student had a similar experience when she discovered severe violations of nursing home regulations in a case. The resident, a wheelchair bound woman in her seventies, had developed a reputation for being disruptive and difficult to handle. She had been transferred from one nursing home to another, but finally found one that she liked, and for good reason: it had the most liberal smoking rules. However, she had been hospitalized in a psychiatric ward after an angry

outburst against the nursing home staff, and the nursing home had refused to take her back when she was ready for discharge, saying that they had no beds. Although the law requires that she be given the first available bed, the nursing home had avoided doing this, and she had been left in the psych ward for more than two months. There, she was being tricked into taking psychotropic drugs by being told they were vitamins. The student identified many violations of rights both by the nursing home and the psychiatric hospital, but the client was not concerned about them. Her goal was clear: she wanted to be back in the nursing home where she could smoke. She did not particularly care about filing complaints about the violations or suing for abuse of her rights. In fact, she told her student attorney, do not come back until she had news of the date of her return.

The case overwhelmingly convinced the student that the nursing home patients rights that she had studied in

class had relevance and practical applications to this woman's situation. However, she also learned it is not the lawyer's role to right every legal wrong, and lawyers must not let their quest for justice interfere with their quest to achieve their client's goal. She learned that it is up to the client to decide how the lawyer uses the power of the law, even a seemingly powerless client in a psychiatric ward in a wheelchair.

As always, our clinic clients teach health law to our students in ways that we professional teachers can only aspire to.

LAW & HEALTH CARE PROGRAM

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