Collection: Galebach, Stephen: Files
Folder: Abortion-AUL Program [Wrongful Life Issue]
Box: OA 11299

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAN KENDRICK; REV. ROBERT E. VAUGHN; REV. LAWRENCE W. BUXTON; DR. EMMETT W. COCKE, JR.; SHIRLEY PEDLER; REV. HOMER A. GODDARD and THE AMERICAN JEWISH CONGRESS, Plaintiffs, v. MARGARET HECKLER, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. 83-3175

MOTION OF AMERICANS UNITED FOR LIFE, INC. TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PLANTIFFS' MOTION FOR SUMMARY JUDGMENT

Americans United for Life, Inc. (AUL) respectfully moves this court for permission to file the attached brief as amicus curiae. In support of this motion, AUL refers the court to its memorandum of points and authorities in support of this motion and says that:

1. AUL is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of AUL is located in Chicago, Illinois.

2. The Legal Defense Fund of AUL is the legal arm of the prolife movement. It has submitted amicus briefs to numerous courts to defend the constitutionality of challenged abortion laws, including several before the U.S. Supreme Court. It has represented defendant-intervenors in a number of

such cases, including Harris v. McRae, 448 U.S. 297 (1980), and Zbaraz v. Williams, 448 U.S. 358 (1980). The Harris case dealt with establishment and free exercise of religion issues in the context of abortion, matters highly relevant to this case.

3. AUL believes this court will benefit from its knowledge of abortion, constitutonal law related to it, and the particular issues before this court and that granting leave to AUL to appear as amicus curiae is in the interest of justice.

Respectfully sumbitted,

Mari Anne T. Hamilton
One Stockton Rd.
Silver Spring, MD 20901
Attorney for Amicus Curiae,
Americans United for Life

Of counsel:

Edward R. Grant
Maura K. Quinlan
Thomas J. Balch

AUL Legal Defense Fund
230 N. Michigan Ave. #915
Chicago, IL 60601
312/263-5029

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAN KENDRICK; REV. ROBERT E. VAUGHN; REV. LAWRENCE W. BUXTON; DR. EMMETT W. COCKE, JR.; SHIRLEY PEDLER; REV. HOMER A. GODDARD and THE AMERICAN JEWISH CONGRESS, Plaintiffs, v. MARGARET HECKLER, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. 83-3175

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF THE MOTION OF AMERICANS UNITED FOR LIFE, INC. TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The ultimate issue in this case is the constitutionality of the Adolescent Family Life Act, 42 U.S.C. §§3002-3002(10) (1981) and grants made thereunder. That issue is dependent on the construction of the religion clauses of the First Amendment as they pertain to government funding of programs that encourage alternatives to abortion.

The proposed amicus is well-qualifed to advise the court on that issue. AUL is knowledgeable about constitutional issues relevant to abortion; it operates the legal defense fund of the prolife community. AUL has been actively involved in the efforts of prolife groups to draft and defend statutes that encourage alternatives to abortion. AUL is accountable to a large constituency of prolife groups, and can represent their views to this court.

AUL is particularly qualified to provide insight into the key issues of this litigation, since it briefed and argued abortion related Establishment and Free Exercise questions at the district, appellate and Supreme Court level in Harris v. McRae, 448 U.S. 297 (1980).

Acceptance of AUL's amicus brief is within the sound discretion of the court. Strasser v. Doorley, 432 F.2d 567,599 (1st Cir. 1979). Granting leave will afford the court a view of the issues at hand by an organization which speaks for the prolife movement, one of the groups which will be most affected by this court's decision. It will prejudice neither the defendants nor the plantiffs and will help to ensure an informed decision by the court.

Respectfully submitted,

Mari Anne T. Hamilton
One Stockton Rd.
Silver Spring, MD 20901
Attorney for Amicus Curiae,
Americans United for Life

Of counsel:

Edward R. Grant
Maura K. Quinlan
Thomas J. Balch

AUL Legal Defense Fund
230 N. Michigan Ave. #915
Chicago, IL 60601
312/263-5029

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAN KENDRICK; REV. ROBERT E. VAUGHN; REV. LAWRENCE W. BUXTON; DR. EMMETT W. COCKE, JR.; SHIRLEY PEDLER; REV. HOMER A. GODDARD and THE AMERICAN JEWISH CONGRESS, Plaintiffs, v. MARGARET HECKLER, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. 83-3175

BRIEF OF AMICUS CURIAE,
AMERICANS UNITED FOR LIFE, INC.,
IN OPPOSITION TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

I.

STATEMENT OF THE CASE

This is an action brought by a number of clergymembers and taxpayers, challenging the constitutionality of the Adolescent Family Life Act, ("AFLA" or "the Act"), 42 U.S.C. §§300z-300(z)(10)(1981) as violative of the Free Exercise and Establishment Clauses of the United States Constitution. Plaintiffs challenge the Act both on its face and as applied. Plaintiffs' prayer for relief seeks, alternatively, an order declaring the Act unconstitutional in its entirety, an order declaring that grants to seven of the over 50 participants in AFLA pro-

grams are unconstitutional and enjoining issuance of further grants to these agencies, and/or an order enjoining defendants from disbursing funds in violation of the Establishment Clause of the First Amendment.

Plaintiffs have filed a Motion for Summary Judgment seeking invalidation of the entire Act. In support of defendant Heckler's opposition to this Motion, this brief shall focus on those aspects of the plaintiffs' constitutional challenge that pertain to the Act's restrictions on counseling for abortion. Amicus will respond to those aspects of plantiffs' summary judgment motion which seek to invalidate the AFLA on its face as an unconstitutional discrimination amongst various denominations, and as an unconstitutional establishment of religion. Acceptance of plaintiffs' facial challenge to the AFLA is not appropriate under the First Amendment, and would establish a principle permitting constitutional challenges to any government policy that coincides with one set of religious beliefs, while disagreeing with others. Hence, your amicus respectfully urges that the facial challenge to the AFLA be rejected by this Court.

II.

GOVERNMENTAL POLICIES FAVORING CHILDBIRTH OVER ABORTION DO NOT DISCRIMINATE AMONG RELIGIOUS BELIEFS OR FAVOR SOME RELIGIOUS BELIEFS OVER OTHERS

A constant theme in plaintiffs' motion for summary judgment is the contention that the AFLA violates the Establishment Clause by preferring some religious denominations over others on the issue of abortion. Larson v. Valente, 456 U.S. 228, 244 (1982). To support this contention, plaintiffs characterize abortion solely as "a religious issue which divides [religions] along denominational lines." Plaintiffs' Memorandum at 22.

While plantiffs are in one sense correct in their description of varying religious views on abortion, they make no account for the fact that abortion as a public policy issue has a predominantly secular character. At stake in abortion is a valid and important state interest in the protection of unborn life, an interest that becomes compelling during the latter phases of pregnancy. Roe v. Wade, 410 U.S. 113, 162-163 (1973). Pursuit of that interest through the legislative power of appropriation does not constitute an incorporation of religious dogma into law. Harris v. McRae, 448 U.S. 297, 320 (1980).

In evaluating plaintiffs' claims concerning the "religious divisiveness" of the abortion issue, it is instructive to obtain a fuller view of the various religious positions than that presented by the record created by the plaintiffs in this case. A comprehensive survey of positions on abortion taken by American denominations reveals a wide range of opinion on abortion, ranging from total opposition to permitting freedom of choice of the woman. The results of such a survey are tabulated in Appendix A to this Brief. However, although some religions clearly prohibit abortion as a sinful act, no denomination among those surveyed condemn the failure to obtain an abortion as a sinful act. The most "permissive" of the denominational teachings surveyed only go so far as to oppose any legal restrictions upon the right to obtain an abortion as secured in Roe v. Wade.

Where these denominations differ, therefore, from those which oppose abortion is over the preferred public policy towards abortion: In brief, they hold that abortion ought to be legal. Therefore, the divisions among denominations over abortion are no more or less significant for First Amendment purposes than the variations in denominational views towards a wide variety of public issues: health care, aid to education, defense

appropriations, housing, social welfare. Accordingly, a decision by government to enact a program discouraging abortion is no more a "discrimination" for or against any particular religion than would be a decision to decrease health care spending, broaden aid to education, increase defense spending or promote public housing.

The most telling consequence of plaintiffs' theory, however, would be upon long-standing government programs in population control which are far more extensive than the programs at issue. Under Title X of the Public Health Services Act, 42 U.S.C. §300-300(a)(8) (1970), the government has chosen to fund family planning services, including contraceptive services that are opposed by some denominations and supported by others. Due to their opposition to artificial contraception, Roman Catholic service agencies are not eligible for participation in Title X programs. Under the rule uged upon this Court by plaintiffs, such agencies could claim that Title X is unconstitutional because it discriminates along religious lines on the issue of appropriate means of family planning. As more fully articulated in section III of the brief, such a result is not mandated by the Establishment Clause of the First Amendment.

III.

THE ACT'S FUNDING OF PROGRAMS WHICH DO NOT COUNSEL OR REFER FOR ABORTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The plaintiffs' claim that the AFLA violates the establishment clause of the First Amendment by 1) pursuing an avowedly sectarian purpose; 2) having the primary effect of advancing religion; and 3) fostering excessive entanglement between government and religion. This attack thus

attempts to track the standard set forth in cases such as Lemon v. Kurtzman, 403 U.S. 602 (1971), and Lynch v. Donnelly, 104 S.Ct. 1355 (1984). However, plaintiffs have ignored another, critical line of jurisprudence that is directly relevant whenever legislation concerning abortion is challenged on Establishment Clause grounds: The mere fact of co-incidence between the legitimate secular purpose of protecting prenatal life, Roe v. Wade, 410 U.S. at 162-163, and the tenets of any one or a number of religious bodies does not invalidate legislative attempts to effectuate that secular purpose. Harris v. McRae, 448 U.S. at 319-320.

The Court in Harris perfunctorily, but unambiguously, rejected the claim that by enacting the Hyde Amendment restricting federal funding for abortion, Congress had contravened the Establishment Clause by "incorporat[ing] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." 448 U.S. at 319.

> Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another, . . . it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." . . . That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion.

Id. (citations omitted). The Supreme Court was "convinced" that the agreement of the Hyde Amendment's funding restrictions with the religious tenets of the Roman Catholic Church "does not, without more, contravene the Establishment Clause." Id.

Plaintiffs' challenge to the AFLA merits an identical response, for the challenge is premised on the argument that any government funding

program which favors childbirth over abortion amounts to illicit legislative adoption of a sectarian purpose. On the contrary, discouragement of abortion as a principle of public policy embodies an entirely secular purpose: the protection of human life. Enactments such as the AFLA "reflect a traditionalist view more accurately than any religious one, a view that was reflected in most state statutes of a generation ago. The purpose of the [AFLA] . . . would be the prevention of abortions, not an identifiably religious purpose, or one that became religious because, after 1973, the most vigorous spokesmen for it put their case in religious terms, and grounded them in religious reasons." McRae v. Califano, 491 F. Supp. 630, 741 (E.D.N.Y.) rev'd on other grounds sub nom. Harris v. McRae, 448 U.S. 297 (1980).

The presence of a distinctly secular purpose in the AFLA is not altered by the fact that some of the grantees are institutions of a religious nature. Several of these grantees, as health-care providers, are presumably eligible, assuming they meet the appropriate criteria, for a wide variety of federal and state programs of reimbursement for costs incurred in caring for the poor and elderly, and for the training of medical students. The general mission of these institutions to provide health care is no less "religious" in nature than their particularized concern for the health and well-being of unborn children and their mothers. A challenge on Establishment Clause grounds to the participation of such institutions in Medicare or Medicaid reimbursement programs based on the argument that the provision of health care advances the sectarian purposes of such institutions and also has the primary effect of advancing religion, would not be credible. Yet, because plaintiffs cannot accept the fact that the promotion of childbirth over abor-

tion has an avowedly secular purpose and a primary secular effect, they have launched just such a challenge to the AFLA. The response of Judge Dooling to the plaintiffs' Establishment Clause arguments in McRae is apt:

> The underlying difficulty with the plaintifs' argument that there is here no clearly secular legislative purpose . . . is that the argument treats Roe v. Wade as removing the issue from the field of secular action, and as forbiding reference to a purpose conceptually at war with Roe v. Wade as a secular purpose. . . .Roe v. Wade . . . does not make the enactments any less secular in their legislative purpose.

491 F.Supp. at 741.

Moreover, the fact that abortion is a more divisive issue among certain religious sects than, for instance, the provision of health care or common education, does not render invalid a governmental scheme designed to discourage abortion on either the "purpose" or "effect" prongs of the three-part Lemon test. A wide variety of government programs and policies are contrary to the tenets of any number of religious sects, and yet, are not unconstitutional. For example, although the Supreme Court has held that the Amish have a Free Exercise right not to be compelled by the state to have their children attend secondary schools, government encouragement of such action through provision of free secondary education and subsidized college education does not run afoul of the Establishment Clause. Likewise, government subsidization of the practice of medicine is not invalid because adherents of Christian Science do not avail themselves of such services, even where such government subsidization is provided directly to institutions operated by religions with contrary views on the morality of health care. Under plaintiffs' suggested rule, however, Christian Science institutions could claim that government medical programs hamper their ability to practice their religion, and denigrate their beliefs. Quakers could challenge defense spending on the

same grounds, and the Amish could do the same with regard to education spending. Such a view turns the First Amendment on its head and would render government in a pluralistic society impotent to enact policies which have any impact on matters of public morality.

Like the plaintiffs in McRae, plaintiffs here seek to gain mileage out of the controversy and divisiveness that characterizes the abortion issue. Yet, as the Supreme Court squarely held in McRae, the mere presence of religious divisiveness on a particular issue, even if that presence is as large as in the case of abortion, does not negate the existence of entirely secular aims which may only be accomplished by the government coming down firmly on one side of the controversy. Plaintiffs here have merely proved that there is a difference on the subject of abortion between the tenets of the Jewish and Methodist religions, on the one hand, and the Roman Catholic and Protestant fundamentalist religions on the other. They have not demonstrated, nor can they, that differences in opinion on abortion can only be traced to distinctions among religious doctrines, or that there is no secular basis for governmental opposition to abortion. Accordingly, plaintiffs fail to demonstrate that the AFLA lacks a secular purpose or has a primary secular effect.

Plaintiffs have likewise failed to demonstrate that enactment and enforcement of AFLA's restrictions on abortion counseling foster an excessive entanglement of government and religion. The argument on this point once again presupposes that abortion is an inherently sectarian issue, and that government sponsorship of an anti-abortion position through the appropriations process inherently entangles government and religion. In light of Harris v. McRae, this presupposition cannot stand; rather, the inquiry must be directed to whether the secular purpose of upholding the

traditional view against abortion can be carried out without excessively entangling the institutions of church and state, for "[t]he entanglement prong of the Lemon test is properly limited to institutional entanglement." Lynch v. Donnelly, 104 S.Ct. at 1367 (O'Connor, J., concurring).

In order to support its claims regarding entanglement, plaintiffs have attempted to deflect judicial attention from the AFLA program as a whole to focus on that small fraction of AFLA grantees that are primarily religious in nature. Out of 405 recipients of AFLA demonstration grants, plaintiffs identify 50 as being religious nature. Then, for purpose of the entanglemnt argument plaintiffs narrow their focus further, to a handful of these 50 recipients who are alleged to have used AFLA funds to disseminate a religious message. The evidence of such use of funds is scanty and conjectural, including such facts as the involvement of clerical personnel in some programs, and the presence of religious symbols in rooms where programs are conducted. Plaintiffs' Memorandum at 61-62, nos. 102-104.

Regardless of whether isolated incidents of funding under the Act may implicate an entanglement of church and state, a conclusion which your amicus does not concede, there is no justification on the record presented here for striking the entire Act on entanglement grounds. Keeping in mind that the cornerstone of the entanglement inquiry is institutional entanglement, there is no justification presented in plaintiffs' motion for invalidating AFLA funds to the overwhelming percentage of grantees which have no religious affiliation. The fact that such grantees, pursuant to the AFLA, cooperate with churches in their respective communities as part of the Act's commitment to broad-based community involvement, poses no more a threat of entanglement between chnurch and state than would a publicly-funded drug abuse or alcoholism prevention program that cooperated with

churches and other community resources.

Furthermore, any inquiry into possible entanglement arising from AFLA grants to religious-based institutions should avoid the kind of mechanical analysis proposed in plaintifs' summary judgment motion. See Plaintiffs' Memorandum at 78-81. Funding under AFLA is not directly comparable to state aid benefitting parochial schools because there is no compulsory attendance component in AFLA programs. Unlike parochial schools, which students attend full-time under compulsion of state law and parental authority, services provided by AFLA grantees to individual adolescents are voluntary and intermittent in nature. Therefore, the same potential for government support of religious indoctrination that was so influential in the school aid cases such as Lemon is not a factor under the AFLA. Moreover, the mere fact that religious personnel are sometimes involved in the delivery of services funded by AFLA is no more constitutionally suspect than the presence of religious personnel in health care institutions, social service agencies and colleges and universities that receive federal and state assistance. The "religious atmosphere" of AFLA grantees as pictured by plaintiffs is not different in quality from the atmosphere prevailing at many of these other types of publicly-funded institutions with religious affiliations.

What makes AFLA grantees different is that their message is one disapproving of abortion. Plaintiffs cannot accept that such a message is a traditional statement of public policy that "happens to coincide or harmonize with the tenets of some or all religions." McGowan v. Maryland, 360 U.S. 420, 442 (1961), and have attempted to convince this Court that the message is indubitably sectarian in nautre. Yet, the coincidence of public policy and religious beliefs in this matter no more creates an entanglement

of the institutions of church and state than does it render the purpose and effect of the AFLA primarily sectarian. Accordingly, plaitiffs' motion for summary judgment should be denied inasmuch as it alleges that the AFLA's prohibition of use of AFLA funds for abortion counseling constitutes an establishment of religion.

CONCLUSION

Plaintiffs in this case have attempted to exploit the differences existing among various religions on the issue of abortion to strike down a governmental program seeking to provide teenagers with responsible, medically-sound and supportive alternatives to abortion. Incident to the dramatic increase in pregnancy among unwed teenagers, which has occurred in spite of massive governmental and private programs in existence over the past decade under Title X of the Public Health Services Act is the frequent and tragic recourse of teenage women to abortion.

Your amicus has attempted to demonstrate that governmental opposition to such use of abortion procedures is neither inherently sectarian, nor constitutionally improper as a breach of the establishment clause. A law which chooses to promote traditional values in favor of childbirth cannot be successfully challenged on its face as an unconstitutional discrimination among religious beliefs, or as an establishment of religion. Such a law has an entirely secular effect and purpose: the protection of unborn life by the provision of responsible alternatives to teenaged mothers. Furthermore, the use of institutions with religious affiliations to carry out their policy is no more constitutionally suspect than government subsidization of medical care, child care and other services provided by reli-

gious agencies. Accordingly, we urge this Court to reject the notion that the coincidence of public policy with the tenets of any religion makes such a policy facially invalid under the First Amendment.

Respectfully sumbitted,

Mari Anne T. Hamilton
One Stockton Rd.
Silver Spring, MD 20901
Attorney for Amicus Curiae,
Americans United for Life

Of counsel:

Edward R. Grant
Maura K. Quinlan
Thomas J. Balch

AUL Legal Defense Fund
230 N. Michigan Ave. #915
Chicago, IL 60601
312/263-5029

POSITIONS ON ABORTION OF SELECTED AMERICAN DENOMINATIONS

(Source: Abortion, the Bible and the Church, T. Bosgra, 1980)

Opposed to Legal Abortion

Amish: Old Order Amish Church
Assemblies of God
Baptist: American Baptist Assn.
Baptist: Southern Baptist
Baptist: Conservative Baptist Ass'n of America
Brethren: Mennonite Brethren Churches
Christian Reformed Church
Churches of Christ
Church of Jesus Christ of Latter-Day Saints
Jehovah's Witnesses
Jewish: Rabbinical Alliance of America (Orthodox)
Jewish: Rabbinical Council of America, Inc. (Orthodox)
Jewish: Union of Orthodox Rabbis of U.S.A. and Canada
Jewish: Union of Orthodox Jewish Congregations of America
Krishna: International Society for Krishna Consciousness
Lutheran: Missouri Synod
Methodist: Southern Methodist Church
National Association of Evangelicals
Roman Catholic Church

In Favor of Legal Abortion

Baptist: American Baptist Churches in the U.S.A.
Brethren: Church of the Brethren
Christian Church (Disciples of Christ)
Episcopal Church
Jewish: The Rabbinical Assembly (Conservative)
Jewish: Union of American Hebrew Congregations (Reformed)
Jewish: United Synagogue of America (Conservative)
Lutheran: The Lutheran Church in America
Lutheran: The American Lutheran Church
Methodist: United Methodist Church
National Council of Churches of Christ in the U.S.A.
Presbyterian Church, U.S.A.
Unitarian Universalist Association
United Churches of Christ

APPENDIX "A"

The Catholic Health Association
OF THE UNITED STATES

1250 CONNECTICUT AVE NW
SUITE 234 • WASHINGTON DC 20036
202 – 296-3993

September 24, 1984

Mr. Steve Galebach
Office of Policy Development
The White House
Washington, DC 20500

Dear Steve:

Please find enclosed the material I promised to send you with respect to the "wrongful life" issue. I am looking forward to discussing this matter with you and Carl Anderson at lunch on Friday; and will be contacting you a bit later in the week regarding time and location.

I am also enclosing a piece on the Church's teaching on abortion and public policy that the Pope John Center prepared and sent to each member of the House and Senate.

With best personal regards and good wishes, I remain,

Sincerely yours,

William J. Cox
Vice President
Government Services

WJC:jmm

Enclosure

THE "WRONGFUL LIFE/WRONGFUL BIRTH" CONUNDRUM

Two Statutory Proposals of the
Catholic Health Association
of the United States

April 1984

The Catholic Health Association
OF THE UNITED STATES
CHA®

I. Introduction

The Catholic Health Association Subcommittee on "Wrongful Life" was formed in April 1983 to formulate a response to a small but notorious minority of court cases that allows one to argue, in effect, that a child would have been better off never having been born than to have been born under the present circumstances. (Exhibits "A" and "B" provide additional background on these cases.)

The wrongful life argument strikes at some of the deepest Christian beliefs regarding the sanctity of human life, however imperfect that life may be. Furthermore, because the plaintiffs predicate their lawsuits on the availability of contraception, sterilization, or abortion as means to have prevented birth, the subject was seen as one particularly appropriate for CHA.

The Subcommittee met three times, and staff and Subcommittee members invested many hours in individual efforts to further the group's two products: (1) a model amicus curiae brief the Association or others can use in appropriate cases, and (2) a pair of statutory proposals that address the problem from the legislative side. The latter were approved at the April 1984 meeting of the CHA Board of Trustees. As a result, the Association has become the first national health care organization to take a stand against the proliferation of "wrongful life" cases.

The following pages provide additional information on the CHA statutory proposals. The amicus curiae brief is not discussed here because it needs to be adapted and supplemented for use in particular cases. It is sufficient to say, however, that the brief strongly articulates the Catholic health ministry's opposition to these cases and will be a valuable addition to appellate advocacy in this area.

II. The "Wrongful Life" Issue

In order to understand CHA's statutory proposals, it is necessary first to understand the nature of the "wrongful life/wrongful birth" problem. The various suits that might be filed in this area of law are defined by reference to the following matrix:

	Suit by Parents (against M.D. or medical facility)	Suit by Child (against M.D., medical facility, or parents)
For Failure To Prevent Live Birth (i.e., failure to facilitate abortion)	(A) Wrongful Birth	(B) Wrongful Birth
For Failure To Prevent Conception (i.e., failure to facilitate steriliza-tion	(C) Wrongful Conception	(D) Wrongful Life

The term "wrongful life" is sometimes employed to encompass both (B) and (D), and sometimes as a generic term to encompass all suits in this area of law. However, it is employed here only to

describe suits of the child against a physician, health facility, or parent for failure to prevent conception.

CHA believes that the critical problem to be remedied by legislation is the lawsuit by either parents or children for failure to facilitate abortion. For this reason, we were primarily concerned with a model statute that would abolish suits (A) and (B).

We concluded that any attempt to abolish suit (C) would meet with insurmountable political resistance since this would involve abolishing suits by parents for negligently performed sterilizations, a well-accepted and traditional medical malpractice action.

We also concluded that an attempt to abolish suit (D) -- either in isolation or in conjunction with suit (B) -- might be counterproductive. Such a statute would focus on the abolition of a suit by a child against a physician, medical facility, or parents for having "wrongfully" been allowed to be born alive and/or conceived. Experience demonstrates that such legislation might be enacted because of its emotional appeal, but probably at the expense of a law that would abolish suit (A). The latter, the parents' suit for failure of a physician or medical facility to facilitate abortion, is filed far more frequently than suits (B) or (D), and it has been almost universally accepted by the courts.

For example, a law that would have abolished suits (A), (B), and (D) was proposed in California, but political compromise resulted in final statutory language that only partially abolished (B) and (D):

California Civil Code § 43.6 (West 1982)

§ 43.6 Immunity from liability; actions against parents on childbirth claims; defenses and damages in third party actions.

(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.

(b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.

(c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.

Passage of a law in this form implicitly endorses all suits other than the specific action of child against parent, and it tends to foreclose further legislative action in this area. Thus, unaffected are the most significant forms of suit -- actions by either parents or children against the physician for failure to facilitate abortion.

In view of these considerations, CHA endorses only the proposed model legislation to abolish suits (A) and (B). We do offer, however a model act that will address suit (D). This latter proposal should be considered in jurisdictions where it might be politically feasible to enact language abolishing (A), (B), and (D).

Some wrongful life/wrongful birth laws have included provisions that, for example, define abortion, or abolish as a defense failure to procure abortion, or remove it as a consideration in child support actions. For example, South Dakota Codified Laws Ann. §§ 21-55-1 through 21-55-4 (1982 Supp.), provide as follows:

Chapter 21-55

"Actions For Wrongful Life Prohibited"

§ 21-55-1. Action or damages for conception or birth prohibited -- "Conception" defined. There shall be no cause of action or award of damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to have been born alive. The term "conception," as used in this section, means the fertilization of a human ovum by a human sperm, which occurs when the sperm has penetrated the cell membrane of the ovum.

§ 21-55-2. Action or damages for birth of another prohibited. There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive.

§ 21-55-3. Consideration of failure to prevent live birth restricted in actions. The failure or the refusal of any person to prevent the live birth of a person may not be considered in awarding damages or in imposing a penalty in any action. The failure or the refusal of any persons to prevent the live birth of a person is not a defense in any action.

§ 21-55-4. Limited effect of chapter. The provisions of this chapter do not prohibit a cause of action or the awarding of damages, except as specifically provided in this chapter, by or on behalf of any person based on the claim that a person is liable for injury caused by such person's willful acts or caused by such person's want or ordinary care or skill.

It is our view, however, that such provisions are unnecessary and that they greatly complicate and confuse the legislative process. We therefore excluded such provisions from the proposed model legislation.

III. The Statutory Proposals

A. Proposal to Abolish Suits (A) and (B)

An Act To Preclude Damages for Wrongful Birth

> No person shall be liable in civil damages for any act or omission that results in a person being born alive instead of being aborted.

"No person" means that no one -- physician, medical facility, or parent -- can be sued for money damages for failure to facilitate abortion.

The phrase "shall be liable in civil damages" means that no one can be sued for money compensation for failure to facilitate abortion. An alternative might be abolition of a "cause of action," but it was deemed politically preferable to emphasize the pecuniary motive of those who would bring such suits.

The phrase "for any act or omission" means that the law would encompass both negligent and intentional conduct.

The language "that results in a person being born alive instead of being aborted" graphically emphasizes the intent of the law to encompass only abortion-related conduct.

B. Proposal to abolish suit (D)

An Act To Preclude Damages for Wrongful Life

> There shall be no award of damages based on a claim of a person that he or she should not have been conceived.

This law would abolish only actions by the child against physicians, medical facilities, or parents for permitting that child to be conceived.

It would not foreclose suits by the child or by the child's parents against anyone for having failed to abort that child.

As noted earlier, we imagine that introducing this proposal in most states would tend to make passage of the other statute more difficult. Furthermore, this cause of action has been almost universally rejected by the courts and, thus, it is unlikely the law would be needed. It could, of course, be enacted as a corrective measure should an adverse judicial precedent develop.

III. Conclusion

The Catholic Health Association of the United States is extremely concerned that "wrongful birth" and "wrongful life" cases -- based as they are on the availability of abortion, contraception, and sterilization -- will further erode belief in the sanctity of human life. To counter these developments, we propose two model acts that may help to check their progress.

Readers are encouraged to evaluate these proposals and consider them for submission to the legislative process.

Law Reports

Excerpted from
Vol. VIII, No. 2
February, 1983

Washington State Approves Wrongful Life Actions. The Supreme Court of Washington recently became the second court to recognize "wrongful life" causes of action. ("Wrongful life" cases generally refer to actions brought by a child who suffers physical or mental defects and who argues that but for the physician's negligence he or she would not have been born to suffer the deformity.) The California Supreme Court became the first state high court to approve a wrongful life action in Turpin v. Sortini, 182 Cal. Rptr. 337, 643 P.2d 954 (1982); Law Reports, vol. VII, no. 6, p. 4 (June 1982). Although many states permit wrongful birth actions (those brought by parents for damages resulting from the birth of an unplanned child), the decision on wrongful life plows new ground. In this article we will both describe the Washington Supreme Court's decision and offer our analysis of its importance.

1. The Decision

In the Washington case the plaintiff-mother is an epileptic who took Dilantin, an anticonvulsive drug, while pregnant with her first child -- a healthy, normal boy. Some time after the boy's birth the plaintiff and her husband informed three doctors that they were considering having other children and inquired about the risks of taking Dilantin during pregnancy. Each of the three doctors responded that the drug could cause cleft palate and temporary hirsutism, but they did not conduct literature searches or consult other sources for specific information regarding the correlation between the drug and birth defects. Relying upon those assurances, the plaintiff twice became pregnant and gave birth each time to a girl suffering from "fetal hydantoin syndrome" a condition characterized by "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eye lids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects."

It was proven that Dilantin was a "proximate cause of the defects and anomalies suffered by [the girls]." It was also shown that "[a]n adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the [parents] would attach significance to such risks in deciding whether to have further children." Finally, it was specifically held that the plaintiffs would not have had more than one child if they had been told of the risk of birth defects associated with Dilantin usage during pregnancy.

The court first addressed the parents' claim for damages due to wrongful birth:

> Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly. Parents can determine before conceiving a child whether their genetic traits increase the risk of that child's suffering from a genetic disorder . . . . After conception, new diagnostic techniques . . . can reveal defects in the unborn fetus . . . .
>
> Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs. Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). We must decide, therefore, whether these developments confer upon potential parents the right to prevent, either before or after conception, the birth of a defective child. Are these developments the first steps towards a "Fascist-Orwellian societal attitude of genetic purity," . . . or Huxley's brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic cost of defective children?

The court answered its own question by holding that such developments are beneficial; therefore, it found that the parents "have a right to prevent the birth of a defective child" and that physicians have a corresponding duty to advise potential parents of the risks involved. Because such was not done in this case, the court held that the parents may recover for extraordinary medical, educational, and similar expenses attributable to the defective condition of the children. "In other words, the parents should recover those expenses in excess of the cost of the birth and rearing of two normal children." In addition, the court held that the parents may be compensated for mental anguish and emotional stress suffered during each child's life as a proximate result of the physicians' negligence. The court did permit an offset for any emotional benefits to the parents resulting from the birth of the children.

Regarding the wrongful life action, the court noted, "whereas wrongful birth actions have apparently been accepted by all jurisdictions to have considered the issue, wrongful life actions have been received with little favor." Nevertheless, the court agreed with the California Supreme Court that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." The Washington judges found persuasive the argument that "the child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority." The court stated that rather than allowing the burden of those expenses to fall on the child's parents or the state, it would "prefer to place the burden . . . on the party whose negligence was in fact [the] cause of the child's need for [special care]." Thus, the court upheld wrongful life actions to the extent that they are to recover any extraordinary expenses due to the child's defects. "Of course, the costs of such care for the child's minority may be recovered only once . . . . If the parents recover such costs for the child's minority in a wrongful birth action, the child will be limited to the costs to be incurred during his majority."

The court stopped short of allowing the child to recover solely for the fact of being alive: "[m]easuring the value of an impaired life as compared to

nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether. General damages are certainly beyond computation." But, to summarize what was stated above, it did recognize the existence of a duty owed to an unborn or unconceived child; thus, it allowed the plaintiff-children to recover for the expenses of "special medical treatment and training beyond that required by children not afflicted" with their defects. Doing so, according to the court, will "foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice."

2. Analysis

This is an extremely troubling decision. Coupled with the California case of a few months ago, its implications could be widespread and extraordinary. This is so not only because of some questionable legal reasoning but also because of the opinion's flat rejection of a number of sanctity-of-life considerations.

For example, it was argued that allowing even limited recovery on a wrongful life rationale would demean "the sanctity of less-than-perfect human life." But the court summarily dismissed that point by quoting the California judges: "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life . . . ." To this bald conclusion, Washington's Supreme Court merely added, "We agree."

Similarly, the opinion asserts that imposing a duty upon physicians -- a duty owed directly to the unborn or unconceived child -- would "foster the societal objectives of genetic counseling and prenatal testing . . . ." If by that the court means to imply that society finds genetic counseling and prenatal testing to be generally accepted objectives, not one shred of evidence is found in the decision to support that contention. On the other hand, if the court means to imply that society has certain objectives that are advanced by counseling and testing, then it has failed to specify what they are and support that conclusion. In either event, the court has apparently made the now common mistake of assuming that because a technology is available, it ought to be used.

The court found that physicians owe a duty to unborn or unconceived children to detect and advise their prospective parents about birth defects. The judges apparently assumed that if testing or genetic history is positive, the parents will prevent the births (either through contraception or abortion), thus "avoiding the vast emotional and economic cost of defective children." But what if the parents decide they want to bear that cost? Presumably they could not sue for wrongful birth, but could the children sue their parents for the suffering that results from their defects? If so, this decision has effectively required abortion and sterilization -- a result that would seem to violate the rights of privacy that the U.S. Supreme Court held in Roe v. Wade could only be abridged by a "compelling state interest." If the children could not sue their parents, to whom could they look for redress of the breach of duty this court states is owed to them? And how would the parents decide what to do: on the basis of what is best for themselves or as surrogates for the "best interests" of the children? (What are the "best interests" of unborn and unconceived children, anyway?)

These and many other questions are left unanswered by the Washington court's opinion, and the complexity of the issues plus the lack of consensus within society have prompted most courts to defer to the legislative branch of government for resolution of the wrongful life question. Thus far, at least three states have enacted legislation that in some way bars wrongful life suits. [California: Ca. Civil Code § 43.6 (West 1982); Minnesota: 1982 Minn. Sess. Law Serv. Chap. 521 House File (West); and South Dakota: S.D. Codified Laws Ann. § 21-55-1 (1982 Supp.).] California's is interesting in that it prevents only those wrongful life actions that are brought against the parents; actions against physicians are not banned. Although legislation preventing these suits might appear to be the best way to address the issue, it is still too early to judge the efficacy of these efforts. It is unfortunate, however, that the Washington court did not defer to the elected lawmakers to decide such an important social question.

The tort of "wrongful life" is just beginning to evolve, but if the Washington decision portends the shape of that evolution, we can anticipate the emergence of a fearsome creature indeed.

Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983).

EXHIBIT "B"

"Wrongful Life" Litigation Outcomes Set Dangerous Precedents

J. STUART SHOWALTER, JD, & BRIAN L. ANDREW, JD

Recent advances in medical technology have created legal and social pressures in health care that were hardly imagined 25 years ago. Some of these pressures have stretched established judicial principles to the breaking point, creating some absurd case law in the process.

For example, the new technologies of extraordinary life support—combined with health care's phobia of litigation—have led to not allowing certain terminal patients to die unless a court gives its permission.[1] Similarly, some now think cardiopulmonary resuscitation, an uncommon procedure in the 1950s, is the standard of care for all persons, even the hopelessly ill; occasionally courts have been forced to pass judgment on decisions not to resuscitate such patients even though resuscitation would be a serious burden and would hold no hope of benefit.[2]

Judicial precedents present danger

Regrettably, the emerging thinking seems to be that because a technology is available it should always be used, lest legal liability attach. Attorneys recognize that this is not necessarily the case, but as court cases increase because of this faulty reasoning, the danger of unfortunate judicial precedents increases significantly.

Two such precedents surfaced in California and Washington in the past year. The issue was physician liability—under the rubric "wrongful life"—for the birth of a defective child when prenatal counseling, testing, or diagnosis might have permitted the parents to avoid the pregnancy and birth through contraception or abortion. Unlike so-called wrongful birth cases (in which *parents* recover because a physician's negligence resulted in their having an unplanned child, defective or not), in wrongful life suits *the child herself* is the plaintiff.[3] She claims that but for the defendant's negligence she would not have been born to suffer the deformity.[4] Although many states permit wrongful birth actions,[5] the decisions on wrongful life plow new legal ground.

As a general rule courts have been unwilling to award damages in pure wrongful life cases because they are uncomfortable deciding that it would have been better for the child not to have been born than to be born with handicaps. On the other hand, damages are often awarded to parents when the child would not have been born but for the defendant's negligence.

These generalizations, however, do not properly convey the intensity of the judiciary's struggle with these issues. Tort law's primary functions are to determine liability and to compensate for injury caused by a defendant's negligent conduct so the plaintiff may be restored to the position he would have occupied had the tort not occurred. Since negligence is often conceded in these cases (as in the case of poorly performed tubal ligation or vasectomy), the courts' inclination is to award damages of some amount. But quantifying the value of a human life in comparison to the value of not having been born runs counter to the notion that all life is special, even if it is less than perfect. The question of the measure of damages, therefore, is the major problem in this difficult area.

In *Turpin v. Sortini* the California Supreme Court became the first state high court to approve a wrongful life action.[6] The Supreme Court of Washington joined ranks with California in 1983 when it decided *Harbeson v. Parke-Davis, Inc.*[7]

Wrongful life likened to malpractice claim

The plaintiff parents in the California case had their first daughter evaluated for a possible hearing defect. The defendant physician incorrectly advised the child's pediatrician that her hearing was within normal limits, when in reality she was totally deaf as a result of a hereditary ailment. The parents did not learn of her condition until after the birth of their second child, whom they had conceived in reliance upon the physician's diagnosis, and who is also totally deaf. According to the complaint, the condition is such that with a reasonable degree of probability any offspring would inherit the hearing defect. The parents averred that had they known of their first child's hereditary deafness, they would not have conceived a second time.

In the 4-2 decision May 3, 1982, the California Supreme Court held that a child, "like his or her parents, may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." What made this decision notable was the court's view that the wrongful life claim is "simply one form of the familiar medical or professional malpractice action."[8] The court refused, however, to permit recovery of general damages for being born impaired as opposed to not being born. The two dissenters would have allowed recovery for both.

In the Washington case, the epileptic plaintiff mother took the anticonvulsant Dilantin while pregnant with her first child, a healthy, normal boy. Some time after

Mr. Showalter is vice-president, legal services division, and Mr. Andrew is staff attorney, The Catholic Health Association of the United States, St. Louis.

Medicine has for centuries sought to prolong life. Implanting an artificial heart for this purpose violates neither the moral principle of totality nor respect for life. Undoubtedly, who receives such an organ and who pays are moral problems.

cial heart is wrong precisely because the organ is artificial, and therefore not natural. The basis for such a charge might be the condemnation of artificial birth control. But this would certainly be a gross misunderstanding of the condemnation of birth control. The Church has never condemned anything simply because it was artificial. For instance, it has never condemned artificial incubation for premature infants, artificial limbs, or artificial heart valves. It condemns the use of something artificial only when such use violates a moral principle, e.g., respect for life. But if something artificial restores physical integrity and/or preserves life, there is no reason why it should be condemned.

It is not even clear that if a natural heart were available, one would have to prefer this to an artificial heart. The choice would depend on which would be the most effective, i.e., which would more surely prolong life. If the artificial heart were judged the more effective, this would be the choice. One might be able to judge, however, that, all things being equal, a natural heart would be preferable. But I am not sure one could judge, at least now, that a natural heart would always be preferable, even if available.

Scarce-resources issue looms

One can legitimately conclude that implanting an artificial heart does not in itself present any special moral problem. A problem may well arise, however, in that it will remain a scarce resource for some time before it can be made available, even to all who are able to pay for it. This fact brings up the problem of the distribution of scarce resources. How does one do this fairly?

This problem has occurred recently with hemodialysis. Initially, not enough equipment was available for everyone who needed treatment. After much moral discussion it was decided that a medical screening should first determine which candidates would profit from the treatment. After this screening, if a selection was still necessary, the fairest system would be random selection, e.g., first come, first served, or chance. While this may not appear to be the best system, others—such as those based on merit or value—proved not only arbitrary but impossible. Chance at least provided equal opportunity to all. It would seem, then, that some kind of random selection would be the best way of distributing heart implants, as long as they remain a scarce resource.

Even after one is able to provide a resource to all who can pay for it, the problem may not be solved completely. Since the prevalence of heart disease is no more related to the size of one's pocketbook than kidney disease, even if the artificial heart becomes generally available, poor people may not be able to take advantage of it because of the cost.

"No one should deny moral limits. If a procedure is moral or otherwise, can it be condemned on the grounds that it is reserved for divine action and should not be usurped by human beings?"

Fair allocation of government funds

The federal government solved this problem for hemodialysis by picking up the tab. Current estimates are that hemodialysis costs the federal government $2 billion annually for rich and poor alike. The estimated cost of an artificial heart is $50,000, and approximately 60,000 people may qualify for such an implant annually. If the federal government were to pick up the tab, the cost would be approximately $3 billion. Can the government pick up this tab? Should it? And if it does not, is it discriminating against the poor?

Obviously, the government does not have all the funds it could use. It must apportion its funds as the community's welfare demands and must limit the amount it provides for health care, education, defense, welfare, etc.; no one area will get all the funds it needs. Even within a particular area, decisions about how to use the money have to be made on the basis of community needs. For health care, for instance, it may be necessary to decide whether money—and, if so, how much—should be spent on prevention rather than therapy. So whether the government can fund heart implants may depend on what priority they would occupy among the community needs. If more important health needs exist and the government has only limited money, it may not be able to fund heart implants. The result would be that the poor might not be able to count on this help. It is hoped that other funding sources would be available to them; if not, the poor might not have access to this health resource. While this is certainly regrettable, if the federal government, in order to provide such access, had to forgo some more important common good, there might be no better alternative. ★

Attempts to resolve cases involving "wrongful life" charges have placed the judiciary in a difficult position. Deferring to legislative solutions may be the answer.

the boy's birth, the plaintiff and her husband informed three physicians that they were considering having other children and inquired about the risks of taking Dilantin during pregnancy. Each of the three physicians responded that the drug could cause cleft palate and temporary hirsutism, but they did not conduct literature searches or consult other sources for specific information regarding the correlation between the drug and birth defects. Relying upon those assurances, the plaintiff twice became pregnant and gave birth each time to a girl suffering from fetal hydantoin syndrome, a condition characterized by "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eye lids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects."[9]

The attorneys proved that Dilantin was a "proximate cause of the defects and anomalies suffered by [the girls]" and also showed that "[a]n adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the [parents] would attach significance to such risks in deciding whether to have further children." Finally, the plaintiffs specified that they would not have had more than one child if they had been told of the risk of birth defects associated with Dilantin usage during pregnancy.

The court first addressed the parents' claim for damages due to wrongful birth:

> Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly. Parents can determine before conceiving a child whether their genetic traits increase the risk of that child's suffering from a genetic disorder. . . . After conception, new diagnostic techniques . . . can reveal defects in the unborn fetus. . . . Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs. *Roe v. Wade*, 410 U. S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). We must decide, therefore, whether these developments confer upon potential parents the right to prevent, either before or after conception, the birth of a defective child. Are these developments the first steps towards a "Fascist-Orwellian societal attitude of genetic purity." . . . or Huxley's brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic cost of defective children?

The court answered its own questions by holding that such developments are beneficial; therefore, it found that the parents "have a right to prevent the birth of a defective child" and that physicians have a corresponding duty to advise potential parents of the risks involved. Because this was not done in this case, the court held that the parents may recover for extraordinary medical, educational, and similar expenses attributable to the children's defective condition. In other words, the parents should recover those expenses beyond the cost of bearing and rearing two normal children. In addition, the court held that the parents may be compensated for mental anguish and emotional stress suffered during each child's life as a proximate result of the physicians' negligence. The court did permit an offset for any emotional benefits to the parents resulting from the children's birth.[10]

"As a general rule courts have been unwilling to award damages in pure wrongful life cases because they are uncomfortable deciding that it would have been better for the child not to have been born than to be born with handicaps."

Regarding the wrongful life action, the court noted, "Whereas wrongful birth actions have apparently been accepted by all jurisdictions to have considered the issue, wrongful life actions have been received with little favor." Nevertheless, the court agreed with the California Supreme Court that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." The Washington judges found persuasive the argument that "the child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority." The court stated that rather than allow the burden of those expenses to fall on the child's parents or the state, it would "prefer to place the burden . . . on the party whose negligence was in fact [the] cause of the child's need for [special care]." Thus, the court upheld wrongful life actions to the extent that these actions are intended to recover any extraordinary expenses due to the child's defects: "Of course, the costs of such care for the child's minority may be recovered only once. . . . If the parents recover such costs for the child's minority in a wrongful birth action, the child will be limited to the costs to be incurred during his majority."

The court stopped short of allowing the child to recover solely for the fact of being alive: "Measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether. General damages are certainly beyond computation." The court did, however, recognize a duty

owed to an unborn or unconceived child. Thus, it allowed the plaintiff-children to recover for the expenses of special medical treatment and training beyond that required by children not afflicted with their defects. Doing so, according to the court, will "foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice."

Effects on sanctity-of-life issue

This is an extremely troubling decision. In tandem with the California case, the decision and its implications could be widespread and extraordinary, not only because of some questionable legal reasoning but also because of the opinion's flat rejection of a number of sanctity-of-life considerations. The court did not recognize what should be obvious to anyone: One can be productive, loving, and loved even with a significant handicap; happiness and worth are not related to intelligence quotient.[11]

It was argued that allowing even limited recovery on a wrongful life rationale would demean the sanctity of less-than-perfect human life. But the court summarily dismissed that point by quoting the California judges, who had written: "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life. . . ."[12] To this bald conclusion, Washington's Supreme Court merely added, "We agree."

Similarly, the opinion asserts that imposing upon physicians a duty—owed directly to the unborn or unconceived child—would "foster the societal objectives of genetic counseling and prenatal testing. . . ." If by that the court means to imply that society finds genetic counseling and prenatal testing generally accepted objectives, not one shred of evidence appears in the decision to support that contention. On the other hand, if the court means to imply that society has certain objectives advanced by counseling and testing, then it has failed to provide credible evidence of those objectives.

In either event, the court has apparently made the now common mistake of assuming that because a technology is available, it ought to be used.[13] This means that physicians may be held liable for omitting prenatal testing and genetic counseling—if any harm occurs to the child—irrespective of why the testing or counseling was omitted.

The court found that physicians owe a duty to unborn or unconceived children to detect and advise their prospective parents about birth defects. The judges apparently assumed that if testing or genetic history is positive, the parents will prevent the births (either through contraception or abortion), thus "avoiding the vast emotional and economic cost of defective children." But what if, knowing that the child will be defective, the parents decide they want to bear that cost? Presumably they could not sue for wrongful birth, but could the children sue their parents for their own suffering? If so, this decision effectively requires abortion and sterilization—a result that seems to violate the rights of privacy that the U.S. Supreme Court has held can only be abridged by a "compelling state interest."[14] If the children could not sue their parents, to whom could they look for redress of the breach of duty this court states is owed to them? And how would the parents decide what to do—on the basis of what is best for themselves or as surrogates for the children's "best interests"? The question remains, What are the "best interests" of unconceived and unborn children?

Legislation may offer solution

The Washington court's opinion leaves these and many other questions unanswered. The complexity of the issues and the lack of societal consensus have prompted most courts to defer to the legislative branch of government to resolve the wrongful life question. Thus far, at least three states have enacted legislation that in some way bars wrongful life suits.[15] California was one, and its statute is interesting in that it prevents only those wrongful life actions brought against the parents; it does not ban actions against physicians.

Although legislation preventing these suits might appear to be the best way to address the issue, it is still too early to judge legislation's efficacy. It is unfortunate, however, that the Washington court did not defer to the elected lawmakers to decide such an important social question.

Washington and California stand out as the only jurisdictions having specifically approved wrongful life claims, albeit limiting damages. Other courts have uniformly rejected such actions, although they have permitted wrongful birth claims.[16] The California Supreme Court is often a bellwether whose opinions are precedent for other jurisdictions; the Washington decision lends credence to this observation. After a decade of rejected wrongful life claims, two states have approved those actions within eight months. The disturbing situation requires close monitoring and consideration of legislative remedy.

The wrongful life tort is just beginning to evolve: if the Washington decision portends the shape of that evolution, one can anticipate the emergence of a fearsome creature. ★

[*Footnotes on page 78*]

"Wrongful life" litigation

from page 64

FOOTNOTES

1. See, e.g., *In re Lydia E. Hall Hospital*, 455 N.Y.S.2d 706 (Sup. Ct. 1982); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).
2. See, e.g., *In re Custody of a Minor*, 434 N.E.2d 601 (Mass. 1981).
3. Cohen, "*Park v. Chessin*: The Continuing Judicial Development of the Theory of 'Wrongful Life,'" *American Journal of Law and Medicine*, vol. 4, 1978, cited on p. 212. To avoid awkward construction and to acknowledge that in the California and Washington cases infant girls were the plaintiffs, the feminine pronoun is used. It should be read to include the masculine, however, where appropriate.
4. This type of suit is sometimes referred to as one for "diminished life." Two other characterizations have emerged: "stigmatized life" suits, alleging a stigmatized status—illegitimacy—as a result of the father's failure to marry the mother before or after the child is born; and "unwanted life" suits, in which a failure of contraception or sterilization results in a healthy but unwanted child (B. Furrow, "The Causes of 'Wrongful Life' Suits: Ruminations on the Diffusion of Medical Technologies," *Law, Medicine and Health Care*, February 1982, p. 11).
5. T. Rogers "Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing," *South Carolina Law Review*, vol. 33, 1982, cited on p. 741.
6. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
7. 656 P.2d 483 (Wash. 1983).
8. 182 Cal. Rptr. at 342.
9. Unless otherwise noted, all subsequent quotations are from the *Harbeson* opinion.
10. See Section 920 of the Restatement Second of Torts. But see D. Wilmoth, "Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis," *Marquette Law Review*, vol. 63, 1980, cited on pp. 627-629.
11. R. Worrell, "Defending a Wrongful Life Action," *Forum*, Fall 1982, cited on p. 72.
12. 643 P.2d at 961.
13. See generally G. M. Atkinson and A. S. Moraczewski, eds., *Genetic Counseling, The Church, and The Law*, Pope John XXIII Medical-Moral Research and Education Center, St. Louis, 1980.
14. *Roe v. Wade*, 410 U.S. 113 (1973).
15. California: Ca. Civil Code § 43.6 (West 1982); Minnesota: 1982 Minn. Sess. Law Serv. Chap. 521 House File (West); and South Dakota: S.D. Codified Laws Ann. § 21-55-1 (1982 Supp.).
16. See, e.g., Alabama: *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); Arkansas: *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); Connecticut: *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); Florida: *DiNatale v. Lieberman*, 409 So. 2d 512 (Fla. Ct. App. 1982); Illinois: *Pierce v. DeGracia*, 431 N.E.2d 768 (Ill. App. 1982); Missouri: *Miller v. Duhart*, 637 S.W.2d 183 (Mo. Ct. App. 1982); New Hampshire: *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); New Jersey: *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (N.J. 1981); New York: *Sala v. Tomlinson*, 87 A.D.2d 670, 448 N.Y.S.2d 830 (1982); Pennsylvania: *Speci v. Finegold*, 439 A.2d 110 (Pa. 1981); Texas: *Sutkin v. Beck*, 629 S.W.2d 131 (Tex. App. 1982); Virginia: *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982).

§ 300a–7. Sterilization or abortion

NOTES

AMENDMENTS

Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions

(1) (2) (3)

(a) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act, by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the peformance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

Discrimination prohibition

(b)(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Development Disabilities Services and Facilities Construction Act, after June 18, 1973, may—

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may—

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privilges to any physician or other health care personnel,

because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

payment,

, or any other program of Federal financial assistance or reimbursement

, or any other program of Federal financial assistance or reimbursement

Individual rights respecting certain requirements contrary to religious beliefs or moral convictions

(c) No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

Prohibition on entities receiving Federal grant, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds

(d) No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

§ 300a–8. Penalty for United States, etc., officer or employee coercing or endeavoring to coerce procedure upon beneficiary of Federal program

Any—

(1) officer or employee of the United States,

(2) officer or employee of any State, political subdivision of a State, or any other entity, which administers or supervises the administration of any program receiving Federal financial assistance, or

(3) person who receives, under any program receiving Federal financial assistance, compensation for services,

who coerces or endeavors to coerce any person to undergo an abortion or sterilization procedure by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

NOTES:

(1) The Public Health Service Act is ch. 6A of 42 U.S.C.A. It includes the "Hill-Burton" Act.

(2) The Community Mental Health Services Act was repealed in 1981.

(3) The Developmental Disabilities Services Facilities Construction Act, now entitled the Developmental Disabilities Assistance and Bill of Rights Act, is ch. 75 of 42 U.S.C.A.

TITLE 42, U.S.C.A.

SUBCHAPTER XIII -- NATIONAL HEALTH PLANNING AND DEVELOPMENT

§ 300m-1 State administrative program

. . . .

(b) The State Program of a State must --

. . . .

(14) provide that the willingness or refusal of a person or entity to perform, assist in the performance of, permit the performance of, or provide counseling concerning an abortion or sterilization procedure shall not be a valid consideration in the determination of the granting or denial of a certificate of need under the State Program.

TITLE 42 U.S.C.A

SUBCHAPTER XVIII -- HEALTH INSURANCE FOR AGED AND DISABLED

§ 1395. Prohibition against any Federal interference; against Federal, State, etc. imposition of certain requirements contrary to religious beliefs or moral convictions

(a) Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person.

(b) No --

(1) officer or employee of the United States, or

(2) officer or employee of any State, political subdivision of a State, or any other entity, which administers or supervises the administration of any aspect of the insurance program under this subchapter

shall require, attempt to require, coerce or attempt to coerce any person or entity to perform, assist in performing, or permit the performance of an abortion or sterilization procedure by threatening such person or entity with the loss of, or disqualification for the receipt of, any benefit or service under this subchapter.

TITLE 42, U.S.C.A.

SUBCHAPTER XIX -- GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a State plans for medical assistance

(a) Contents

A state plan for medical assistance must --

. . . .

(45) Provide that no officer or employee of the state, a political subdivision of the state, or any other entity administering or supervising the administration of the state plan for medical assistance may either --

(i) coerce or endeavor to coerce any person to undergo an abortion or sterilization procedure; or

(ii) coerce or endeavor to coerce any person or entity to perform, assist in the performance of, or permit the performance of an abortion or sterilization procedure

by threatening such person or entity with the loss of, or disqualification for the receipt of, any benefit or service under the state plan for medical assistance.