abortion, which is negligently carried out. The child is born with a genetic disease. The child is denied standing to sue in a wrongful life suit, and the parents cannot sue for wrongful birth.[3]

The couple in Case 2 cannot seek compensation while the couple in Case 1 can, although both couples were (1) subjected to subprofessional conduct, perhaps even gross negligence, by physicians, (2) which caused them, (3) the expense of a child with substantial impairments. So long as abortion is a legally obtainable reproductive choice, the couple in Case 2 is being unfairly and arbitrarily denied resource to litigation to compensate them for the negligent acts of a third party on whose competence they relied. This unequal treatment of parties in roughly the same position gives rise to a constitutional problem—denial of equal protection—where a tort rule operates unequally and unfairly. The CHA proposal, if enacted by a state, is likely to be struck down as unconstitutional.[4]

The tort system has its critics; and it does indeed have uneven effects in a variety of situations, due to lack of consumer information about the right to sue, to economics, or to other factors. Nonetheless, there is no justification for compounding the existing inequalities of the system by creating another anomaly, in which the moral beliefs of a vocal minority are injected into the common law system.

Conscientious health care professionals have sought for years to ensure the availability of safe and effective abortions.[5] Many experts contend that only by providing the best medical and genetic information possible to potential parents can we actually save the babies who might have been aborted because of unfounded fears of defects.[6] Information can save as well as destroy. Abortions are currently legal and are, therefore, part of a woman's reproductive choices, no matter how undesirable we may individually find such a state of affairs. The tort system should not immunize a whole category of medical practitioners—and their negligence—in order to take a stand against abortion. Parents need accurate information on potential genetic defects; abortions and other procedures should be safely performed. Physicians must, in fairness, be judged against the standards of their specialities, rather than exempted in this narrow category of cases.

References

1. The CHA has also drafted a second statutory proposal aimed at abolishing actions by a child against doctors, medical facilities, or parents for allowing that child to be conceived: "There shall be no award of damages based on a claim of a person that he or she should not have been conceived." This is considered a secondary proposal by CHA, and I will not discuss it here. See CATHOLIC HEALTH ASSOCIATION, THE 'WRONGFUL LIFE/WRONGFUL BIRTH' CONUNDRUM: TWO STATUTORY PROPOSALS OF THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (April 1984).

2. The Catholic community is not united on legislative attempts to restrict the availability of abortions. See Statement, *A Diversity of Opinions Regarding Abortion Exists among Committed Catholics*, N.Y. Times, Oct. 7, 1984, at E7.

3. This is not an impossible situation. For a case where a similar failure occurred, see *Speck v. Finegold*, 408 A.2d 496 (Pa. 1979) (defective infant has no course of action, but parents may sue in their own right for pecuniary expenses of caring for and treating diseased child). Proposal B of the CHA would, if enacted, prevent a child from suing on its own behalf but would not prevent the parents from suing for their own damages.

4. See Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, UNIVERSITY OF FLORIDA LAW REVIEW 34:477 (1982). For a constitutional attack sustained on such grounds, see *Brown v. Merlo*, 506 P.2d 212 (Cal. 1973).

5. W. HERN, ABORTION PRACTICE (Lippincott, Philadelphia, 1984) (describing data and procedures to make abortions safe and effective).

6. See Milunsky and Reilly, *The 'New' Genetics: Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders*, AMERICAN JOURNAL OF LAW & MEDICINE 1:71 (1975) (proper genetic information may offer assurance to parents, enabling them selectively to have unaffected offspring). The medical emphasis is "not on removal of defective fetuses, but on provision of life for those who otherwise may never have been born" (*id*).

Caselaw on Fetal Monitoring

Dear Editors:

The recent article by Barry Schifrin, Henry Weissman, and Jerry Wiley—"Electronic Fetal Monitoring and Obstetrical Malpractice," in the June 1985 issue—may give readers the impression, since no cases are cited on the points that they make, that none exist.

Williams v. Lallie Kemp Hospital, 428 S.2d 1000 (La. App. 1983), *cert. den.* 434 S.2d 1093, in fact, holds precisely against the major point the authors argue. In that case it was held that proof of failure to comply with ACOG standards would be sufficient, as a matter of law, to permit a finding of negligence. There is a clear inference in the opinion that compliance would, equally, be sufficient to preclude it. Other directly relevant fetal monitoring cases are: (1) *Walker v. United States*, 600 F. Supp. 195 (D.C. DC 1985); (2) *Haught v. Maceluch*, 681 F.2d 291 (CCA 5, 1982); (3) *First National Bank of Chicago v. Porter*, 448 N.E.2d 256 (Ill. App. 1983); and (4) *Jones v. Karraker*, 440 N.E.2d 420 (Ill. App. 1982).

In *Williams* it was held that proof of failure to comply with ACOG standards would be sufficient, as a matter of law, to permit a finding of negligence.

Relevant material is also discussed in the supplement to 40 *ALR* 3d 1222, "Liability for prenatal injuries," Section 9.

Feinberg, Peters, Willson, and Kroll also discuss this issue in their *Obstetrics, Gynecology and the Law*, at pages 374–78.

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