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## Commentary

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# COMMENTARY

*Frederick C. Robbins\**

I ENJOYED PROFESSOR Wadlington's article and learned a great deal from it. His discussion of the legal responsibilities of parents to their children and the interaction between parent and the State and his great erudition on the topic of foster care and adoption make a unique contribution. I found the concept of subsidized adoption a particularly appealing one, and one with which I had not been familiar before. As has been true with many of the presentations at this Symposium, concern is expressed about the potential impact of the steps taken to achieve cost containment upon the access to care, quality of care, and quantity of care. The legal implications are often not very evident. Nonetheless, it seems very clear that there is a great potential impact upon children's health care from certain legal developments and from the cost-containment measures taken by both the government and private payors.

Professor Wadlington makes several excellent points concerning the peculiar vulnerability of children. As he points out, families with young children tend to be on the lower end of the economic scale. In this day and age, with increasing numbers of single-parent homes and homes in which both parents work outside the home, there is a large number of children dependent upon public assistance in one form or another. The teenage mother, usually unmarried, often from the lower socioeconomic segment of society, and usually lacking much in the way of employable skills, is among the most vulnerable persons in our society to changes in the level of support from public sources. Again, I tend to agree with Professor Wadlington that there does not seem to be the degree of recognition that I believe there once was of the importance of giving children a good start, as exemplified by programs providing adequate perinatal care for expectant mothers and the Headstart and WIC programs. Rather, there is a preoccupation of many in our society both with reducing the cost of government and with the much publicized abuses of the welfare system. Parenthetically, this latter issue impresses me as peanuts compared to the abuses we read about in the

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paper every day by big corporations in their dealings with the Defense Department where the sums of money involved are in the billions. One hears little talk these days of the "right to health care" or the importance of equity within the health care system. The legal implications of these two issues are not entirely clear to me.

Professor Wadlington's article demonstrates that the legal system plays an important role in assuring two things: that parents and children do receive what they are entitled to, and that legislation directed at providing appropriate assistance to families and children is structured so as to achieve the societal goal of access to services. The "Baby Doe" case has been an interesting episode in which the legal right of the government to intervene in decisions made by families and physicians concerning the degree of care severely handicapped infants should receive was challenged. The government's concern here was based on ethical considerations rather than on a desire to limit costs. Indeed, the result of the proposed legislation would be an increase in cost, since a greater number of severely impaired infants might survive than otherwise would be the case. The cost to society of each such infant's care can be very great.

Professor Wadlington discussed rather briefly the impact of the tort system on health care costs. In this instance the concern is with the cost implications of legal actions rather than with the legal implications of health care cost containment. I do not need to tell this audience what a serious problem has been generated by the proliferation of liability suits and the large judgments that have been rendered so often. This problem is not limited to the health care arena, but my remarks will deal specifically with the impact on children's health care. The impact has been surprisingly broad, and has affected obstetrical care, day care, recreational facilities, and the availability of vaccines.

Obstetricians have been particularly at risk, and their malpractice premiums have been among the highest within the medical profession. They have been subject to suits that ascribe a wide array of outcomes, including mental retardation or cerebral palsy, to failures in obstetrical care. The situation in certain parts of the country has become critical, with a significant number of obstetricians abandoning obstetrical care and limiting themselves to the practice of gynecology. The nurse-midwife has even been more vulnerable, since he or she is typically less affluent. The potential impact on child health of this threat to the availability of obstetrical care is obvious. The two most important factors in assuring a favorable

outcome of a pregnancy are adequate prenatal care and skilled assistance at the time of delivery and during the immediate postnatal period.

Many day care centers are having difficulty paying their insurance premiums, and some have been forced to close. This is particularly unfortunate at a time when so many mothers work and are dependent on good day care for their infants. Some public playgrounds, swimming pools, and other recreational facilities have also been closed because of the fear of liability suits.

Probably one of the most important areas where liability concerns have affected child health, one not discussed by Professor Wadlington, has been that of vaccines: their development, supply, and use. I would remind you that vaccines are among the most effective public health measures we have. Vaccination benefits not only the vaccinee but the community as well by interfering with the spread of the agent. Diphtheria, tetanus, measles, polio, whooping cough, german measles, and mumps are rare diseases in this country today, and, indeed, smallpox has been totally eradicated from the world. These achievements are largely due to vaccination.

Many vaccines carry with them a small risk but have been well accepted over the years because the risk from the vaccine is so much less than the risk from the disease in question. For instance, approximately one in one million infants vaccinated with the live or Sabin type polio vaccine will become paralyzed due to the vaccine virus. Nonimmune parents or other persons who come in contact with the vaccinated infant are exposed to a similar risk. Risks of this sort are generally referred to as unavoidable and inherent in the procedure. However, when such risks are realized in injury, suits have often resulted in large judgments. This occurs even though there has been no malfeasance on the part of the manufacturer or the physician, although it is often alleged that the recipient was not properly informed of the risk. It is a widespread opinion that such awards are made because there is no other method to recompense those who are unavoidably injured. It would seem appropriate for society to provide some other means of recompensing those who suffer injury, particularly since vaccination is required by law in this country for entry to school. In the meantime, such liability awards increase a vaccine manufacturer's liability premiums, thus indirectly affecting the availability of vaccines to children. It has also been pointed out that the system of contingency fees in this country encourages suits, further increasing liability premiums. Economically speaking, vaccines for human use, as opposed to animal vac-

cines, are not particularly profitable; the market is limited, and development costs are high. An additional complication in many states is that the statute of limitations does not begin to run until a child reaches majority. Thus, suit can be brought for an event that occurred many, many years before.

The result of all of this has been to discourage manufacturers from developing, manufacturing, and distributing vaccines. We are dangerously limited in the number of suppliers we have in this country today, and those who are still in the business are debating whether or not they should remain. As a result of these several factors, the cost of vaccines in the United States has been steadily rising. In the last year or two, it has reached a level where it may inhibit significantly the use of vaccines—a most undesirable outcome from the point of view of society.

As I complete my remarks in response to Professor Wadlington's excellent article, I wish to make one further observation. With the tremendous advances in biomedical science in the past quarter of a century, we are in a position today to provide health and medical care of a scope and quality that had never been dreamed of before. Indeed, we have already extended the average life-span of our population, eliminated certain diseases, and brought others under control. Clearly, if we are to realize the benefits of modern science, we will have to make some very hard decisions concerning the allocation of resources. These decisions will have to be made in the public arena and will involve legal and ethical, as well as political and scientific, considerations. I only hope that in the process, we will not totally abandon the concept of equity within our society—the provision of adequate health care to every member of society regardless of his or her capability to pay.

