# Committee Name:
# Senate Committee – Judiciary, Corrections and Privacy (SC–JCP)

**Appointments**

03hr_SC–JCP_Appt_pt00

**Committee Hearings**

03hr_SC–JCP_CH_pt00

**Committee Reports**

03hr_SC–JCP_CR_pt00

**Clearinghouse Rules**

03hr_SC–JCP_CRule_03–

**Executive Sessions**

03hr_SC–JCP_ES_pt00

# Hearing Records

03hr_ab0000

# 03hr_sb0027

**Misc.**

03hr_SC–JCP_Misc_pt00

**Record of Committee Proceedings**

03hr_SC–JCP_RCP_pt00

# WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director*
*Laura D. Rose, Deputy Director*

TO: SENATOR NEAL KEDZIE

FROM: Laura Rose, Deputy Director

RE: Questions Relating to 2003 Senate Bill 27

DATE: October 27, 2003

This memorandum discusses 2003 Senate Bill 27, which relates to recovery in cases involving "wrongful birth" and "wrongful life."

Under the bill, a "wrongful birth action" means a cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, seeks economic or noneconomic damages resulting from a condition of the child that existed at the time of the child's birth, and is based on a claim that a person's act or omission contributed to the mother's decision not to undergo an abortion. A "wrongful life action" means a cause of action that is brought by or on behalf of a child, seeks the child's economic or noneconomic damages resulting from a condition of the child that existed at the time of the child's birth, and is based on a claim that a person's act or omission contributed to the mother's decision not to undergo an abortion. In *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (S. Ct. Wisconsin 1975), the Wisconsin Supreme Court held that the right to sue for wrongful life ***is not recognized in*** Wisconsin. The court stated, however, that the right to sue for wrongful birth is recognized in Wisconsin.

The bill specifies that in a wrongful birth or wrongful life action, no person may recover damages from another person resulting from any condition that existed at the time of the child's birth, if that other person's negligent act or omission contributed to the mother's decision not to undergo an abortion. To fall under the bill's exemption from damages, the damages must result from a condition that exists at the time of the child's birth if it is based on a claim that the person's ***negligent*** act or omission contributed to the mother's decision not to undergo an abortion. Therefore, if a person brought a cause of action for wrongful birth (wrongful life actions are not recognized in Wisconsin), the person could recover damages from another person for a person's ***intentional acts or omissions*** that may have contributed to the mother's decision not to undergo an abortion, such as intentionally withholding medical information from a patient.

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Further, the bill does not eliminate other types of liability that might exist outside of damages in a wrongful birth action or a wrongful life action. Physicians are held to a standard of care with regard to prenatal diagnosis and testing. The American College of Obstetricians and Gynecologists has established standards for obstetric and gynecologic services. [The American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services 18-19* (6th Ed. 1985).] Those standards indicate that a woman who is identified through the taking of a medical history as having an increased risk for fetal defects should be offered prenatal diagnosis. Some of the signs of increased risk include advanced maternal age, previous offspring with a chromosomal aberration, family history of birth defects, and exposure to teratogenic agents during pregnancy. ["Wrongful Birth Actions: A Case of Legislative Curtailment, *100 Harvard Law Review 2017* (June 1987), p. 2022, footnote 22.]

The question is raised, then, as to the effect that precluding damages in wrongful death and wrongful life causes of action has on the ability of the patient to seek a remedy against a person who may violate this standard of care. The following are three types of actions which may be available to the parent of a child with birth defects that could have been detected by prenatal diagnostic tests if Senate Bill 27 became law (this assumes that the physician intentionally withheld information from the parents regarding the availability of prenatal diagnostic testing):

1. The parent could file a complaint with the Medical Examining Board (MEB), based on the allegations by the parent that the physician was guilty of unprofessional conduct. Section 448.02, Stats., authorizes the MEB to take various disciplinary actions upon making these findings regarding a physician.

2. A physician could be prosecuted for violating the informed consent law. [s. 448.30, Stats.; ch. MED 118, Wis. Adm. Code.] Under that law, a physician is generally required to inform a patient about the availability of all alternative, viable medical modes of treatment, and about the benefits and risks of those treatments. Therefore, a violation of this statute by a physician could lead to a charge of unprofessional conduct being filed by the MEB. [s. 448.02 (3) (a), Stats.] It could also lead to the physician being prosecuted since this is also punishable as a crime. [s. 448.09, Stats.]

3. Other causes of action in connection with negligent prenatal diagnostic testing might still be available. For example, such testing could provide information about the condition of the fetus or the mother which could lead to treatment of the child prior to the child's birth. Senate Bill 27 only speaks in terms of immunity from liability in wrongful birth or wrongful life causes of action.

I hope this information clarifies your questions with regard to Senate Bill 27. If you need any further information on this topic, please do not hesitate to contact me at the Legislative Council staff offices. My direct number is 266-9791.

LR:jal;tlu

# Better Off Dead?

*Jay Webber*

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In my favorite movie, George Bailey falls under the terrible illusion that everyone around him would be better off if he had never even been born. To show him how tragically misguided he is, his guardian angel Clarence shows him what the world would be like without him, and—I don't think I'm ruining the ending for anyone—George realizes that his really has been a wonderful life.

In 2002, a plaintiff's attorney might get to George quicker than an angel. That's what I gather, anyway, from a recent edition of a local legal newspaper. In it there is an advertisement by a law firm trumpeting the multimillion–dollar settlements it has won for people willing to claim they wish that they, or their children, had never been born. Those lawyers are getting rich—and they want you to get rich too—on two of America's most outrageous legal absurdities, "wrongful birth" and "wrongful life" claims.

Essentially, wrongful birth and wrongful life claims are variations on the standard medical malpractice claim: plaintiffs seek damages from doctors and hospitals for negligent acts committed by medical professionals. They involve a macabre twist of logic, however, that sets them apart. Wrongful birth and life plaintiffs must claim that if only the physician (or ultrasound technician, or geneticist) had given the parents of an unborn child the proper notice about their child's birth defects, the parents would have had an abortion in order to avoid the anguish and expense the child has caused since his birth. In other words, but for the negligence of the doctor the child would never have been born, and because the child has been born, the parents and the child are worse off emotionally and financially. Wrongful birth suits are brought by the parents of disabled children to claim damages for themselves; wrongful life suits are brought by parents on behalf of their handicapped children for the "damages" the child has suffered by being brought into the world.

It is important to note that in neither cause of action does a plaintiff claim that the medical professional actually caused the child's birth defects. The defects occur either naturally or by some other cause. The professional is negligent only insofar as he misreads an ultrasound or miscommunicates the chances of a genetic defect due to disease or genetic predisposition. The birth defects that can give rise to such suits range from the fatal (such as anencephaly—the brain growing outside of the skull) to the manageable (such as deafness, blindness, Down's syndrome, and hemophilia).

Wrongful birth and life suits have been in the news recently for the minor uproar they have caused in France. The French high court recognized wrongful birth and wrongful life as causes of action for the first time in November 2001. (See FT, Public Square, January 2002.) In January 2002, the French legislature passed a bill overturning that decision with respect to wrongful life suits. As the issue turns to the French Senate, French pro–lifers continue to lobby for the outlaw of wrongful birth suits as well.

Sadly, such lawsuits do not make headlines in America anymore, because in many states they have been with us for years. Not long after the *Roe v. Wade* decision in 1973, state courts began recognizing wrongful birth and life causes of action. The Supreme Court of my home state of New Jersey led the

way.

Before *Roe*, the New Jersey Supreme Court practically scoffed at the notion of either type of lawsuit. In 1967, it rejected a claim with language pro–life lawyers could find only in their dreams today:

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause of action. . . . A child need not be perfect to have a worthwhile life. . . . The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.

The *Roe* opinion completely reshaped legal views of the unborn, however, and soon thereafter the New Jersey Supremes were singing a different tune. In 1979, that court became the first to recognize the tort of wrongful birth. In light of *Roe*, the Court said that eugenic considerations in fact did control decisions regarding the birth of a child.

Public policy now supports, rather than militates against, the proposition that [the plaintiff] not be impermissibly denied a meaningful opportunity to make that decision [to abort]. . . . [We will not] immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects.

In 1984, the same court recognized wrongful life suits as well. At last count, twenty–seven states recognize the tort of wrongful birth, while three recognize wrongful life causes of action.

A first–year law student can count the ways in which these suits violate the tenets of traditional tort law, let alone common sense. For example, in traditional tort law, in order for one to be liable for the injuries of another, one's actions must actually *cause* the injuries. But in wrongful birth and life suits, the defendants have not caused any harm to the unborn child. The plaintiffs argue that the child's life itself is an injury, nonexistence being preferable to the child's challenged existence.

Such claims fly in the face of another basic element of tort law: a plaintiff must be able to claim damages for the injury incurred. In tort, courts are charged with making the plaintiff whole, or putting the plaintiff in the same position he would have been in had the injury not occurred. But how can a court compare the value of a life with a handicap to the alternative—never having lived at all? And which handicaps make life not worth living? If blindness and deafness make life unbearable, does blindness in one eye, or deafness in one ear? Does being born with just plain bad eyesight or hearing entitle one to an award? How serious must one's mental retardation be to qualify for compensation? Must it be "severe," or can a person of mere lower–than–average intelligence recover damages?

Those are dismal questions indeed. To avoid them, our only position must be that no life with any of those naturally occurring maladies should count as an "injury." Bishop Fulton J. Sheen had it right: life—every life—is worth living.

There is also the small point of a plaintiff's obligation under the law to mitigate his damages. In other words, once an injury occurs, the injured must take all reasonable steps to prevent the injury from getting any worse. If indeed a handicapped child is a net drain such that her parents are due

compensation for her very existence, then why not require them to give the child away? Or, if the child is generally a net drain on society, why not kill her? Chilling and perverse as that "logic" might be, can anyone predict with confidence that that will not be an option in, say, Oregon in the next twenty years?

Not that even casual court watchers could have been surprised by the recognition of these suits. As should be obvious by now from various contexts, our courts rarely allow high metaphysical, logical, or even legal hurdles to impede them from the "progress" they seek to make. In New Jersey, the Supreme Court simply emoted its way over and around the traditional obstacles to recognizing wrongful birth and life claims. "Law is more than an exercise in logic," it wrote, "and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice." The Court saw it as its job "to respond to the call of the living for help in bearing the burden of their affliction." Hundreds of years of legal precedent to the contrary were out the window.

Helping the disabled bear the burden of their affliction is a praiseworthy goal, but it's also something our elected officials do fairly well. At nearly every level of government, legislative bodies have passed laws that make clear that the disabled among us are to be loved, respected, and assisted. Federal, state, and local programs provide financial, medical, educational, and vocational assistance to children and adults with disabilities as well as their families. Discrimination on the basis of handicaps is outlawed in the workplace and the housing market, and accommodations for the disabled are required of public and private employers and transportation providers. Legislators scramble for the credit whenever they win victories for the physically or mentally disabled, and usually for good reason. Those programs represent the most basic threads of our social safety net and should remain a high priority.

The advantages of programs instituted by elected representatives are many. Chief among them are that such statutes are generally applicable and provide immediate assistance to families in crisis. In contrast, trying to help families bear the burden of their children's disability through litigation is a prolonged, piecemeal approach that offers potentially rich monetary rewards only to those few parents who are aggressive enough to file suit and who are fortunate enough to win compensation. I see no good reason for that: wrongful birth and life plaintiffs have no greater claim to assistance than the rest of the families that must rear disabled children.

In stark contrast to our stated legislative policy of protecting and cherishing the disabled, wrongful birth and life suits marginalize and stigmatize them. Courts have concluded that it is permissible and right to proclaim that, as a matter of law, some handicapped individuals would be better off dead. Worse, they put parents in the position of testifying to that effect in open court about their own children, who someday will doubtless wonder what could have driven their parents to make such cruel statements. The *Roe* logic has sunk us that much further into a culture of death. Rank disregard for the unborn has devolved into open contempt for the most vulnerable and innocent of the born.

The harm the courts do in this area extends beyond the creation of intangible stigma or theoretical harms. Wrongful birth and life suits create negative incentives that can affect the behavior of medical professionals. The lawsuits encourage more, and more thorough, prenatal genetic testing. If an ultrasound or other genetic test indicates that there might be the slightest problem with an unborn child, it is in the medical professional's interest to point out the defect, or potential defect, and advocate abortion as a course of "treatment" to the parents. From the doctor's perspective, why risk a lawsuit over a child who might be born with a defect? In a close case, better to suggest an abortion and reduce one's potential liability.

Further, an increased emphasis on genetic screening places an increased social pressure to abort on parents of the disabled unborn. If they do not abort, the parents risk being blamed by neighbors for subjecting their child to a malady that was so "avoidable." For proof of such pressure, see the recent and

rapid decline in the birth rate of Down's Syndrome children during the last decade. As the human genome continues to be mapped and the reality of human cloning sinks in, these lawsuits represent a less visible, but still very real, eugenic influence on society.

Those incentives are obviously abhorrent to the usual defenders of life in the womb, whose religious backgrounds help them recognize in each human being an imperfect but loved member of God's family. They should also be unwelcomed by at least some on the opposite end of the political and ideological spectrum. Some feminist scholars, for example, have pointed out that increased prenatal screening may yield information that an uncommitted biological father could use as a pretext to abandon child and mother.

No one should denigrate the pain and anger that parents feel when they learn that their child is disabled. It is hardly unexpected for them to lash out and seek someone to blame for their anguish and their child's challenges. In twenty–first–century America, those emotions often move people to call a lawyer and sue anyone who might be blamed for their problem. They do so regardless of its real cause and even though there's often no one, at least no human being, to blame.

There's an old saying that goes, "You can't lend a hand if you're pointing a finger." The desire for parents of a disabled newborn to point a finger at the closest or most convenient person as the cause of their pain is understandable. When that happens, it's time for society to lend the parents the hand they need, whether through public support or formal or informal private assistance, rather than point a finger with them by condoning wrongful birth and life suits. Only by doing that can we affirm the child's life, salve the parents' wounds, and recognize the obligations of our common imperfection. Recommitting ourselves to solidarity in those ways reclaims a small part of our culture for the culture of life.

The good news is that wrongful birth and life suits are fairly easy to ban legislatively in the states. It's not hard to imagine a powerful coalition consisting of advocacy groups for the disabled, pro–lifers, medical professionals, and tort reformers pushing through the simple and straightforward laws that outlaw these causes of action. Eight states have already banned one or both; Michigan barred both just last year. One hopes that more legislatures will follow their lead, because the world could use fewer plaintiffs' attorneys and more guardian angels.

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Jay Webber, a new contributor, is an attorney living in northern New Jersey.

## Vote Record

# Committee on Judiciary, Corrections and Privacy

Date: 10-25

Moved by: Stepp Seconded by: Zien

AB _____ SB SB 27 Clearinghouse Rule _____

AJR _____ SJR _____ Appointment _____

AR _____ SR _____ Other _____

A/S Amdt _____

A/S Amdt _____ to A/S Amdt _____

A/S Sub Amdt _____

A/S Amdt _____ to A/S Sub Amdt _____

A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

☐ Passage ☐ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

| Committee Member | Roll | Aye | No | Absent | Not Voting |
|---|---|---|---|---|---|
| **Senator David Zien** | ✓ | ☑ | ☐ | ☐ | ☐ |
| **Senator Scott Fitzgerald** | ☐ | ☐ | ☐ | ☐ | ☐ |
| **Senator Cathy Stepp** | ✓ | ☑ | ☐ | ☐ | ☐ |
| **Senator Gary George** | ☐ | ☐ | ☐ | ☐ | ☐ |
| **Senator Tim Carpenter** | ✓ | ☐ | ☑ | ☐ | ☐ |
| **Totals:** | | ____ | ____ | ____ | ____ |



☐ Motion Carried ☐ Motion Failed

# STATE SENATOR DAVE ZIEN

**CHAIRPERSON**
COMMITTEE ON JUDICIARY, CORRECTIONS AND PRIVACY
**VICE CHAIRPERSON**
COMMITTEE ON HOMELAND SECURITY, VETERANS AND MILITARY AFFAIRS AND GOVERNMENT REFORM
**MEMBER**
COMMITTEE ON SENATE ORGANIZATION
COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON LABOR, SMALL BUSINESS DEVELOPMENT AND CONSUMER AFFAIRS
SENTENCING COMMISSION
COUNCIL ON TOURISM
JUDICIAL COUNCIL

**ASSISTANT MAJORITY LEADER**


**MEMORANDUM**

TO: Senator Scott Fitzgerald, Member, Senate Committee on Judiciary, Corrections & Privacy

FR: Senator Dave Zien, Chair, Senate Committee on Judiciary, Corrections & Privacy

DT: October 28, 2003 (hand delivered 3:30pm)

RE: Paper Ballot for SB27, SB28, SB181, Senate Amendment LRBa1534 to SB273, SB273, AB265, and AB375 (3 pages)

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Please consider the following bill and vote on the motion below. **Return this ballot to Senator Dave Zien, Room 15 South, no later than 1:00pm (Wednesday), October 29, 2003.** Committee members' ballots not received by the deadline will be marked as not voting.

**Senate Bill 27**

Relating to: recovery in cases involving wrongful birth or wrongful life.

By Senators Kedzie, S. Fitzgerald, Schultz, A. Lasee, Kanavas, Welch, Lazich, Leibham, Stepp, Cowles and Reynolds; cosponsored by Representatives Weber, Montgomery, Gundrum, Krawczyk, Petrowski, Ziegelbauer, Stone, Bies, Suder, Hines, Nischke, Owens, Ladwig, McCormick, Gunderson, Ott, Albers, Nass, Plale, Kerkman, J. Fitzgerald, Vrakas, Freese, Friske, Kreibich, Seratti, Hahn and Grothman.

Please consider the following motion:

- Moved by Senator Stepp, seconded by Senator Zien that SENATE BILL 27 be recommended for PASSAGE.

Aye X No _____

**Senate Bill 28**

Relating to: requiring a woman upon whom an abortion is to be performed or induced to be informed at least 24 hours before the abortion is performed or induced that she may anonymously and with immunity from


WISCONSIN 1848

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liability relinquish custody of her newborn child to a law enforcement officer, an emergency medical technician, or a hospital staff member when the newborn child is 72 hours old or younger.

By Senators Kedzie, Reynolds, Schultz, A. Lasee, Lazich, Stepp, Roessler, Cowles, S. Fitzgerald and Kanavas; cosponsored by Representatives M. Williams, Ladwig, Rhoades, Jensen, Albers, Weber, Stone, Krawczyk, Petrowski, Hines, Bies, Suder, Hahn, Olsen, Seratti, Ainsworth, Townsend, Ott, Hundertmark, Nischke, M. Lehman, Gielow, Owens, McCormick, Gunderson, Kerkman, Loeffelholz, J. Fitzgerald, Van Roy, Vrakas, Freese, Jeskewitz, D. Meyer and Lothian.

Please consider the following motion:

- Moved by Senator Stepp, seconded by Senator Zien that SENATE BILL 28 be recommended for PASSAGE:

Aye X No _____

**Senate Bill 181**

Relating to: leaving the scene of an accident and providing a penalty.

By Senators S. Fitzgerald, Darling, Erpenbach, Roessler and Kanavas; cosponsored by Representatives Hines, Friske, Zepnick, McCormick, Kreibich, Ainsworth, Ott, Wasserman, Seratti, Gronemus, Hundertmark, Townsend, Hahn, Nass, Bies, J. Fitzgerald, Turner, Van Roy, Pettis, Suder, Owens and Vrakas.

- Moved by Senator Carpenter, seconded by Senator Stepp that SENATE BILL 181 be recommended for PASSAGE:

Aye X No _____

**Senate Bill 273**

Relating to: limiting the amount of bond set by a court in a civil action.

By Senators Kanavas, Erpenbach, Welch, Plale, S. Fitzgerald, Lassa, Schultz, M. Meyer, Darling, Wirch, Stepp, Decker, Zien, Reynolds, Leibham, Hansen and Breske; cosponsored by Representatives Suder, Kreuser, Pettis, Huebsch, J. Wood, Friske, Shilling, Musser, Ladwig, Jeskewitz, Kaufert, Montgomery, Travis, Balow, McCormick, Hubler, Petrowski, Hines, Plouff, J. Fitzgerald, Gunderson, Grothman, Richards, Schneider, F. Lasee, Sherman, Colon, Sinicki and Hundertmark.

- Moved by Senator Stepp, seconded by Senator Zien that Senate Amendment LRBa1534 be recommended for INTRODUCTION and ADOPTION:

Aye X No _____

- Moved by Senator Stepp, seconded by Senator Zien that SENATE BILL 273 be recommended for PASSAGE AS AMENDED:

Aye X No _____

**Assembly Bill 265**

Relating to: causing substantial bodily harm to another person and providing a penalty.

By Representatives Suder, Shilling, Albers, Balow, Berceau, Boyle, Coggs, Cullen, Gottlieb, Hahn, Hines, Hundertmark, Kaufert, Krawczyk, Kreibich, Kreuser, Ladwig, Lassa, J. Lehman, Loeffelholz, McCormick, Montgomery, Morris, Musser, Nischke, Owens, Pettis, Plouff, Pocan, Richards, Schooff, Stone, Turner, Van Roy, Wasserman, Weber, Zepnick, Taylor, Gielow, Molepske and Hebl; cosponsored by Senators Stepp, Brown, Darling, Lazich, Robson, Roessler and Wirch.

- Moved by Senator Carpenter, seconded by Senator Stepp that ASSEMBLY BILL 265 be recommended for CONCURRENCE:

Aye X No _____

**Assembly Bill 375**

Relating to: leaving the scene of an accident and providing a penalty.

By Representatives Hines, Friske, Zepnick, McCormick, Owens, Kreibich, Ainsworth, Ott, Wasserman, Seratti, Gronemus, Hundertmark, Townsend, Hahn, Nass, Bies, J. Fitzgerald, Turner, Van Roy, Pettis, Suder, Vrakas and Vukmir; cosponsored by Senators S. Fitzgerald, Darling, Erpenbach, Roessler and Kanavas.

- Moved by Senator Stepp, seconded by Senator Carpenter that ASSEMBLY BILL 375 be recommended for CONCURRENCE:

Aye X No _____

Signature _____

Senator Scott Fitzgerald

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35 Years
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1968 - 2003
State Affiliate of the
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Washington, DC 36004-1193

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**TESTIMONY OF**

**SUSAN ARMACOST**

**LEGISLATIVE DIRECTOR**

**WISCONSIN RIGHT TO LIFE, INC.**

**ON**

**SENATE BILL 27**

**October 28, 2003**

**before the**

**Senate Committee on**

**Judiciary, Corrections and Privacy**

Senator Zien and members of the committee, my name is Susan Armacost. I am the Legislative Director for Wisconsin Right to Life, Inc. I appear today in support of Senate Bill 27, a bill that would ban wrongful birth and wrongful life lawsuits in Wisconsin.

Initially, it is important to clarify the types of lawsuits that would be prohibited by this legislation and whether or not they are currently actionable in Wisconsin. "Wrongful birth" refers to a civil action brought by parents seeking damages for the birth of a child with disabilities, alleging that they would have aborted the child if the defendants had properly tested, detected, or warned them of the risks of a disability. They seek recovery for their emotional distress and the exceptional medical and educational expenses of rearing the child. "Wrongful life" refers to a civil action brought by or on behalf of a child with disabilities, alleging that the child's very existence is a legal wrong and that, but for the negligence of the defendants in failing to test, detect, or warn of a disability, the child would have been aborted. The child seeks recovery for pain and suffering during his or her life, and for the exceptional expenses associated with medical care and education during his or her lifetime. The Wisconsin Supreme Court has recognized the right to sue for wrongful birth, but has not recognized the right to sue for wrongful life. See *Dumer v. St. Michael's Hospital*, 69 Wis.2d 766 (1975).

The essence of this legislation is that no one should be held legally liable for failure to obtain information that would lead to a eugenic abortion. The critical claim in wrongful birth and wrongful life lawsuits is that a child has been born who, if certain facts had been known, would have been aborted. These claims are based on the absurd notion that a human life itself, if disabled, is a legal wrong and the child would have been better off if he or she had not been born. It is inaccurate, ignorant and discriminatory to assume that persons with disabilities cannot live meaningful and satisfying lives. Wrongful birth and wrongful life claims encourage discrimination

against unborn children with disabilities. In wrongful birth and wrongful life lawsuits, the doctors have not done anything to cause the child's disability and doctors should not be sued when they did nothing to cause the child's impairment.

It is important to clarify the types of lawsuits that this legislation would **not** affect. **This bill does not affect the ability to sue a doctor for malpractice if the doctor's act or omission causes harm to the mother or her unborn child.** For example, if the child has spina bifida, then it is important to know this condition so the child can be delivered by cesarean section to prevent trauma to the spinal cord. This legislation would not affect a doctor's liability for the failure to properly diagnose and treat a condition such as hydrocephaly, which can be treated in utero and at birth.

In states that allow wrongful birth or wrongful life lawsuits there is tremendous pressure on the medical community to practice defensive medicine in order to avoid liability for claims of malpractice. This results in pressure on doctors to routinely recommend unwarranted tests for every pregnancy. An example of a recommended prenatal test to which many obstetricians and family physicians object is a blood test referred to as a "triple screen" or "multiple marker screening for chromosome disorders". This test measures alpha-fetoprotein (AFP), human chorionic gonadotrophin (hCG), and estriol and is commonly used to screen for the presence of Down syndrome and spina bifida. However, there is a very high rate of *false positives* with this test. The only way to be sure is to perform amniocentesis, which involves inserting a long needle into the mother's uterus to extract amniotic fluid for more accurate diagnostic testing. Unfortunately, this is an invasive procedure and there is a 1 in 200 chance of a miscarriage. On the other hand, if the amniocentesis is not performed, then the parents may worry unnecessarily throughout the pregnancy. Even more sadly, about 90% of the babies that are diagnosed with

these abnormalities are aborted. Hence, these tests are sometimes called "search and destroy" procedures, especially for unborn children who have Down syndrome or other anomalies that cannot be treated during the pregnancy.

In addition, pressure to recommend testing that is not done for treatment purposes has caused a moral dilemma for pro-life physicians who object to being unwilling accomplices to an abortion. They are forced to choose between their moral convictions and potential legal liability. This legislation would protect these physicians from being compelled against their wishes to *offer* unwarranted testing that could result in the abortion of a child simply because the child has a disability.

This situation can be easily remedied by this legislation. There are at least nine states that have enacted statutes to prohibit wrongful birth or wrongful life actions, usually in response to a court decision allowing the action. In many other states, the courts have refused to allow wrongful birth or wrongful life actions. The language in Senate Bill 27 is similar to a Minnesota statute that was upheld by the Minnesota Supreme Court as constitutional when it was challenged on due process and equal protection grounds.

Wisconsin Right to Life urges you to support Senate Bill 27 and recommend its passage. Thank you.

Pro-Life Wisconsin

Defending them all...

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**Testimony of Rebecca Sande**
**Member, Board of Directors**
**Pro-Life Wisconsin**
**Senate Bill 27**
**Immunity from Wrongful Life and Wrongful Birth Lawsuits**
**October 28, 2003**

Good morning Senator Zien and Committee members. My name is Rebecca Sande and I am testifying today on behalf of Pro-Life Wisconsin as a member of the Board of Directors in support of Senate Bill 27.

In 1999, when Senator – then Representative – Kedzie first introduced this legislation, I worked on this bill myself as his research assistant. This bill is needed even more urgently today as wrongful life and wrongful birth cases unfold at an increasing pace. Why? Because Wisconsin must reject the sick and dangerous idea that it is better for someone to be dead than disabled.

This idea, of course, is the only reason for a wrongful birth or a wrongful life lawsuit. Indeed, such lawsuits are not brought if a child is born healthy.

To be clear, a "wrongful birth" lawsuit is filed by the parents of a disabled child against medical personnel for an alleged failure to provide them with information about tests to detect a possible disability

***so that they could abort the disabled baby***. Wrongful birth lawsuits were recognized by the Wisconsin Supreme Court in a 1975 court case. [Dumer v. St. Michael's Hospital.]

A "wrongful life" lawsuit is filed by or on behalf of a child with a disability who argues that his or her parents were not properly advised of birth defects ***so that he or she could be aborted***. Wisconsin law does not currently recognize "wrongful life" lawsuits.

**Wrongful life/wrongful birth or malpractice?**

Let us be clear: This legislation DOES NOT permit doctors to withhold any information either on the availability or the results of prenatal tests. Doctors are not exempt, under SB 27, from offering or providing reasonable diagnostic prenatal tests. Parents who desire such tests, even non-standard genetic testing, deserve the right to have them and retain that right under this legislation. In fact, these tests are often very valuable in preparing parents emotionally and financially for caring for a child with special needs.

Still, for parents who believe their physician negligently withheld information from them regarding prenatal diagnostic tests, Wisconsin law provides at least three legal actions. They may file a complaint with the Medical Examining Board. The physician could be prosecuted for violating the informed consent law, punishable under section 448.09 of the Wisconsin Statues. And ordinary negligence principles under common law still apply under this bill. Clearly, this legislation

does not eliminate liability on the part of a doctor who is negligent in his or her professional conduct.

**Detrimental to medical profession**

On the other hand, doctors should not be forced to practice extraordinary tests above and beyond the standard of care required of all health care professionals for fear of litigation by families and attorneys seeking astronomical financial settlements.

While the Wisconsin Medical Society has not taken a position on this legislation, it is important to note the consequences to the medical community that are being experienced as a result of these lawsuits.

Dr. Jim Shwayder is the Director of Ultrasound Medicine at the Denver Health Medical Center. He was interviewed earlier this year by Ed Bradley of *60 Minutes* because he has testified as an expert witness in many wrongful birth cases for both doctors and patients. According to Shwayder, these suits are driving good doctors out of the profession. "I think they are," said Shwayder. "I think what's happened is physicians now are held to a level that perhaps many people could not see in their own life, they're basically held to perfection. As an example, he cites the fact that a slightly thickened neck fold detected on ultrasound is a common marker for Down's syndrome. Yet, according to Shwayder, this only represents a 45 percent sensitivity in detecting Down's. "That means," he says, "that over half those babies that have a thickened neck fold do not have Down's syndrome."

In France, after a series of rulings by the country's highest court upholding wrongful life lawsuits, doctors have claimed they would be forced to pressure mothers into having an abortion when there is any risk of a child being born with a disability. They also pointed out that their insurance premiums had multiplied by 10 times in just 14 months, since a high profile wrongful birth decision by the high court.

**Qualitatively different type of lawsuit**

Rather than eliminating all legal action against negligence in the medical field, SB 27 would simply disallow a completely immoral, discriminatory and dangerous legal cause of action – wrongful life and wrongful birth. These lawsuits are *qualitatively different* than ordinary malpractice suits. Liability that is usually brought to bear on doctors for allowing or causing another's death is now brought to bear on doctors for allowing or causing another's birth!

**Traditional Tort Law**

It should also be pointed out that in traditional liability suits, in order for someone to be liable for the injuries of another, he or she must have actually caused the injury. Of course, doctors do not cause children to be disabled. Secondly, in traditional tort law, a plaintiff seeks to be "made whole" – or in the same condition he or she would have been in had the injury not occurred. But how can a court of law do this in a "wrongful birth" suit? Remove the child from the parents' care? Abort the child post-natally? These suggestions may sound ludicrous, but in reality, they would be the logical remedy.

**Horrific societal message**

Anita Allen-Castellito, a law professor at the University of Pennsylvania and a bioethicist, worries about such a "remedy" for people like 9-year-old Ryan Powers. Ryan was born with spina bifida and is paralyzed from the waist down. Ryan's parents won an out of court settlement in a wrongful birth lawsuit, and Castellito worries that Ryan will be emotionally damaged if he ever learns that his mother testified that she would have had an abortion if she had known about his condition.

"Realistically," Castellito said earlier this year in an interview with *60 Minutes,*' "how many children are going to hear that complicated story as opposed to the simpler message that 'I didn't want you, you're disabled, I didn't want a disabled child."

Besides the emotional damage to children, these lawsuits are discriminatory against the disabled and hypocritical. They contradict public policy and laws such as the Americans with Disabilities Act that affirm and protect the lives of our disabled citizens. It is hypocritical to encourage or allow the destruction of "defective" lives before birth, yet to protect them after birth. Will we as a society ultimately say to the disabled: "Yes, we will protect you," or "No, you are a burden – go away."

Pro-Life Wisconsin is grateful to Sen. Kedzie for authoring this legislation, and we urge this committee to allow a full hearing of its merits on the Senate floor. Thank you, and I'd be happy to answer any questions.

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**Testimony of Peggy Hamill**
**State Director of Pro-Life Wisconsin**
**SB 27 – Immunity from Wrongful Life and Wrongful Birth Lawsuits**
**October 28, 2003**

Chairman Zien and members of the Committee, thank you for allowing me to speak.

I was born with what some consider a disability. I have a genetic condition known as albinism. Besides a lack of pigment in my skin, hair and eyes, I am legally blind. I have had this condition since the moment I was formed in my mother's womb.

It is an insult to me to know that if I was born in Wisconsin today, our laws would allow my parents to sue my mother's doctor if they felt that they were not properly appraised of my condition before birth. They would be entitled to damages if they claimed this lack of information prevented them from knowing to eliminate me before I was born.

I know my mother and father would never have done so. The fact, however, that our state condones such action is not only discriminatory, but demeaning to those of us with disabilities.

I ask you to vote to send SB 27 to the full Senate for approval. This gesture of respect for the dignity of persons with disabilities would be deeply appreciated.

# Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Judiciary, Corrections and Privacy

FROM: Alice O'Connor & Mark Grapentine, JD
Wisconsin Medical Society

DATE: October 28, 2003

RE: Senate Bill 27 - Testifying for Information Only

The Wisconsin Medical Society, with more than 10,000 members statewide, wishes to thank Chairperson Zien for this opportunity to provide information on Senate Bill 27. The Society has recently rescinded policy that relates exactly to the bill before you today, so we feel it is important to inform the committee where we currently stand and the reasoning behind the policy alteration.

Until April of this year, the Society's policy read as follows:

"**Wrongful Birth:** The Wisconsin Medical Society supports legislation that would prohibit action or suits against a physician based on the claim that, but for the act or omission of the physician, a person would not have been born alive but would have been aborted."

In August 2002, the Society's Council on Ethics and Judicial Affairs – comprised of physicians and medical ethicists from around the state – deliberated over the above policy. Discussion was held on the philosophical and legal aspects of the issue, including the need to balance the overarching importance of informed consent with medical malpractice protections. While the policy did not directly mention any change in a physician's duty to disclose the availability of viable alternative treatments or speak specifically to a prenatal diagnostic test duty, the Council felt that the policy could give such an appearance. A majority of the Council voted to recommend to the full Society Board of Directors that the policy be deleted.

In April 2003, the Society's House of Delegates (HOD), which oversees the Society Board of Directors' policy, adopted the Council's recommendation. The HOD emphasized that the physician has a "duty to inform" while also recognizing that some accommodation must be made to provide safeguards in a highly litigious climate.

As of October, the Society's Council on Ethics and Judicial Affairs has yet to formalize an official position on this delicate and controversial issue. Our physicians recognize that in updating the Society's official position, further discussion is needed before our organization can properly take a stance one way or the other.

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We recognize that SB 27 does nothing to overtly alter the current duty a physician has under our state's informed consent law, currently found in Wis. Stats. §448.30. Because our policy is still evolving in this area at the current time, we felt that an explanation of that evolution would be helpful to Committee members.

Thank you again for the opportunity to provide this information. As always, please feel free to contact us with your questions. Alice O'Connor can be reached at aliceo@wismed.org or by phone at 442.3767. Mark Grapentine can be contacted via markg@wismed.org or 442.3768.

# Testimony on Senate Bill 27

**Senator Neal Kedzie**
**Senate Committee on Judiciary, Corrections and Privacy**
**October 28, 2003**

Mr. Chairman, members of the Committee, thank you for holding a public hearing today on Senate Bill 27.

Senate Bill 27 would prohibit wrongful birth and wrongful life actions in Wisconsin.

A wrongful birth action means a cause of action that is brought by a parent, and that seeks economic or non-economic damages resulting from a condition of the child that existed at the time of the child's birth, and is based on a claim that a person's act or omission contributed to the mother's decision not to undergo an abortion.

A wrongful life action means a cause of action that is brought by or on behalf of a child, and seeks the child's economic or noneconomic damages resulting from a condition of the child that existed at the time of the child's birth, and is based on a claim that a person's act or omission contributed to the mother's decision not to undergo an abortion.

**Arguments in Support of SB 27**

- Wrongful Birth/Wrongful Life actions treat children as products
- Physicians should not be compelled to initiate screening tests that are not medically necessary – simply to avoid the possibility of a Wrongful Birth/Wrongful Life lawsuit.
    - Approximately 1 in every 200 amniocentesis result in miscarriages
    - Approximately 1 in every 20 tests to detect Down's Syndrome are false positives.
    - If an individual aborts a fetus on a false positive, does it open doctors up to a wrongful death lawsuit?
- A 1975 Wisconsin Supreme Court case (Dumer v. St. Michael's Hospital) recognized wrongful birth actions, but not wrongful life actions in the state of Wisconsin. Both types of lawsuits should be prohibited.
- These type of lawsuits are based on the idea that the lives of certain people -- disabled people -- are inherently wrong, and that death is preferable to life with disabilities. The very idea that a person's birth or life is WRONG is repugnant to me – and should be to all of us.
- Doctors are not responsible for the disability of a child. But wrongful life and wrongful birth lawsuits seek to hold them

responsible. That is wrong, and Wisconsin law should not recognize such actions.

Opponents of Senate Bill 27 have claimed in the past that this bill will allow Doctors to intentionally withhold information from patients, give them the right to lie to patients, and to exempt them from a duty to offer, perform and advise parents of results of prenatal tests. This is simply untrue. SB 27 simply creates immunity from either a wrongful life or wrongful birth lawsuit. Doctors would still be subject to ordinary negligence principles, as well as disciplinary action by the Medical Examining Board.

Thank you again for your consideration of Senate Bill 27

**(Note: Last Session, this bill, AB 360, was recommended for passage by the Assembly Committee on Family Law by a 5-1 vote. No further action was taken. The session before, AB 535 was passed by the Assembly on a 62-30 vote.)**

# WISCONSIN CATHOLIC CONFERENCE

TO: The Honorable Members of the Senate Committee on Judiciary, Corrections, and Privacy

FROM: Kathy Markeland, Associate Director for Respect Life and Health Care

DATE: October 28, 2003

RE: Support for Senate Bill 27

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The Wisconsin Catholic Conference respectfully requests your support for Senate Bill 27, which would prohibit claims of wrongful birth and wrongful life.

At the outset, it is important to note that SB 27 would *not prohibit* families from seeking *any* legal recourse for negligence on the part of the physician, but it would prohibit the specific claim that the negligent act "contributed to the mother's decision not to undergo an abortion." In other words parents would not be able to claim that a physician should be liable for the fact that their child is alive.

Medicine has made marvelous advances in treatments for pre-born children. Diagnosing potential conditions or disabilities is significant not only to possible treatments that may be available in utero, but it can also help physicians and families make the necessary preparations to care for a disabled child.

To address the ethical issues that these new technologies present, Catholic health care facilities operate under a set of guidelines promulgated by the US Bishops. According to these Ethical and Religious Directives for Catholic Health Care (ERDs): "Prenatal diagnosis is permitted when the procedure does not threaten the life or physical integrity of the unborn child or the mother and does not subject them to disproportionate risks; when the diagnosis can provide information to guide preventative care for the mother or pre- or postnatal care for the child; and when the parents, or at least the mother, give free and informed consent."

As a matter of principle, under the ERDs "prenatal diagnosis is not permitted when undertaken with the intention of aborting an unborn child with a serious defect." This is consistent with our beliefs regarding the inherent value of human life at all stages and in all forms. To value human life differently simply because it does not conform to our community's standard of perfection feeds discrimination and callousness.

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We have made great strides in this American society to advance the rights of disabled individuals. However, far too often, we still fall victim to a vision of "rugged individualism" that denies the inherent interdependence of all members of our human community. None of us is independent and none of us is perfect.

For parents, ultimately these are profoundly difficult situations. Some families may feel ill equipped emotionally and financially to handle the challenges presented by a disabled child. Society has a special duty to serve and support families that are entrusted with the care of one of the more vulnerable members of our human family. We do not support these parents by establishing a rule of law that sends the message that bringing their child into this world was a mistake.

Fundamentally, as a matter of principle, Wisconsin law should say that no child's life is a mistake or wrong. To declare the birth or existence of any individual as "wrongful" is to establish by law that some human lives are more valued than others and some are dispensable and unworthy.

We urge you to support SB 27.

October 28, 2003

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to speak to you today to oppose SB 27. When I heard about this bill, I felt compelled to speak to you about it because, as a mother, a health care professional and an educator of health professionals, I am deeply committed to maintaining the ethical contracts between health care providers and their patients.

I have been a Physician Assistant for 16 years and an educator of Physician Assistants in Wisconsin for 10 years. In both practice and teaching I have been bound by the principle of patient autonomy—the patient's right to make decisions about their own healthcare. Without full information about their options, patients can not make meaningful decisions. If we, as health care providers, withhold information from patients that bears upon their decisions, we have violated their autonomy and their right to make their own decisions. Therefore, I oppose this bill first because it violates patient rights.

Second, I oppose this bill because it creates a separate category of patient that is not entitled to her full right of informed consent. How will I explain to my students that, although patient autonomy is the paramount ethical principle that we should adhere to in practice, the legislature of Wisconsin does not feel that this right applies to pregnant women. Women do not lose their rights when they become pregnant. Women do not lose their judgement or their ability to make good decisions when they become pregnant. The last I heard, pregnant women retain full citizenship.

Third, I oppose this bill because it works against best medical practice, as recommended the the American College of Obstetricians and Gynecologists, which is the premier authority on the care of women in pregnancy. Under this bill, a health care provider can provide substandard prenatal care and be legally protected from this act of negligence. This law is not just about preventing abortions—there are other implications. For example, if an abnormality is detected in the mother or the fetus that may be amenable to treatment, a doctor could withhold information about the abnormality if he or she feels that it could also possibly lead a woman to choose abortion.

Finally, I oppose this bill because I do not believe that health care providers are invested with the capacity or the right to make decisions for their patients. Our job is to evaluate, educate, and offer options to patients.. For example, I (along with many experts) do not believe that current testing for prostate cancer benefits men over the age of 70 or so. In fact, I think this test leads to treatments that decrease the quality of life in these men. At the same time, we have no evidence that these treatments are helpful. Although I do not think these tests are useful, I do not decide for my patients whether to have the tests. I inform patients about the options and trust them to make their own decision. This same approach, which is used by most health care providers currently, and which is endorsed by medical ethicists and the public, should extend to pregnant women.

Please oppose SB 27. It works against the interests of good health care, of women, and of families.

Thank you for your attention.

Perri Morgan
505 Maple Ave
Madison, WI 53704

BECKY
WEBER
WISCONSIN STATE REPRESENTATIVE
5TH ASSEMBLY DISTRICT

October 28, 2003

Testimony by Representative Becky Weber in favor of SB 27

SB 27 is a necessary bill. It eliminates the possibility of a lawsuit against a physician from a parent who argues that had they known their child would be born with a birth defect they would have killed their unborn child.

In 1975, the Wisconsin Supreme Court held that wrongful birth actions are allowable in Wisconsin. Aside from the moral issues, this action alone was a case of the Court overstepping its bounds and creating a common law of action where one had never existed before. It is long overdue for the Legislature to correct this action by the Court.

Wrongful birth is becoming widely accepted as a mainstream legal suit. Wrongful birth is wrong! Across the country, thousands of these cases have already come before the courts. If wrongful birth and life cases continue to become more common, will doctors, in an effort to protect themselves from a possible lawsuit, be forced to advise abortions even when risks are remote? How many healthy children will *not* be born because of this?

As the mother of two boys, I cannot imagine going before a court and saying I wished my child had never been born. In a mother's eyes every child is perfect. Wrongful birth suits gives children with disabilities the message that their very existence is a tragic mistake. It sends the message that these children's' lives are so bleak and such a burden to the family that the only compensation would be millions of dollars. This is such a distortion of what these children's lives are like.

As I stated, SB 27 is a necessary bill. It:

- Does not prohibit parents from requesting any medical test on their unborn child
- Does not allow a doctor to willfully withhold medical information from a parent
- Does not exempt physicians from a duty to offer, perform or advise parents of the results of prenatal tests

SB 27 sends the message that there is no such thing as a wrongful birth or wrongful death. It says that every child is precious - no matter what their disability may be.

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# Testimony In Opposition To SB 27

As a pediatrician and parent of three teenagers, I urge the members of this committee to oppose Senate Bill 27. As a physician, I believe that it is unethical for a medical professional or other health care provider to deliberately mislead and misinform a patient. The role of this legislative body is to protect patients and the health-care consuming public in Wisconsin, not to facilitate unethical care by providers in this state.

Abortion is a legal and safe medical option that must be discussed in the delivery of health care to pregnant women who receive pre-natal diagnostic testing. In my work teaching medical students and residents, I encourage those individuals with religious or personal objection to abortion to find a field of medicine in which they will not encounter pregnant women as patients. Our patients expect us to meet **their** health care needs and to present medical information in a factual and unbiased manner—not to force our personal political or religious agenda upon them. Health-care providers who intentionally withhold critical information from expecting parents do not deserve protection by the state for their negligence.

Senate Bill 27 prevents the pregnant women and their families in Wisconsin from receiving the best medical care possible and it violates the Best Practice Guidelines established by the American College of Obstetricians and Gynecologists. By allowing physicians to withhold information, pregnant women are subjected to substandard medical care and are treated differently than other patients. In addition SB 27, by allowing physicians to fail to inform women about all health care treatment options, violates principles of informed consent that are well recognized in Wisconsin and federal law. SB 27 allows physicians to violate medical ethics by withholding vital health information from women and by legally allowing a physician to commit negligent acts or omissions against pregnant women.

This bill is not supported by the health care community or any health care organization. It is being pushed by special interest groups committed to eliminating a woman's right to choose abortion in any instance, even when her life or health is endangered. The purpose of SB 27 is to erect a substantial obstacle in the path of a woman seeking an abortion. Such a purpose is unconstitutional as determined by the U.S. Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey.

Please keep politics out of the medical examination and consultation room and oppose Senate Bill 27.

Thank you!

Scott J. Spear, MD
Associate Professor of Pediatrics
University of Wisconsin-Madison
608-233-1035

October 28, 2003