The Abortion Counseling Case

BY HENRY RESKE

For decades the federal government has turned over millions of dollars to religious groups to help them deal with societal problems. Federal tax dollars are used by church-run hospitals and shelters for the homeless and by church-affiliated programs for runaways and drug addicts. It is widely viewed as money well spent in humane endeavors.

Yet the Adolescent Family Life Act, which has sent a paltry $9 million a year to groups working on the problems of teen sex and pregnancy, has drawn fire from a variety of interest groups involved in civil liberties, the separation of church and state, and abortion rights.

Enacted in 1981, the act was derisively dubbed the "Chastity Act" for its "Just say no" message and its deliberate involvement of religious groups in the teen sex problem. It also spawned a fight in federal court, which upheld the law but barred the participation of religious groups—a decision that made no one happy. All parties appealed to the Supreme Court, and its decisions in *Bowen v. Kendrick*, No. 87-253 and three other related cases are pending.

Kendrick presents the Court with a complex set of problems. Its ruling may affect not only the AFLA but also the myriad of state and federal programs that have sent tax dollars to groups affiliated with religions. Underneath it all is yet another skirmish in the long and bitter war over abortion.

"There are some very sincere people who are concerned about the problem of advancing religion," said Sen. Orrin Hatch, R-Utah, a key sponsor of the act, "but the driving force of the attack is the abortion industry and those who feel deeply about abortion."

Abortion was clearly on the minds of those who supported the act. Court documents are replete with anti-abortion statements made by conservative supporters of the measure during congressional debate. According to one brief, Hatch and other conservative senators sent a letter to President Reagan describing the bill. The letter noted that abortion rates continued to rise dramatically and that the act "stresses the need for family involvement and seeks alternatives to abortion."

The "Chastity Act" was designed to deal with the problem of teen-age pregnancy not with birth control and abortion, but by trying to teach discipline to adolescents; in other words, by talking them out of having sex.

The act, passed with the sponsorship of such ideologically opposed senators as Hatch and Edward Kennedy, D-Mass., calls for the active involvement of religious groups, prohibits funding any organization involved in abortions (even if it is simply advising about the option), instructs the groups to advise pregnant teens to choose adoption and requires emphasis on the values of premarital abstinence.

The AFLA requires grant applicants to describe how they will "as appropriate ... involve ... religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives."

Grants have gone directly to religious groups in the District of Columbia; St. Cloud, Minn.; Arlington, Va.; Amarillo, Tex.; Wayne County, Mich., and Ohio.

Taxpayers, clergy and the American Jewish Congress filed suit in October 1983, charging the act is unconstitutional.

Judge Charles Richey agreed with the plaintiffs and issued summary judgment in April 1987 in the U.S. District Court for the District of Columbia. He said that while the act has a valid secular purpose of dealing with the problem of teen pregnancy, the portion of the act involving religious groups is contrary to the First Amendment.

"Upon examination of the language of the Adolescent Family Life Act, the court finds that on its face the AFLA has the primary effect of advancing religion and fosters excessive entanglement between government and religion," the judge wrote. "Moreover, the uncontroverted facts show, without a doubt, that as applied, the AFLA has the primary effect of advancing religion."

Indeed, Richey found that the

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Networking through women's bar associations

Some women believe that the best way to function in the male-dominated legal profession is exclusively through traditional bar associations.

Susan Loggans is one of them. The Chicago plaintiff's attorney believes that involvement with women's bars keeps women out of the mainstream.

"There is no doubt in my mind that women's bars do positive things," she said, "but there is a danger of isolating ourselves as an oddity."

On the contrary, said Janine Harris, president-elect of the National Conference of Women's Bars. Women's bars train women to operate in a male-dominated profession, she said.

Women's bars have many solid achievements, said Harris. They have promoted civil rights litigation, helped formulate maternity and family-leave policies, helped pass child-care legislation, investigated gender bias in the courts, and helped put many women on the bench, she said.

"We have pushed for more women on the bench because it's very important to have a representative judiciary—not just for women lawyers, but for women litigants and the citizenry at large," Harris said in February at the ABA's hearings on women in the legal profession.

"We address issues that other bars are not interested in or have a different stand on," she said. "They just aren't responsive."

Because their membership is united, women's bars respond more quickly, said Bankruptcy Judge Lisa Hill Fenning, current NCWBA president and a member of the ABA Commission on Women in the Profession. While mainstream bars may debate endlessly about taking a position, women's bars can act immediately, said Fenning.

They also provide women with leadership opportunities they might not get in other bar associations. "You just don't find the same recognition and support for women in the mainstream bars," Fenning said.

ABAJ/Wide World

Lisa Hill Fenning

And women's issues are getting more recognition in mainstream bars because women are bringing them there from the women's bars, said Lynn Hecht Schafran, also on the ABA Commission on Women in the Profession. Through "cross-fertilization," she said, different points of view and ideas are being filtered into the mainstream.

Nevertheless, some women shy away from women's bars because they anticipate a negative response from their colleagues.

"It's true," said Fenning. "Men sometimes make fun of women or denigrate them for that activity. That's partly because they're afraid of it." Some men fear that women will develop the political skills necessary to advance in the legal profession, she said.

Nevertheless, membership in the women's bar association in Los Angeles alone has dramatically increased over the past three years, Fenning said. Women's heightened awareness has caused them to turn to women's bar associations. "Until this profession is truly and fully integrated, there is a need for women's bar associations."

—Valerie Feder

in the 11-member firm of Cotchett & Illston in San Mateo, Calif.

"In younger women partners, I see more of a willingness to get families started earlier. I also see more willingness for women to become permanent associates or something else that requires less commitment," she says.

As a member of California's Committee on Women and the Law, she hears many partners grappling with the issue of building flexibility into their firm's structure, such as allowing part-time work without falling off the partner track.

Illston is particularly encouraged that men are getting caught up in quality-of-life issues.

One is Larry Baskir, a D.C. lawyer and husband to Marna Tucker. He recalls shifting around his work schedule to spend more time with his wife and first child. Baskir says that both men and women must be prepared to set rational boundaries on their jobs, but admits, "It's only after a certain stage of self-confidence and awareness that you can do that."

Judy Perry Martinez of New Orleans planned her life around her and her husband's careers. But like many others who barreled down the partnership track, she is now a little wistful. "So many women like myself who have ordered and prioritized our careers and waited to have a family may find we have put off the decision for too long."

"If I had a family when I was a new associate, I would have been divorced or they would have come and taken my children away," says Patricia Seitz, a partner for nearly a decade at the Miami firm of Steel, Hector and Davis. "I never went home before 10 p.m. I found that after I was made a partner, I could cut back some on the time at work because I was more efficient and there were other people to help me out," she says.

"The fact is that for women, the choices are still not very many," says Hufstedler, who has a son and three grandchildren. "You can decide never to have a family, but you have to live with that decision. If you make the choice to try to have a family, you are going to have to work harder than anyone else. When I talk with women partners who have raised families, none of them wants to trade in their children." ■

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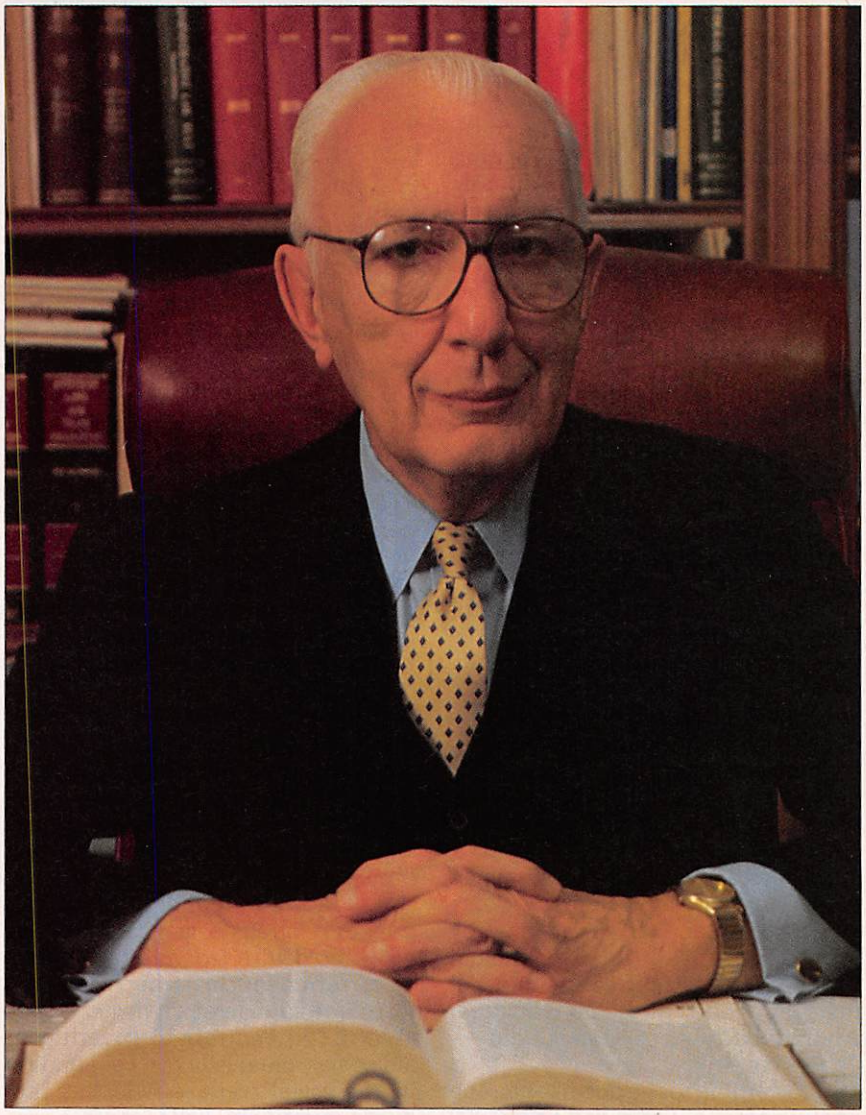

Judge Charles Richey: "On its face the AFLA has the primary effect of advancing religion and fosters excessive entanglement between government and religion."

religious message of some of the grant recipients found its way into the "Just say no message" of the program.

Citing a 400-page, three-volume record filed with the plaintiff's request for summary judgment, Richey noted that one AFLA-funded employee was told that she must follow the directives set forth in "ethical and religious directives of Catholic facilities."

He said another grantee offered "spiritual counseling" and others "used curricula with explicitly religious materials."

"In addition, a very large number of AFLA programs took place on sites adorned with religious symbols—precisely the 'crucial symbolic link' between religion and government that establishment clause jurisprudence has cautioned against, particularly where youngsters are involved," he wrote.

But Richey did not find the entire act unconstitutional—only the parts dealing with funding for religious groups—a decision that managed to offend all sides.

The court ordered funding to religious groups to stop, but a stay of Richey's ruling was issued by Chief Justice William Rehnquist while the case was on appeal to the Supreme Court.

Because the district court found portions of an act of Congress unconstitutional, the case could be appealed directly to the Supreme Court without first going to the circuit court of appeals, and the high court agreed in November to hear the case.

According to information supplied by the Department of Health and Human Services, which oversees the program through its Office of Population Affairs, the AFLA is a research and demonstration project and is the only "federal program focused exclusively on developing strategies to address the problems of teen sexual behavior and teen pregnancy."

The program is just one of several HHS programs dealing with pregnancy-related issues, however. The National Family Planning Program, for example, allocates about $140 million annually to provide free or low-cost, confidential contraceptive services to low-income women, including adolescents.

The purpose of the AFLA is to promote teen abstinence and deliver health, education and social services to pregnant and parenting teen-agers.

A pamphlet prepared and distributed by HHS tells teens that one million teen-agers become pregnant each year and warns of problem pregnancies and sexually transmitted diseases like herpes, syphilis, gonorrhea and AIDS.

"Face it. Sex for young people is pretty risky," it says.

The pamphlet concludes by telling teens there are people in the community who want to help, including "your family doctor, your priest, minister or rabbi."

However, even defenders of the bill admit that some grantees went far beyond such innocuous messages and into First Amendment grounds.

"We do not contend that there were no departures from proper constitutional principles in individual AFLA programs," the government said in its brief on the merits. "The District Court correctly found that Catholic Charities of Arlington, Va., held AFLA classes in religious settings and that its inclusion of religious discussions at the conclusion of

Joan Marcus

◂ Sen. Orrin Hatch was a sponsor of the AFLA.

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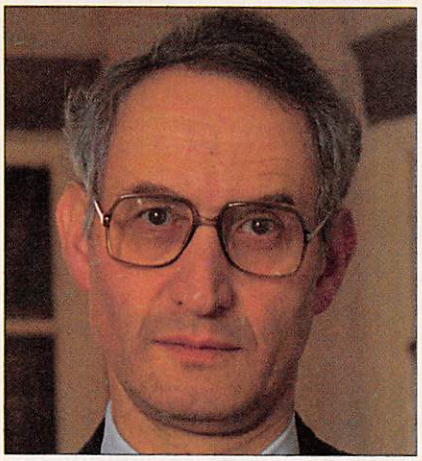

U.S. Solicitor General Charles Fried

otherwise secular AFLA programs raises serious concerns. In another case, a grantee ... proposed to 'include spiritual counseling in its AFLA program,' while another grantee ... did at one point use curricula that 'included explicitly religious material.'

"Such departures are not representative of the many different programs funded under the AFLA, including those in which religious organizations participated."

The government notes that such departures were dealt with and that HHS specifically instructs grantees that they may not use government funds to inculcate religion.

During oral arguments, Solicitor General Charles Fried called the departures "constitutionally troublesome."

"Well, I think that some of those departures are departures not only from what the Secretary directed, but departures from a fairly tight reading of some of the decisions of this Court," Fried said.

Nonetheless, according to documents lodged with the Supreme Court as part of an amicus curiae brief by groups opposed to the law—including the NOW Legal Defense and Education Fund and the National Abortion Rights Action League—abuses continue.

According to the documents, one organization that received a $150,000 grant prepared a pamphlet entitled "37 ways to say no." It included the admonitions to "Commit each date to the Lord; be Christlike, and act like Jesus would if he were on a date."

Janet Benshoof, an ACLU attorney, told the court during oral arguments, "We're not saying chastity cannot be a secular value," but that in the hands of religious organizations it can be misused.

"When you put the values of chastity, intercourse, masturbation and marriage into the hands of religious authority, it's going to be very hard and, I think we proved, impossible for religious organizations to teach them in a secular way," Benshoof argued.

However, Hatch said the United States has a long history of religious organizations participating in social welfare programs as long as they are not advancing religion.

He said there is no question that all statutes can be abused, adding, "Teaching religious doctrine is impermissible, no question about it.

"The purpose of the act itself was to try to give an alternative to premarital sex and pregnancy and we feel that those problems are best approached by families and religious organizations," he said.

An amicus brief filed for the attorneys general of Arizona, Louisiana, Missouri, New Hampshire, New Mexico, Utah and Washington supported the view that religious groups are and should be involved in such programs.

"Since the founding of the republic, religious organizations have cooperated with federal, state and local governments in caring for the unfortunate and less-privileged," they argued. "In contrast to government aid to parochial schools, cooperation in the social welfare field has produced relatively little controversy. Instead for nearly 200 years, this cooperation has provided food, shelter, medical care and other essentials to millions of needy Americans."

The brief goes on to quote a 1977 study sponsored by the Commission on Private Philanthropy and Public Needs that concluded that Jewish- and Catholic-related agencies received 35.4 percent of their grants and contributions from governmental sources.

"Reports by various religious groups, including Catholic Charities, Lutheran Social Services and Jewish Federations, reveal similar levels of governmental funding," they said.

Catholic Charities USA, the coordinating body of Catholic Human Services Agencies in the United States, reports that in 1986, 45 percent of the nearly $700 million worth of services delivered by local Catholic Charities agencies came from government funding.

The attorneys general amicus brief warns that "disrupting this well-established tradition would seriously jeopardize a substantial portion of the nation's most effective social services."

It also calls Judge Richey's ruling, which applied the three-part test developed in *Lemon v. Kurtzman*, 403 U.S. 602, one of "extraordinary breadth."

Under the *Lemon test* the AFLA must have a valid secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not foster excessive entanglement between government and religion. Richey found the act passed only the first test.

Richey also found that the law advanced religion through the counseling of adolescents by religious organizations on matters related to religious doctrine.

"It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. ... The AFLA does not prohibit these religions from receiving AFLA grants," Richey wrote. "Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations."

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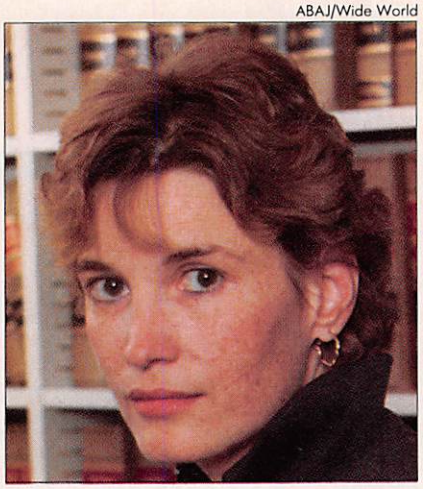

Janet Benshoof

But, the state attorneys general warn, "This logic condemns literally every social welfare service provided by religious groups.

"Feeding the hungry, sheltering the homeless, tending the sick, and counseling the bereaved are all 'fundamental religious missions' of religious groups. If applied consistently, the District Court's sweeping rationale would forbid government aid for all these services, thereby threatening countless welfare programs around the nation. Nothing in the establishment clause requires a result that is so harsh and so inconsistent with our history."

An amicus brief filed by Catholic Charities USA and the Catholic Health Association of the United States argues that, "The fact that the work involved deals with a matter of public morality does not convert this service into the teaching of religion."

The Rev. Thomas J. Harvey, executive director of Catholic Charities USA, said, "Literally hundreds of other religiously sponsored social service organizations stand to be crippled in their efforts to provide vital human services in this nation" unless Richey's ruling is overturned.

The Baptist Joint Committee on Public Affairs, the American Jewish Committee and Americans United for Separation of Church and State, though, note in their amicus brief that the very nature of the AFLA "must inevitably promote religion."

"The first question a pregnant teen-ager is likely to ask her counselor or instructor is, 'Should I have an abortion, and if not, why?' Because abortion generally entails less medical risk to the mother than does carrying a fetus to full term, a negative answer would be based on religious rather than medical reasons. The same is true with regard to premarital sex. Why shouldn't teens engage in sexual activity if reasonable precautions can prevent disease and pregnancy? Again, for the religious organization, the answer is fundamentally a religious one."

However, the fear that other public programs operated by religious groups could come under legal scrutiny is not unjustified.

Dr. Robert L. Maddox, a Baptist minister and executive director of Americans United for Separation of Church and State, said, "Those programs are going to come under more and more scrutiny and part of the reason is, unfortunately, that in the era of TV preachers and scandals a pall is thrown over religion and I think people will look at it more carefully.

"The sweep of the times is in that direction. They will come under scrutiny."

He said suits have already been brought to stop the more blatant forms of funding and more are to come. Maddox said that religion creeps into government-funded programs despite bans.

"I think the religious groups are doing it; it makes them kind of dishonest."

Maddox also said that with the government money also comes government controls on programs, which furthers the entanglement problems.

"We basically say these groups would do better not to fool with the government," he said.

Maddox also notes that the AFLA has drawn such intense fire because of abortion. "That's not what drew our attention—we didn't like how the bill was written. But there are a lot of pro-choice people involved in fighting the measure."

Hatch bemoaned the fact that the "bill is caught up in an awful battle about abortion and I don't think it should be."

But the plaintiffs, on page one of their brief on the merits, put the blame on those who wrote and supported the bill.

"Congress undertook to fund a religious crusade against adolescent 'promiscuity' and abortion," they said.

The amicus brief filed by the NOW Legal Defense and Education Fund, The National Abortion Rights Action League and others accuses Congress of trying to silence discussion about abortion.

"The AFLA was designed to alter the terms of the public discourse on the issues of adolescent sexual activity, reproductive health, contraception and abortion," they charge.

"It is intended to bring about a change in the behavior of young people by silencing the educators, counselors, community leaders and medical professionals who are willing openly and accurately to discuss adolescent sexuality and reproductive health, including contraception and abortion, and by amplifying with government funding the voices of those who promise not to discuss these critical issues."

The brief charges that AFLA funding has flowed to select religious groups—Catholic, Mormon, Fundamentalist—that are anti-abortion and result in "governmentally funded, doctrinally approved coercion of young women."

The brief said that the pregnancy distress center of Columbus, Ohio, which recently received $119,135 in AFLA funds, states in its counseling manual: "When counseling girls and women considering an abortion, sometimes we have the opportunity to share our faith with them and urge them to let God be a part of this important decision."

The manual continues by suggesting that counselors suggest to clients: "If Jesus were sitting right here, would he tell you that it's all right to have an abortion?"

Kate Michelman, executive director of the National Abortion Rights Action League, said, "Religious groups have every right to teach what they believe is the right position.

"What they don't have the right to do is use government funds to teach that view. It is outrageous that the government is supporting these programs."

She said the AFLA was clearly designed to be an anti-abortion act.

"When this bill was passed it was the height of the Reagan era," she said. "The religious right and the movement conservatives were at the zenith of their movement. It was designed to encourage religious institutions who were against abortion to apply for government money.

"It was another anti-choice, anti-woman and anti-health care program," she said. ■

BY ROBERT M. CALICA

Criminal lawyers are accustomed to defending clients whose standards of dress and behavior do not meet the general social criteria for respectability. As a matter of course, the attorney will clean up the client's act—get him a haircut and put him in a suit and tie, instruct him to remain mostly silent and always polite, and guide him on the nuances of facial expression and physical posture.

Clients of commercial litigators, on the other hand, are normally at home in business attire and in command of the social graces. Typically, the commercial client is successful, articulate, and most eager to contribute to the construction of a credible, winnable case. Paradoxically, these very qualities can prove as devastating to the outcome of commercial litigation as impudent behavior or slovenly dress can be to a criminal defense.

The criminal attorney knows what the commercial attorney sometimes forgets: The untutored and unmanaged client is his own worst enemy.

The client's testimony during the pre-trial deposition is especially critical in a commercial case for one simple reason: Most commercial litigations never go to trial. A recent *New York Times* analysis of litigation in the federal courts estimated that 71 percent of commercial cases were entirely or partially disposed of by summary judgment.

Unlike a tort or criminal case, a commercial litigation rarely depends on sharply disputed factual issues. In a tort setting, different accounts of a factual occurrence can produce widely differing results. Almost nothing is free from doubt and only a jury or judge will determine whose perception is correct. In a criminal case, facts not only must be established, but proven "beyond a reasonable doubt"—requiring a searching factual inquiry.

Commercial litigation, on the other hand, is normally the result of unanticipated disagreements that have arisen during the course of a business transaction. Typically a long paper trail—contracts, letters, memoranda, checks and the like—has been generated. By the time discovery is complete, a strong foundation of written documents makes the facts largely indisputable. The outcome of commercial litigation will depend on documentation, admissions, and the application of the controlling legal principles.

During the deposition, the litigator will set about accomplishing three tasks: Proving only that which needs to be proven; establishing those issues which advance the client's position; and subtly guiding the testimony of the adverse witnesses to extract a statement that will help win summary judgment.

It is during their deposition that clients can sabotage the most scrupulously prepared cases. These individuals—typically successful business owners and executives—do not understand the negative impact a single misplaced word can have in a legal labyrinth of fine terms and obscure principles.

Many commercial litigators have noted a correlation between the level of business success achieved by the client and the potential for disaster during the deposition.

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