Nova Law Review

Volume 2, Issue 1 1978  Article 1

Nova Law Review Full Issue

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Judicial Review and the Supreme Court: An Accelerating Curve

ROGER HANDBERG*

The power of judicial review of federal statutes in American constitutional history has the mystique of the Hammer of Thor. Striking a congressional act down as violative of the United States Constitution has attracted the interest of several generations of constitutional scholars. The Court, depending upon one's substantive views on the particular case at hand, is either seen as exercising a great power in defense of liberty—political or economic—or is perceived as a usurper of the powers of the political branches of government. Whatever the substantive events, great controversy and attention have been focused upon this relatively rarely exercised Court power.¹ The data presented here indicate that the United States Supreme Court and the present justices on that Court operate on the assumption that judicial review is not politically provocative nor in fact an extreme power. This view is one founded not upon the syllogisms of the justices, but upon their behavior patterns over the last 175 years (1801-1976). The discussion here is premised upon a literature (both in the legal and social science disciplines) that has been greatly concerned with the role of the Supreme Court in protecting oppressed minorities. Majorities have been identified as coterminous with the dominant groupings in the legislative and executive branches of government. Given the increased sense of alienation and distrust about the federal government present in the populace, one could legitimately question the accuracy of such an identification.² As a shorthand notation, legislative majorities can be equated with the popular majorities, but the fit is not always exact.


Richard Funston's article, "The Supreme Court and Critical Elections," developed an elaborate argument about the Court's activities whenever it acted in what was termed an "antimajoritarian" context: i.e., striking down a congressional statute. The issue examined was whether "[d]uring realignment phases or, as they might be called, critical periods . . . the tendency of the Court to declare federal legislation unconstitutional [was] significantly greater than during non-critical periods of stable party competition." The realignments referred to by Funston and in this paper are the periods where significant and enduring shifts in party allegiance occurred in the political electorate. The results of these realignments could be either the destruction of an old political party, use of a new political party, or a change in the party's bases of support. For example, the present party era typified by Democratic Party dominance grew out of shifts in the late 1920's to early 1930's of the working-class votes from the Republican to the Democratic Party. The dramatic shift was best seen in the unionized ethnic Catholic segments of the electorate. A period of transition occurred during each realignment when the old forces still controlled parts of the federal government. Therefore, the newly dominant political coalition might take between four and eight years to come to power. The analysis by Funston was an attempt to refute or to modify Robert Dahl's famous article which had strongly questioned the Supreme Court's willingness to defend minorities (oppressed or otherwise). In Funston's analysis, the Court was found to behave in a pattern suggestive of what might be termed a disequilibrium or lag model. That is: the Court as a whole and the individual justices active during a particular period of transition hold views that are out of touch with the new national political majority. Through an inevitable process of attrition (retirements and death), the "old" justices are replaced by the new judicial incumbents whose views are more consonant with the power-holders in the executive and legislative branches. By the end of a four to eight year period, the Court (in effect) through membership change rejoins the dominant political coalition. Exceptions to this pattern occur

4. Id. at 804.
7. Funston, supra note 3.
when justices fail to leave the bench in the normal cycle. A president makes new appointments on the average of one every twenty-two months. In the 1930's, the new political coalition was unable to make an appointment for over four years. In that situation, however, once the logjam was broken, enough new appointments were made in three years to constitute a "new" Court.8 Professors Canon and Ulmer in a reanalysis of the Funston data (with several corrections) concluded that the null hypothesis of "no difference" between the critical and noncritical historical periods could not be rejected. Their argument in part was premised upon the skewness of the data, especially in the critical periods of electoral realignment.9 The data relied upon are all instances where the power of judicial review was exercised. Ultimately, Funston's and Dahl's analyses hinge upon interpretations of the 1930's crisis rather than upon the broader spectrum of Court activity over the past 180 or so years.

Whatever the results of that particular dispute, both sides premise their analyses upon the fundamental assumption that the exercise of the power of judicial review over federal legislative acts is both an unusual and potentially provocative action by the Court. The action is unusual in that the power of judicial review is used relatively infrequently, and provocative in that the action taken is a direct affront to the "political" branches.10 This scenario is based upon a perception of the Court's activities which developed in the early years of the Republic. Imagewise, the Court is seen as timidly and craftily striking down an act of Congress and then in effect taking shelter against a possible majoritarian counter-attack. This particular image draws heavily upon the early nineteenth-century cases, notably Marbury v. Madison11 and Dred Scott v. Sanford.12 Implicit in this scenario are two considerations: first, how often should the power of judicial review be exercised; and, second, should the Court speak with a unified voice, i.e., with minimal or no dissent.

11. 5 U.S. (1 Cranch) 137 (1803) (establishing the Supreme Court's power to review legislative acts of Congress).
12. 60 U.S. (19 How.) 393 (1857) (holding that Negroes were not "citizens" as provided in the United States Constitution and therefore not entitled to sue in the courts of the United States).
Chief Justice Marshall led the Court to exercise the power of judicial review only once during his long tenure in office. Clearly, this reluctance to move more precipitously was based upon the threat posed to the Court and especially to Marshall by the Jeffersonian Republicans. Broad areas of public policy were staked out by the Federalist-dominated Supreme Court, but paths of tactical retreat were always left open. The traditions established in these early days of the Court were such that the power of judicial review was relatively rarely exercised.

The second consideration, that of a unified Court, is important in minimizing the target presented to outside critics. When the Court speaks as one, the outsider has increased difficulty in focusing his attacks upon the particular policy. An inside critic (in this instance a dissenting justice) is important because that individual makes criticism of the decision legitimate. This is also illustrated by the Dred Scott case, where the Court, badly factionalized, undermined the credibility of its own opinion on what was obviously a sensitive political issue. As a result of that debacle, the Court's prestige sank to political insignificance until after the Civil War. This concern with unanimity was not restricted just to questions of judicial review, but also included all appearances of uncertainty or ambiguity in the law. Chief Justice Taft probably carried this concern to an extreme, but he was not alone in his concern with the monolithic image of the law.

Table 1 attempts to consolidate the Court's history into five time periods based upon Professor Funston's analysis. These time periods reflect major shifts in the American political party system. For example, period one (1800-1828) saw the collapse of the Federalist Party. The end of period two (1829-1860) saw the rise of the Republican Party to power, while in period four (1897-1936) a reconstituted Republican

13. An example of the effectiveness of the inside critic was demonstrated by Justices Burton, Harlan, and Clark's role in Jencks v. United States, 353 U.S. 657 (1957)(Burton, Harlan, JJ., concurring; Clark, J., dissenting). Their opinions, criticizing the Court's holding that a defendant is entitled to production of relevant documents which are to be used against him at trial, contributed to the enactment of 18 U.S.C. § 3500, which delineated the procedure to be used in the production of such documents. Act of September 2, 1957, 18 U.S.C. § 3500 (1976). See generally W. Murphy, CONGRESS AND THE COURT ch. 6 (1962).
17. Funston, supra note 3.
Table 1. PERIODS OF JUDICIAL ACTIVITY

<table>
<thead>
<tr>
<th>Periods</th>
<th>Total Votes to Strike Down</th>
<th>Average per Decision</th>
<th>Total Votes to Uphold</th>
<th>Average per Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1800–1828</td>
<td>1</td>
<td>6</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>1829–1860</td>
<td>1</td>
<td>7</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>1861–1896</td>
<td>21</td>
<td>156 (7.4)</td>
<td>25 (1.2)</td>
<td></td>
</tr>
<tr>
<td>1897–1936</td>
<td>51</td>
<td>361 (7.1)</td>
<td>88 (1.7)</td>
<td></td>
</tr>
<tr>
<td>1937–1976</td>
<td>39*</td>
<td>238 (6.1)</td>
<td>65 (1.67)</td>
<td></td>
</tr>
</tbody>
</table>


*The Federal Election Commission case, Buckley v. Valeo, 96 S. Ct. 612 (1976), was recorded 7 to 1 even though the vote varied on the four provisions struck down. They key provision in terms of being an affront to a co-ordinate political branch dealt with appointment of the FEC’s membership: Congress was told not to encroach on the presidential power of appointment.

Party continued in power until the Great Depression. The realignment periods are consolidated with the previous period of electoral stability, since the realignment period (for the Court at least) is a continuation of the past. Otherwise, Professor Funston’s original thesis has no merit since realignment would be coterminous for both the electoral and judicial institutions. Professors Canon and Ulmer have adjusted Professor Funston’s time periods to conform more fully to what they see as the more accurate periods of realignment.

In Table 1, the number of cases in which a federal law was nullified during a particular time period (adjusted to the Canon-Ulmer criteria) is presented along with the total vote in favor of nullification or support of the laws and the average number of votes in the majority and dissent. Data for this analysis are drawn from Professor Abraham’s compilation in The Judicial Process and from cases cited in the United States Reports. One difference that occurs between this analysis and the earlier studies is that Pollock v. Farmers’ Loan and Trust Co. is counted twice.

19. Canon & Ulmer, supra note 9, Tables 2 and 3, at 1217.
20. H. Abraham, supra note 10, Table 9, at 288-93.
21. 157 U.S. 429 (1895) (White, Harlan, J., dissenting), vacated on rehearing, 158 U.S. 601 (1895) (Harlan, Brown, White, and Jackson, J., dissenting). While the Court vacated its original decision on rehearing, the result was the same. However, on rehearing the Court extended its prior decision by holding that the provisions of the Act...
because the first reported decision was 6-2 in favor of nullification while the second was 5-4 to strike down the Income Tax Act of 1894.\textsuperscript{22}

A power of this reported magnitude should be unleashed relatively infrequently. This maxim of judicial power is used to explain the relative rarity of such decisions by the Court. What has been pointed out as a probably more relevant explanation is that the Court's most important political-legal function is that of a legitimator or "yea sayer" rather than as a negative force or "nay sayer."\textsuperscript{23} More importantly, the role of legitimator is supposedly ingrained at least partially into the Court's traditions as, for example, in \textit{Ashwander v. Tennessee Valley Authority}.\textsuperscript{24} The \textit{Ashwander} rules presuppose or presume the constitutionality of challenged statutes or governmental actions. The burden of proof is placed upon the challenger. Clearly, in certain substantive areas of law, this presumption does not hold, especially in civil liberties cases, notably free speech. Not all justices have accepted this new presumption of unconstitutionality, but the earlier tradition has clearly been broken.\textsuperscript{25}  

which taxed a person's income, whether from real or personal property, were unconstitutional as direct taxes.

\textsuperscript{22} Ch. 349, 28 Stat. 509 (1894).


\textsuperscript{24} 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Justice Brandeis set forth seven rules which have been used and developed by the Court to avoid passing upon constitutional questions. Those rules are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals...."

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

\textsuperscript{25} \textit{See} L. Lusky, \textit{supra} note 1, for a discussion of United States v. Carolene

\textit{et al.}: Nova Law Review Full Issue

Published by NSUWorks, 1978
This break in tradition is reflected in the time comparison presented in Table 1. After the initial period for the establishment of judicial review, the Court has increasingly been willing to accept challenges to the constitutionality of federal statues and to act favorably upon those challenges. Such challenges are obviously motivated by different values, as shown by the earlier laissez-faire capitalism of the pre-1937 Court and the civil libertarian values of the post-1937 Court. Whatever the value orientation, the Court has moved to the position of exercising the power relatively frequently (at least in historical terms). This activism has persisted even into periods of relative controversy about the Court’s work. For instance, some members of the “old” Court were willing to push the issue of activism to the point of a constitutional crisis. During the Warren Court, there were adjustments to the political winds in terms of activity level, but the overall trend was toward increasing activism. Over the last decade, the Supreme Court has been averaging nearly two such actions per term. More impressively, this trend has held up throughout both the Warren and Burger Courts. The Burger Court period (1969-1976) has been summarized as one of increased activity on the part of the Court. In a short seven-year time period, the Court has “voided provisions in twenty seven federal laws, established a distinctive record in the areas of First Amendment freedoms and equal protection and by unanimous decisions delivered some of the severest blows to presidential power ever recorded in American history.” Professor Dionisopoulos’ analysis, based upon a limited segment of Court cases, is accurate, although generally these two periods in Court history

Products Co., 304 U.S. 144 (1938), in which the Court stated that the presumption of constitutionality may not be as far reaching when legislation is within a specific prohibition of the Constitution. Id. at 152-53 n.4.

26. See, e.g., Hammer v. Dagenhardt, 247 U.S. 251 (1918) (holding that the prohibition of the use of child labor to make products traveling in interstate commerce was an unconstitutional restraint on commerce and was beyond the authority of Congress). See also Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the provision of the right of coal workers to organize and the allowance of collective bargaining to set wage and hour agreements in the Guffey Coal Act were beyond the powers of Congress under the commerce clause).

27. See, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964) (declaring § 6 of the Subversive Activities Control Act of 1950, c.1024, 64 Stat. 993 (codified at 50 U.S.C. § 785 (1970)), holding that prohibiting a member of a registered Communist organization from obtaining a passport was unconstitutional as a violation of the fifth amendment, and of the right to travel).

have presented images much different in terms of substantive policy. 29
The Warren Court was seen as the most consistently liberal activist period in Court history, while the Burger Court has moved in a more conservative direction. In any case, the trend identified in Table I has apparently accelerated despite the addition of what have been termed "judicial restraint" advocates to the Court. 30 This activism is accentuated when one considers that the Court deals formally with fewer cases now than before. 31 Apparently, restraint is a sometime thing.

A further concern is most succinctly identified as that of "massing the Court." 32 Basically, the Chief Justice or other dominant individuals on the Court are involved in an active effort to maximize support for the decisions. Game theory could be applied easily in this context, given the tradeoffs necessary to gain maximum voting support while maintaining some coherence in the content of the decision. The optimal strategy is to generate a unanimous Court with no concurring opinions. In an analogous situation, Professor Ulmer has described the massive personal effort by Chief Justice Warren required to produce such apparent consensus in one very controversial case. 33 Support maximization or dissent suppression is necessary in order to minimize the vulnerability of the Court to political or legal counter-attack. 34

Dissenters in a case of the presumed magnitude of one striking down legislation are to be discouraged or co-opted. Recent examples (in several policy areas) of this apparent concern about dissent have included school desegregation cases until the 1970's and United States v. Nixon 35 in 1974. In these cases, no federal statute stood in jeopardy, but the Court operated in such a fashion as to maintain a united front. In contrast, as is readily apparent in Table 1, the Court has apparently become increasingly less concerned with controlling or minimizing dissent when it strikes down congressional legislation. Rather, the norms

31. Canon & Ulmer, supra note 9, at 1216; F. Frankfurter & J. Landis, The Business of the Supreme Court at 60, 297 (1928).
34. See S. Wasby, The Impact of the United States Supreme Court (1970).
on the Court are now such that dissenting behavior in these cases follows the general patterns of dissent on the Court as a whole—a pattern which was established in the aftermath of the 1925 Judges’ Bill and which was strengthened during the Roosevelt Court.  

Table 2. DISSENT PATTERN

<table>
<thead>
<tr>
<th>Unanimous Votes</th>
<th>3 or 4 Dissenting Votes*</th>
<th>Total Cases During Time Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1861–1896</td>
<td>42.9% (9)</td>
<td>19.0% (4) (21)</td>
</tr>
<tr>
<td>1897–1936</td>
<td>37.3% (19)</td>
<td>35.2% (18) (51)</td>
</tr>
<tr>
<td>1937–1976</td>
<td>25.6% (10)</td>
<td>43.6% (17) (39)</td>
</tr>
<tr>
<td>Total</td>
<td>34.2% (38)</td>
<td>35.1% (39) (111)†</td>
</tr>
</tbody>
</table>

Source: H. ABRAHAM, THE JUDICIAL PROCESS (3d ed. 1975); Canon & Ulmer, The Supreme Court and Critical Elections: A Dissent, 70 AM. POL. SCI. REV. 1215 (1976); and cases cited in the United States Reports.

*Where only eight or fewer justices participated, two dissenting votes are recorded as equivalent to the three- or four-vote situation in a nine-person court.

†The two earlier cases have been excluded from this stage of the analysis.

Table 2 further isolates this trend by focusing upon the declining percentage of unanimous decisions that occur when a congressional statute is struck down. Arguments which rely upon the fact that dissent on the Court is more prevalent than ever before miss the point that striking down federal statutes is not considered business as usual, at least according to the conventional analyses of constitutional law and history. The point made here is that, in fact, the behavior pattern is similar to the Court’s general behavior pattern.  

In Table 2, the percentage of unanimous votes is given along with the percentage of decisions with three or four dissents. Clearly, the Court is moving to a situation of relative disunity when it moves to strike down the statutes, either state or federal. This is best illustrated by the discordant note struck in two recent instances of judicial review. In Buckley v. Valeo, S. HALPERN & K. VINES, DISSENT, THE JUDGES’ BILL AND THE ROLE OF THE U.S. SUPREME COURT (1974). See also PRITCHETT, supra note 8.


424 U.S. 1 (1976) (Burger, C.J., White, Marshall, Rehnquist, and Blackmun, JJ., all filed separate opinions) (holding that provisions of the Federal Election Campaign Act of 1971 limiting individual contributions to campaigns were constitutional despite first amendment objections; but that provisions limiting expenditures by candidates on their behalf, provisions limiting total expenditures in various campaigns, and provisions limiting the amount which an individual could spend independently of a
the opinion was a per curiam one, with five additional opinions by individual justices; in National League of Cities v. Usery the vote was 5-4, with one concurring and two dissenting opinions. None of the justices appears bashful about either voting against the political branches or explaining why he did so. In fact, the plethora of opinions makes it increasingly difficult for the political branches to know what exactly was decided and why.

What is apparent, however, is that the Court no longer holds to the view that judicial review is such a terrible power that it should never be used, and if used, only under certain controlled conditions. Rather, it appears that elite (both judicial and elected) perceptions of the rules of the game now accept the probability of such Court action. Disagreement may occur between the "political" and judicial branches, but the issue is one of substantive policy rather than of the judiciary's power to act. This is most graphically illustrated by the Court's decision striking down the campaign practice reforms which were passed in the aftermath of Watergate. Congressional reaction was relatively muted and directed primarily at the substantive question of how the reforms should be revised in order to meet the Court's mandate and what the Congress saw as political reality. One could argue that the debate over the Court's power to act goes on, but the real issues are those of its power of statutory construction and interpretation rather than of constitutionality.

From this perspective, a strong argument can be made that Justice Brandeis' concurring opinion in Ashwander was clearly a temporary avowal of judicial restraint. This view of the judicial function had strong policy implications in the 1930's, but those policy overtones no longer hold. Rather, the Court's more recent activities in Baker v. Carr and

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42. 297 U.S. 288 (1936).
43. 369 U.S. 186 (1962). The Court set forth the following elements describing a political question:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or for the impossibility of deciding without an initial
Flast v. Cohen\textsuperscript{44} indicate clearly the Court's willingness, if not eagerness, to be policy relevant. The reinterpretation of the political-question doctrine in Baker opened up new vistas for Supreme Court activity. More recently, the Court has backed away from some of the opportunities that were opened by those cases, but the precedents have only been partially distinguished, not extinguished.\textsuperscript{45} In a sense, the Ashwander rules are a dinosaur of the past, although certain aspects are still maintained as convenient. In fact, it appears that Chief Justice Hughes in 1937 won the war but lost the battle, since the institution’s ultimate power of judicial review continues uncontrolled and is increasingly being used. The only viable controls presently imposed on the exercise of the power of judicial review are the individual justice's sense of discretion and the possibility (though remote) of congressional retaliation. Either the Supreme Court has acquired such sanctity as to be almost beyond control or it has fallen to such levels as to be the subject only of indifference. Given the relatively high prestige of the institution, one could presume the former more than the latter. As a symbol, the Court may stand somewhat removed from the political battle, but its actions make clear that it is an active participant despite the protestations of its members.

\begin{itemize}
\item policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
\end{itemize}

\textit{Id.} at 217.

44. 392 U.S. 83 (1968) (holding that taxpayers have standing to challenge expenditures of tax money which are in violation of the establishment of religion clause of the first amendment).

45. The Court has not followed through on the potential inherent in Flast. See United States v. Richardson, 418 U.S. 166 (1974). In Richardson, the Court denied standing to a taxpayer seeking to compel the Central Intelligence Agency to disclose a detailed account of its expenditures. The Court distinguished the facts of the present case from Flast, stating that the respondent did not claim a violation of a constitutional limitation upon the taxing and spending power, but rather sought to obtain information about how those funds were spent. Therefore, the Court concluded, there was no "logical nexus" between the respondent's status of taxpayer and the failure of Congress to require the detailed report of expenditures. \textit{Id.} at 175.
The Federal and State Response to the Problem of Child Maltreatment in America: A Survey of the Reporting Statutes

Society's concern with the abuse and neglect of children is not a new phenomenon, but as a result of heightened awareness by professionals and by the public in general, this problem is receiving new and intense scrutiny. The issue extends to all members of society and particularly highlights the relationships existing between the legal, medical, and social services. Child abuse and neglect arise from a wide range of social and psychological problems that cannot be managed by any one discipline or profession. Physicians, lawyers, judges, teachers, and others must work together if the continuing cycle of maltreatment of children is to be broken.

While all fifty states and Washington, D.C., have child abuse statutes in one form or another, the legal framework provided for the protection of children in many instances is fragmented and unnecessarily complex. It is not unusual to find that workers involved with protecting children from abuse are not adequately equipped and trained to meet the critical demands assigned to them. Too often, the only treatment alternatives available to both child and parent are infrequent and inadequate home visits by social agencies, and overused foster care where the child may be moved from one home to another.

1. For an excellent discussion of the fate of children in history, see Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C. L. Rev. 293 (1972) [hereinafter cited as Child Abuse and Neglect]. Child abuse is deeply ingrained in our cultural history. Many children who were ill or deformed at birth were murdered for reasons of maintaining a controlled population. It had long been an acceptable practice for children to be sold into bondage, tortured, or murdered.

2. See text accompanying notes 68-78, infra.

3. See note 122, infra.

4. Id. For statistical purposes, Washington, D.C., will be considered a state.

In dealing with child abuse, one is almost immediately confronted with traditional societal values which have precluded overt interference with the "integrity and sanctity of the family and for the privacy of its interrelationships." With the emergence of a greater understanding of the physical and psychological damage caused by child abuse, societal interest is moving toward an awareness of the need to promote the health and well-being of children. This concern has made itself known through the child abuse and neglect legislation enacted at federal and state levels within the past fifteen years.

1. EARLY HISTORY OF CHILD ABUSE IN AMERICA

It has been suggested that it is the very abhorrence of child abuse which has made it such a slow-moving area of both federal and state concern. The idea that a parent, who is supposed to love and protect his offspring, could be responsible for the child's physical injury or emotional deprivation is so repulsive that many are reluctant to believe it. The federal and state governments have also been hesitant to become involved in the internal mechanisms of the family. This implied hands-off policy followed by these governmental units is traceable to their close association with English common law.

Under the common law, the right of the father to custody and control of his offspring was considered almost absolute, even where this was at odds with the welfare of the child.

A child in colonial America was ruled over by the father. Parental discipline was quick, decisive, and severe. In a very real sense, the child


8. The public welfare policy of this country originated with the passage in 1601 of England's Poor Relief Act. It later became popularly known as the Elizabethan Poor Law. The philosophy which put this legislation into action considered poverty a disgrace. The poor and destitute were considered a burden on the rest of society. Poverty was considered the result of one's own inability to better oneself. Welfare practices in this country were influenced by these English concepts. The use of physical force with children was permitted as a normal part of child-rearing behavior. Proceedings, supra note 6, at 55.


10. Child Abuse and Neglect, supra note 1, at 300.
was considered little more than the property of his parents.\textsuperscript{11} It was not unusual for a child to be bound out to other households as an indentured servant or apprentice.\textsuperscript{12} The shortage of labor in the American colonies, as well as the pervasive Puritan work ethic, was reflected by early laws passed by the various colonial legislatures.\textsuperscript{13} These early laws made a distinction between apprenticeship and servitude, but this was not always observed.\textsuperscript{14} Eventually two forms of apprenticeship evolved. Under a voluntary apprenticeship, the child and his parents entered into an agreement on their own initiative. The other form, compulsory apprenticeship, resulted from the practice of binding out dependent children, who had little or no say in the choice of their master or trade.\textsuperscript{15} As time passed, laws were enacted which prohibited the binding out of infants, but the practice of binding out children beyond infancy continued.

The earliest documented case of child abuse involved a master and his apprentice.\textsuperscript{16} In Salem, Massachusetts, in 1639, a man by the name of Marmaduke Perry was arraigned for the death of his apprentice. The evidence given stated that the boy had been ill-treated and subject to unreasonable correction by his master.\textsuperscript{17} However, the boy's own charge that the fractured skull he suffered was due to a broomstick blow delivered by his master (which later resulted in the boy's death) was disputed by testimony that the boy had told another person that he received the blow from falling out of a tree. The defendant was found not guilty. A Massachusetts court found another master guilty of extraordinary abuse of an apprentice; he was executed in 1643.\textsuperscript{18} Other early cases show the masters of servant children being verbally reprimanded, having their chattels confiscated, or even requiring that the children be freed from

\begin{itemize}
\item \textsuperscript{11} See 5 \textit{Fordham L. Rev.}, supra note 9, at 460.
\item \textsuperscript{12} Apprenticeships were often used by local governments to ensure that children were placed in a home environment which could adequately meet their needs. The need to fully utilize scarce labor was a strong economic factor of the times which overrode all other considerations. On many occasions, these apprenticeship practices were carried out by court officials despite the objections of the childrens' economically-disadvantaged parents.
\item \textsuperscript{13} 1 \textit{Children and Youth in America: A Documentary History, 1600-1865}, at 122 (R. Bremmer ed. 1970) [hereinafter cited as 1 \textit{Children and Youth}].
\item \textsuperscript{14} Thomas, \textit{Child Abuse and Neglect Part II: Historical Overview, Legal Matrix, and Social Perspectives in North Carolina}, 54 N.C. L. Rev. 743, 745 (1976).
\item \textsuperscript{15} \textit{Child Abuse and Neglect}, supra note 1, at 301.
\item \textsuperscript{16} 1 \textit{Children and Youth}, supra note 13, at 122.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at 123.
\end{itemize}
indenture because of their ill treatment. In 1700, the colony of Virginia issued specific laws for the protection of servants against mistreatment.

The vast majority of these early cases dealt exclusively with the issue of a master's maltreatment of child servants. There is no indication of a similar movement to protect children from abusive or neglectful parents. Available court action involving the family was limited to removal of the child from an "unsuitable" home environment. "Unsuitable" usually referred to the parents' not providing their children with an adequate religious upbringing, or a general failure to teach them to become productive members of society. There were two Massachusetts cases, in 1675 and 1678, in which children were removed because of "unsuitable" homes. The first case involved children who were removed from the home because the father refused to see that they were "put forth to service as the law directs." The second case gave similar justification for the removal of children from the home environment, with that offense being compounded by the refusal of the father to attend church services on a regular basis.

The "societal solution" for disadvantaged children in the cities was to place them in almshouses. Conditions in these poorhouses were unsatisfactory for adult paupers, let alone young children. It was not

19. Child Abuse and Neglect, supra note 1, at 304.
20. 1 CHILDREN AND YOUTH, supra note 13, at 127.
21. Id. at 40.
22. Id. The "New England" or public vendue method of pauper relief was an ingenious and thrifty variant of the apprenticeship practices of the times. The town poor, the young, and the old were auctioned off to the lowest bidder for their services. The bidder who had the lowest bid would then accept his payment from public funds and take the child home as a servant or apprentice. The children usually came either from poor families or from families which the community felt would raise the children to become vagrants and undesirables.
23. Child Abuse and Neglect, supra note 1, at 304.
24. 1 CHILDREN AND YOUTH, supra note 13, at 41.
25. Id.
26. By 1800, the system of almshouses in the United States was rapidly becoming institutionalized. Some 16 states had such a system in extensive operation. The "almshouse" approach lasted until the end of the 1800's. Reform was slow owing to the resistance of those who ran the almshouses and had a large investment in the lands and buildings used. The ease with which children could be placed in such institutions and forgotten, and the inability to come up with alternative methods of care, also created a state of inertia against change. Child Abuse and Neglect, supra note 1, at 304.
27. Id., where it was reported that a large number of children (both poor and
until the beginning of the nineteenth century that major efforts were made to provide separate residences for children, and it took nearly 100 more years before broad-based improvements appeared.\textsuperscript{28}

The near absence of recorded family child abuse cases in the early history of this country suggests a trend of the courts to allow a child's parents their own discretion in determining the kind and degree of discipline in the home. Parents were believed to be immune from prosecution unless the disciplining of children went beyond the bounds of reasonableness in relation to the offense, or was deemed excessive, or injured the child permanently.\textsuperscript{29} There existed a legal presumption in the courts which favored the conduct of the parents as being reasonable.\textsuperscript{30}

An 1840 criminal case in Tennessee involved parental prosecution for excessive punishment.\textsuperscript{31} The court record indicates that the mother had repeatedly beaten the child with her fists, and that both parents had systematically maltreated the child. The court, in reversing the mother's conviction, noted without citing any precedent that the "right of parents to chastise their refractory and disobedient children is so necessary to the government of families . . . that no moralist or lawgiver has ever thought of interfering with its existence. . . ."\textsuperscript{32}

\textbf{A. Nineteenth Century Awakening of Concern}

It was not until the second decade of the nineteenth century that orphaned (orphaned) were indiscriminately placed with adult paupers, the mentally unbalanced and retarded, alcoholics, and persons suffering from venereal disease.

\textsuperscript{28} See Fox, \textit{Juvenile Justice Reform: An Historical Perspective}, 22 STAN. L. REV. 1193 (1970), for an examination of the events leading up to the passage of the 1899 Illinois Juvenile Court Act. One of the purposes of the Act was to improve the condition of children in orphanages, poor houses, and detention centers.

\textsuperscript{29} \textit{Child Abuse and Neglect}, supra note 1, at 305.

\textsuperscript{30} \textit{See} State v. Pendergrass, 19 N.C. 348 (1837). Even though this case concerned the right of a teacher to punish a child in the classroom, the court interpreted this right as being coextensive with that of a parent. \textit{See also} Kleinfield, \textit{The Balance of Power Between Infants, Parents and the State}, 4 FAM. L. Q. 408, 413 (1970).

\textsuperscript{31} Johnson v. State, 21 Tenn. 282 (1840).

\textsuperscript{32} \textit{Id.} In this case, the question for the jury to determine was whether the correction of a child by the defendant so far exceeded the reasonable limits of parental duty and authority as to amount to a trespass and breach of the peace. The court was of the opinion that this was a conclusion of fact, to be drawn by the jury, rather than a conclusion of law. The trial court judge had charged the jury in such a manner as to encroach upon the province of the jury regarding matters of fact. The court reversed the judgment and remanded the case for a new trial.
public authorities began to interfere in cases of parental neglect. Most of these reform movements were directed toward children in institutions, however, and were aimed primarily at preventing a neglected child from entering a life of crime.\(^{33}\) Probably the most significant and helpful of these numerous reform campaigns for child protection was launched by persons connected with the American Society for the Prevention of Cruelty to Animals (ASPCA).

In New York City in 1874, an old woman near death informed a church worker who lived in a nearby building that she was aware of a young girl who was being terribly treated by her step-mother. As a last wish the old woman wanted to tell someone about this "so she could rest in peace."\(^{34}\) The church worker sought the help of Henry Bergh who at that time was the president of the ASPCA. Bergh looked into the matter and soon thereafter decided to initiate an action, not as president of the ASPCA, but rather as an individual. He did, however, use the services of two of the Society's attorneys—Elbridge Gerry and Ambrose Monell—as legal counsel in the matter.\(^{35}\) The child, Mary Ellen Wilson, was apprenticed to her step-mother Mary Connolly in 1866. At that time Mary Ellen was less than two years old. The New York Times printed a number of articles concerning court hearings in the spring of 1874 which have formed the basis for a case history.\(^{36}\)

On April 13, 1874, Mrs. Connolly was indicted by the Grand Jury of the Court of General Sessions for various offenses which included "five indictments for assault and battery, felonious assault, assault with intent to do bodily harm, assault with intent to kill, and assault with intent to maim."\(^{37}\) Evidence presented at trial by numerous witnesses

\(^{33}\) See Fox, supra note 28, at 1232-33. Fox noted that the concept of preventive penology rested essentially on the belief that society could recognize the conditions of childhood that would give rise to adult criminals, and develop techniques such as institutions, foster homes, and specific probation procedures that would be able to arrest the condition and prevent the crime. It was believed that legal mechanisms could be used to enact legislation that could carry out these "reforms."

\(^{34}\) 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866-1932, at 185 (R. Bremmer ed. 1971) [hereinafter cited as 2 CHILDREN AND YOUTH]. See also Child Abuse and Neglect, supra note 1, at 307-10, for a thorough discussion of the Mary Ellen case.

\(^{35}\) Child Abuse and Neglect, supra note 1, at 307. See also N.Y. Times, April 11, 1874, at 2, col. 6.

\(^{36}\) The New York Times provides much of the knowledge of this case through a series of articles which it printed from April 10, 1874, through December 12, 1875.

\(^{37}\) N.Y. Times, April 14, 1874, at 2, col. 4.
strongly indicated that a severe condition of abuse and neglect had purposefully been perpetrated against Mary Ellen. The jury returned a verdict of guilty after only twenty minutes of deliberation. Mrs. Connelly was sentenced to one year at hard labor in the state prison. Mary Ellen was later sent to the Sheltering Arms, an orphanage in New York City.

One commentator has noted that "some historical and legal confusion has resulted from the close relationship between the animal and child protection movements in connection with this case." A number of articles in the legal and social service fields cite the myth of the Mary Ellen case as an instance where the ASPCA used the laws against cruelty to animals as the basis for protecting the child. In reciting this myth, these articles concluded that Mary Ellen, as a member of the animal kingdom, was entitled to the protection of laws originally enacted to safeguard animals from cruel treatment. The facts of the Mary Ellen case clearly demonstrate a state of governmental neglect with regard to the supervision and protection of children after agency placements had been made.

In the aftermath of public indignation over the case, Elbridge T. Gerry, the ASPCA attorney whose services were used by Bergh, founded the New York Society for the Prevention of Cruelty to Children (NYSPCC). It was originally organized as a private group and later incorporated. Legislation was soon thereafter passed in New York which authorized the NYSPCC and later similar societies to file complaints for the violation of any laws relating to children. A requirement of this legislation was that law enforcement officials and the courts were to aid the societies whenever possible.

Similar societies were soon organized in other cities throughout the nation, and by 1922 there existed some 57 Societies for the Prevention of Cruelty to Children, and 307 humane societies concerned with the welfare of children. With the advent of government intervention into

38. N.Y. Times, April 28, 1874, at 8, col. 1.
39. Child Abuse and Neglect, supra note 1, at 308.
41. Child Abuse and Neglect, supra note 1, at 310.
42. Id. at 310.
child welfare, however, the number of these societies began to decline rapidly.\textsuperscript{43}

\textbf{B. Some Familial Characteristics of Child Abuse}

An early commentator on the treatment of children noted that “the general history of the child . . . moves as from one mountain peak to another with a long valley of gloom in between.”\textsuperscript{44} Numerous reform movements have been inaugurated with the hope of curtailing child abuse only to fall by the wayside as the shocking facts of abuse and neglect become avoided or forgotten over time.\textsuperscript{45} Concern reawakened when a pediatric radiologist wrote an article in 1946 which called to the attention of the medical community an “unrecognized trauma” described as subdural hematomas and multiple bone abnormalities in children he had treated.\textsuperscript{46} Seven years later, in 1953, Dr. Silverman wrote an article describing multiple fractures due to recurrent trauma.\textsuperscript{47} By 1955, medical journal authors had begun to recognize that the injuries previously called “unrecognized trauma” were inflicted intentionally by abusive parents.\textsuperscript{48} Doctors Wooley and Evans wrote an article in 1955 suggesting the possibility of parental or child custodial abuse.\textsuperscript{49}

The spark in this resurgence of interest in child abuse was not a case of abuse like the trial of Mary Ellen’s guardian, but rather the advent of a technological revolution which had changed the course of medicine. The beneficial uses of x-rays by pediatric radiologists have

\textsuperscript{43} Id. at 313.
\textsuperscript{44} G. PAYNE, \textit{THE CHILD IN HUMAN HISTORY} 302 (1916), as quoted in \textit{Child Abuse and Neglect, supra note 1, at 293.}
\textsuperscript{45} \textit{Child Abuse and Neglect, supra note 1, at 293.}
\textsuperscript{46} Caffey, \textit{Multiple Fractures on the Long Bones of Infants Suffering from Chronic Subdural Hematoma}, 56 AM. J. ROENTGENOLOGY 163 (1946). Subdural hematoma is defined as “[a] hematoma (localized collection of clotted blood) occurring beneath the dura mater (which is the outer of the three membranes covering the brain and spinal cord).” J. SCHMIDT, 2 ATTORNEY’S DICTIONARY OF MEDICINE S-135 (1975). Caffey did not explain what may have caused such injuries, only that they were traumatic in origin. This gave rise to the phrase associated with such injuries—“unrecognized trauma.”
\textsuperscript{47} Silverman, \textit{The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants}, 69 AM. J. ROENTGENOLOGY 413 (1953).
\textsuperscript{48} See, e.g., Bakwin, \textit{Multiple Skeletal Lesions in Young Children Due to Trauma}, 49 J. PEDIATRICS 57 (1956).
resulted in more sophisticated ways of seeing subdural hematomas and abnormal fractures.  

It was not until July 1962, however, that the full impact of physical abuse was brought to the attention of the medical profession and subsequently to the social service and legal professions, as well. At that time, Dr. C. Henry Kempe and others published the classic paper which defined the *battered child syndrome* as "a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent." The impact of this paper was considerable. The concept of child abuse as inflicted injury in the Kempe paper was admittedly narrow. Dr. Fontana proposed a more broadly defined maltreatment syndrome in which the child "often presents itself without obvious signs of being battered but with the multiple minor evidences of emotional and at times, nutritional deprivation, neglect and abuse. The battered child is only the last phase of the spectrum of the maltreatment syndrome." 

Numerous studies indicate that in families with more than one child, usually only one of the children is singled out for systematic abuse. Race, ethnic background, and the socio-economic status of abusive parents have been found to have no correlation with child abuse. Recent studies have found that child abuse and neglect are not

50. The abused child may have fractures distributed about the body. The value of x-rays rests essentially on the ease with which previous fractures, some of which may not be fully healed, can be discerned. To the informed physician, a child's skeleton can reveal a long history of abuse by telltale signs of unaided bone healing. Silverman, *Radiological Aspects of the Battered Child Syndrome*, in *The Battered Child* (Kempe & Helfer, eds., 2d ed., 1974).


53. *Id.* at 19.


56. Note, *supra* note 55, at 374. But see Newberger & Hyde, *Child Abuse, Principles and Implications of Current Pediatric Practice*, 22 PEDIATRIC CLINICS OF NORTH AMERICA 695 (1975), where it has been observed that child abuse is associated with poverty, low birth weight, and social isolation.
problems of poor and marginal families alone. They are problems which affect children of all social classes. Yet child abuse in poor and marginal families is most often reported. One reason may be that the more affluent families, whose children receive their medical care in private practice settings, have a different relationship between practitioner and family. These families tend to have their injuries characterized as "accidents," which connotes isolated, random events. Research has shown that there is an association between childhood accidents and child abuse and neglect. Many child abuse and neglect cases in wealthier homes are misdiagnosed as "accidents." The terms "abuse" and "neglect" carry important, implicit judgments which doctors are often reluctant to make. As one commentator notes:

It's easier to make the diagnosis of child abuse if you are a physician in an inner-city hospital room or in a clinic for the indigent. . . . It is also less painful to report the case, where the family is not paying you directly, and where you may never see them again.

Estimates of child abuse and neglect range from projections of 10,000 children abused each year to one million. Clear empirical knowledge as to the number of deaths resulting from child abuse and severe neglect is also limited. Estimates range from 700 per year to 6,000 per year. Because of this wide range of estimates, it is difficult to draw a conclusion as to the actual incidence of child abuse in this country. The information gleaned from official statistics must be quali-

57. See Daly, supra note 40, at 290.
58. 1977 Senate Hearings, supra note 5, at 44 (statement of Eli Newberger).
59. Id.
60. Id. at 53.
61. Id.
65. A number of research projects use what might be termed "statistical alchemy" in developing incidence rates for child abuse in this country. The use of local or regional estimates applied to the national population only yield a distorted, if not inaccurate, picture of the true incidence of abuse. 1977 Senate Hearings, supra note 5, at 12.
fied by the fact that they represent only "caught" cases of abuse which became cases through varied reporting and confirmation procedures.66

While physical punishment of children appears to be almost a universal aspect of the parent-child relationship, very little is known about the modes and patterns of violence toward children. Numerous studies have shown that abuse in families may not be as haphazard an occurrence as has been previously supposed.67 One expert believes that this generation's battered children, if they survive, will become the next generation's battering parents.68 The most important aspect of this "cyclical pattern" is that of those neglected and abused children who survive, many will suffer future emotional and psychological crippling which will be passed on to succeeding generations.69 Abusive and neglectful parents have often been found to be lonely, isolated people, with few friends and little outside contact with society.70 Numerous forms of dysfunction of the home environment may occur in conjunction with instances of child abuse.71

The abuse and neglect of children by parents may occur at any age with an increased incidence in children under three years of age. A large percentage of these children are under six months of age.72 The lives of abusing parents are often marked with divorce, extra-marital relationships, alcoholism, poor housing, and financial distress.73 These stress

66. Another difficulty in determining what is an accurate picture of the abuse problem is relying solely on reported or "caught" cases of child abuse and neglect. Like the tip of an iceberg, which may only represent 10% of the total mass, "caught" cases of abuse do not accurately represent the totality of the problem. The statistics used by many researchers should be prefaced by a statement explaining what they actually are—"educated guesses."

67. See D. Gil, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES 27 (1971); Friedrich & Borniskin, supra note 40, at 205.

68. 1977 Senate Hearings, supra note 5, at 502 (statement of Vincent J. Fontana, M.D.).

69. Child Abuse and Neglect, supra note 1, at 335.

70. See, e.g., Friedrich & Borniskin, supra note 40, at 205; Note, supra note 55, at 375; Daly, supra note 40, at 292.

71. Friedrich & Borniskin, supra note 40, at 202, where it was noted that marital conflict, social isolation, and the social pressures of financial adversity act in conjunction with the abuse of children who are members of families with such difficulties.

72. 1977 Senate Hearings, supra note 5, at 505 (statement of Vincent J. Fontana, M.D.). Very young children are abused more often than older children because they are usually unable to protect themselves and generally must rely on the help of others.

73. The National Clearinghouse on Child Abuse and Neglect, Children's Division of the American Humane Association, gathered information on child abuse and neglect
factors all contribute to the condition that causes the potentially abusive parent to strike out at a special child during a crisis situation. The parents' own lack of love, support, and protection makes them unable to give love, affection, and empathic care to their own children.\textsuperscript{74} One commentator has developed a schema of the life cycle of an abused child becoming an abusing parent.\textsuperscript{75} The schema is entitled the World of

for the calendar year 1975. In examining the figures which follow, the caveats stated in notes 65-66, \textit{supra}, should be considered.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{I. Reporting: Neglect and Abuse} & \textbf{Number} & \textbf{Per cent} \\
\hline
Total number of reports of neglect and abuse & 289,837 & \\
Number of cases investigated & 228,899 & 79.0\% \\
Status undetermined & 60,938 & 21.0\% \\
Of investigated cases of neglect and abuse: & (228,899) & \\
found to be valid & 136,504 & 59.6\% \\
found not valid & 92,395 & 40.4\% \\
\hline
\textbf{II. Alleged Abusers-Neglecters} & & \\
Natural parents & \textbf{(83.80\%)} & \\
Step-parents & \textbf{(6.08\%)} & \\
Adoptive parents & \textbf{(0.10\%)} & \\
Paramours & \textbf{(1.80\%)} & \\
\hline
\textbf{III. Types of Abuse Reported} & & \\
Physical injuries, minor & 30,310 & \textbf{(50.3\%)} \\
Sexual abuse & 6,372 & \textbf{(10.6\%)} \\
Physical injuries, major & 1,384 & \textbf{(2.3\%)} \\
Burns, scalding & 1,578 & \textbf{(2.6\%)} \\
Physical abuse (unspecified) & 20,557 & \textbf{(34.1\%)} \\
\hline
\end{tabular}
\caption{Proposed Extension of the Child Abuse and Treatment Act, 1977: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. 149 (1977-78) [hereinafter cited as \textit{House Hearings}].}
\end{table}

\textsuperscript{74} This emotional neglect, or the lack of a warm, sensitive interaction necessary for the child's optimal growth and development, may have tragic consequences for the child as he reaches adulthood. The absence of adequate empathic care or mothering during the first two years of life may cause the child to lack basic trust and confidence. \textsc{Nat'l Center on Child Abuse & Neglect, U.S. Dept of Health, Education & Welfare, 1 Child Abuse and Neglect: The Problem and Its Management} 18 (1975).

Abnormal Rearing, or the WAR cycle. It views a child from conception through mating, with the intervening steps illustrating how environmental factors may largely determine how the child will function in society.  

The inability of abusive parents to cope with the rearing of their children has led commentators to suggest that the essential element in this abuse and neglect is not the parents' intention to destroy the children, but rather their inadequacy to nurture them properly. This inability to care for children may cause such children to suffer emotional as well as physical trauma which, if allowed to continue, will ultimately threaten their survival.

2. THE LEGAL RESPONSE—CHILD ABUSE LEGISLATION AT FEDERAL AND STATE LEVELS

Without adequate guidance at federal and state levels, little success can be expected in the areas of preventing and treating cases of child abuse and neglect. The grim reality of child abuse and the revelations of research in this area have spurred communities into social action. Public concern and recognition of need have pressured legislative bodies into giving attention to the problem at a pace with little precedent in recent legislative history. The introduction of child abuse legislation in 1963 amounted to eighteen bills, eleven of which achieved passage that year. California was reputed to be the first state in the nation to have enacted a child abuse reporting statute, which required certain designated groups to report known or suspected instances of abuse. In 1964, ten more states passed reporting laws, with another twenty-six states

76. For a brief examination of the twelve steps of the WAR cycle, see Friedrich & Borniskin, supra note 40, at 206.
78. Id.
79. See Daly, supra note 40, at 284-85, where she suggests that the rapid passage of the child abuse reporting laws was due to a combined mass media response to the problem. This resulted in an outpouring of public attention on the subject which compelled legislatures to enact state reporting laws.
81. California was reputed to have an earlier statute, but it did not specifically relate to children. The old law required reporting of any injuries by any person in violation of any penal statute. For a discussion of the 1963 California Act see McCoid, The Battered Child and Other Assaults Upon the Family: Part One, 50 MINN. L. REV. 1, 21-22 (1965).
doing so in 1965.\textsuperscript{82} Some of the laws enacted by state legislatures between 1963 and 1967 were hastily conceived and reflected public indignation against parents who abused their children. Most of these early statutes, however, accurately saw the need for protective social services on behalf of the child victims.\textsuperscript{83}

These laws were characterized by many differences in form and substance. They also contained many similarities, due in large measure to suggested legislative guidelines developed by various private and governmental agencies which promoted mandatory reporting laws.

The most significant of these model acts which motivated the establishment of reporting laws was one proposed by the Children's Bureau of the United States Department of Health, Education and Welfare.\textsuperscript{84} This legislative model acted as a catalyst in encouraging the states to require mandatory reporting of cases of child abuse.\textsuperscript{85} In 1963, the Children's Division of the American Humane Association promulgated its own legislative guideline.\textsuperscript{86} While the Children's Bureau model restricted its mandatory reporting to physicians, the AHA model extended such reporting of child abuse or neglect to public or private welfare community agencies.\textsuperscript{87} Legislative guides were published by other medical associations during this period, as well. The New York County Medical Association suggested legislation that would extend

\textsuperscript{82} D. Gil, \textit{supra} note 67, at 21-22.
\textsuperscript{83} Sussman, \textit{Reporting Child Abuse: A Review of the Literature}, 8 \textit{FAM. L. Q.} 245, 310 (1974), where it is noted that the main function of the reporting statutes is to ensure that various social and protective services of the state are activated to treat the child and the parents while, at the same time, protecting the child from further harm. But see Fraser, \textit{Independent Representation for the Child: The Guardian Ad Litem}, 13 \textit{CALIF. WESTERN L. REV.} 16, 19 (1976), where he asserted that the purpose of the initial statutes was misleading. The quick identification of abused children by a mandated group of reporters, the rapid investigation of reported cases, and adequate treatment being offered all proved to be too simplistic. Fraser concluded:

In short, persons who were mandated to report did not know that they were so obligated and furthermore, were not aware of child abuse. Many of the persons who were able to identify the symptoms and knew of their obligation to report, refused to do so even though a number of states included a criminal provision for a failure to report. Finally, effective treatment was not available in most communities.

\textsuperscript{84} For the text of this model act see McCoid, \textit{supra} note 81, at 20.
\textsuperscript{85} Sussman, \textit{supra} note 83, at 247; see also Paulsen, \textit{Child Abuse Reporting Laws: The Shape of the Legislation}, 67 \textit{COLUM. L. REV.} 1, 3 (1967).
\textsuperscript{86} \textit{Id.}, \textit{supra} note 1, at 331.
\textsuperscript{87} Id.
coverage beyond physicians and hospitals to "persons, firms or corporations conducting a pharmacy." 88

Two newer models have recently been promulgated. The first is the American Bar Association Juvenile Justice Standards Project, which developed a Model Child Abusing Report. 89 Even though the final draft of this model act was proposed after the enactment of the 1974 Federal Child Abuse Prevention and Treatment Act, 90 it does not appear to meet the scope of that Act's requirements. Another recent addition to the list of model acts is the model developed by the Education Commission of the States. 91 The primary purpose of this model is to offer state legislatures a guideline on how best to meet the broad requirements of the Federal Act.

A. Federal Legislation

Government at the national level did not become involved in the welfare of children until 1912, when, after much debate, Congress promulgated an act which established the United States Children's Bureau. 92 This act became law on April 9, 1912, and authorized the establishment of a bureau which was charged to conduct research and provide information about children. 93 With the passage of the Social Security Act during President Roosevelt's first term in office in 1935, 94 the federal government became more directly involved in child welfare services. 95 The emphasis was placed upon the "protection and care of the

88. For the text of this model act see Daly, supra note 40, at 312-13.
89. ABA, MODEL CHILD ABUSE AND NEGLECT REPORTING LAW (Jan. 3, 1975).
91. EDUCATION COMMISSION ON THE STATES, CHILD ABUSE AND NEGLECT MODEL LEGISLATION FOR THE STATES (March 1976).
93. Id. § 192.
95. Id. § 521(a), 49 Stat. 633 (codified at 42 U.S.C. § 721), repealed by Social
homeless, dependent and neglected children and children in danger of becoming delinquent." 96

Congress made significant amendments to the Social Security Act in 196297 which required each state to make child welfare services available to all children. It provides the necessary co-ordination between current child welfare services98 and the social services under the Aid to Families with Dependent Children program.99 This latter requirement was to be accomplished by maximizing the use of existing personnel in providing basic services to those qualified for the programs. This amendment broadened the definition of "child welfare services" to include the prevention of child abuse.100

Under Title IV-B of the Social Security Act,101 federal funding had been fixed at $46 to $50 million from 1972 to 1974.102 Of these sums available for IV-B activities, only $507,000 was spent on activities related to child abuse.103 It is clear that the Act purposefully limited itself to assisting the states through the commitment of funds and research grants for child welfare programs. Recently, however, the federal government established a mandatory reporting requirement and created a National Center on Child Abuse and Neglect.104

96. Id.
97. Id. § 102(b), 76 Stat. 182-83 (codified at 42 U.S.C. § 609).
103. Id.
104. 42 U.S.C. § 5101 (Supp. V 1975). H.R. 6693 would require that the Secretary of Health, Education and Welfare establish research priorities for the making of grants of contracts. Further, the Secretary would be required to submit proposed priorities to the Federal Register at least 60 days before their establishment, for public comment. 1977 HOUSE AMENDMENTS, supra note 90, at 10.
The Federal Act provides assistance at the national level for the identification, prevention, and treatment of child abuse and neglect. This legislation went beyond that of a mere reporting statute and "mandated certain remedial and therapeutic steps be taken upon receipt of a child abuse report." The Federal Act envisions the reporting of child abuse as the first of a series of steps in a comprehensive plan for child protection and for the amelioration of the abused child's environment. Not only does the Federal Act seek to place a greater emphasis on social worker case work, rather than mere case carrying; it also entails having available a trained staff of state and local personnel who can closely examine every suspected case of child abuse.

The National Center on Child Abuse and Neglect is required to collect and distribute information on child abuse, and also gather information toward an annual survey of child abuse and neglect in the nation. Federal monies are available for specific purposes, which include project grants and research contracts designed to assist in the identification, prevention, and treatment of child abuse and neglect. These funds may be spent on demonstration programs and the establishment and maintenance of centers which provide additional counseling services.

The primary benefits of the Federal Act are directed at the state level. A grant system has been devised that requires not "less than 5 percent of the monies appropriated in carrying out the Act . . . to go to the states" for the purpose of developing, strengthening, and carrying out child abuse prevention treatment programs. The Federal Act also mandates that not less than fifty per cent of the funds available for any fiscal year must be spent on grants to and contracts with "public agencies or nonprofit private organizations (or combinations thereof) for demonstration programs and projects designed to prevent, identify

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107. Paulsen, supra note 85, at 3.
108. 42 U.S.C. § 5101(b)-(c) (Supp. V 1975). H.R. 6693 requires that grants made under the Federal Act may be made for a maximum period of three years. Review of such grants must be on an annual basis. 1977 HOUSE AMENDMENTS, supra note 90, at 10.
and treat child abuse and neglect.”

For a state to qualify for assistance under the Federal Act a number of rather stringent requirements must be met. These requirements include: (1) implementation of a state program which provides for reporting of known or suspected instances of child abuse and neglect; (2) prompt investigation of reports by properly constituted authorities; (3) specific administrative procedures and adequate personnel to deal with child abuse and neglect; (4) immunity provisions for persons reporting suspected instances of child abuse and neglect so long as such reports are made in good faith; (5) preservation of the confidentiality of records, with criminal sanctions being exacted against those who disseminate such information in an unauthorized manner; (6) co-operation between agencies dealing with child abuse and neglect cases; (7) public dissemination of information on the problems, incidence, and other related information assisting in the identification, prevention, and treatment of child abuse and neglect; (8) a prohibition against any state cutback in expenditures appropriated for child abuse and neglect programs below that of funds designated in fiscal year 1973; and (9) to the extent feasible, the Federal Act calls for the co-operation of the state agencies with parental organizations which are combatting child abuse and neglect in their respective states. The states are also required to appoint a guardian ad litem to represent an abused or neglected child in a judicial proceeding.

Even though the Federal Act has been in existence for four years, not all of the states have been able to comply fully with its provisions for funding purposes. A number of reasons have been cited which

111. 42 U.S.C. § 5103(a)(Supp. V 1975). H.R. 6693 would authorize that programs “funded under section 4 of the act shall include service programs and projects, in addition to demonstration programs and projects.” This would permit federal support for direct services to abused children and their families in lieu of grants given strictly for research and demonstration projects. 1977 HOUSE AMENDMENTS, supra note 90, at 10-11.


make it difficult for the states to comply with the Federal Act. One is the time-consuming process of making the substantial changes necessary—both administratively and legislatively—to conform their current operations and state laws to those required under the Federal Act. Some states have found the guardian ad litem requirement to be a burdensome demand on their judicial systems. Other states are having difficulty with the definition of child abuse because their statutory definitions of abuse are not as comprehensive as the Federal Act requires.

Questions of an individual's right to privacy and the confidentiality of records have been raised with regard to the establishment of central registries. States which have central registries use them to receive reports of suspected or known instances of abuse or neglect, establish a tracking system of abused and neglected children and their families, and provide a statistical profile of the incidence and social characteristics of those children and their families. Some experts believe that despite procedures in many states which require invalid reports to be expunged from the system, there exists the danger that they may not be. There also exists the possibility that unauthorized persons may gain access to the information in the system.

B. Current Legislative Approaches to Child Abuse— the State Reporting Statutes

The discovery of the bruised and weighted-down body of three-year-old Roxanne Felumero in the East River of New York City in 1969 set off a public furor when it was learned that just two months prior to her death her parents had been brought before the New York Family Court for alleged abuse and neglect. The judge had released the young girl back to her parent's custody. The inability of the courts to prove conclusively the criminal act of child abuse can lead to just this type of

category. For full eligibility of federal monies each of these states must submit requested documentation. 1977 Senate Hearings, supra note 5, at 397-98.
116. 1977 Senate Hearings, supra note 5, at 182 (statement of Arabella Martinez).
118. See text accompanying notes 289-98, infra.
119. See text accompanying notes 184-86, infra.
120. Sussman, supra note 83, at 312.
121. Grumet, supra note 62, at 310.
unfortunate situation. Protecting a child from abuse is a difficult task, since the victim of the abuse often will not—or cannot—testify against his or her assailant. Abuse usually takes place in the privacy of the home away from public scrutiny, and even when it is reported, it is difficult to prove in the absence of eyewitnesses. The need to discover and identify abused children is the primary reason for devising a case-finding tool such as the reporting laws.

In one form or another all fifty states and the District of Columbia have child abuse statutes. These laws encourage or require the report-

ing of suspected or known cases of child abuse. Many include criminal provisions to punish or rehabilitate those who abuse children and establish or authorize protective services for children.

(1). A SURVEY OF THE REPORTING STATUTES

The state reporting laws have undergone considerable change in the past five years. For analysis purposes, each of the state's reporting laws may be divided in thirteen basic areas of concern. These areas include: (1) a statement of purpose; (2) definition of abuse and neglect; (3) mandatory or permissive reporting of suspected cases of child abuse or neglect; (4) mandatory reporting to a medical examiner or coroner; (5) authorized reporting procedures; (6) immunity from civil or criminal prosecution for reporting; (7) sanctions for failure to report; (8) statutory abrogation of privileged communications; (9) temporary protective custody; (10) evidentiary use of color photographs and x-rays; (11) the central registry; (12) failure to provide medical care because of religious beliefs; and (13) the guardian ad litem. The degree of conformity, the extent of common agreement, the presence or absence of these thirteen elements, and the strengths and weaknesses of these enactments will be reviewed.

(a). A statement of purpose. The policy of a state regarding a specific law is usually found in an intent clause which defines the purpose sought to be served by the legislative act. In that statement, the legislature expresses the ultimate goals and objectives which it believes the law should achieve. While the purpose does not have the force of law behind it, it can serve as a guide for interpreting or resolving doubts created by language found within the law.

Forty-one states include purpose clauses in their reporting statutes, all directed to the necessity of providing protection to the child.

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123. This article does not extensively cover the historical development of legislation in this area. For a thorough discussion of legislative history, see Paulsen, supra note 85, at 1.

and for the prevention of further abuse. These states further provide for the use of protective services to children. Twenty-nine states speak to the non-punitive intent of the law and the desire to preserve the family unit whenever possible. Also present in purpose clauses are the kinds of community resources sought to be marshaled into action on behalf of abused children. New York calls for the establishment of a child protection service in each county to investigate reports and provide protection for the child and rehabilitation for the parents or person

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126. Id.

125. Id.
acting in loco parentis.\textsuperscript{127} The Louisiana purpose clause directs that its reporting statute “be administered and interpreted to provide the greatest possible protection as promptly as possible for such children.”\textsuperscript{128}

(b). Definition of abuse and neglect. Since the inception of the first reporting laws in 1963, the definition of “abuse” has undergone considerable change. A “child” has been defined as any person under the age of 18 in forty-seven states,\textsuperscript{129} under 17 in one state,\textsuperscript{130} and under 16 in two states.\textsuperscript{131} New York, until recently, had a dual age requirement: it defined an “abused child” as a child under 16 and a “maltreated child” as a child under 18.\textsuperscript{132} Some states look to the mental or physical

\begin{itemize}
\item \textsuperscript{127} N.Y. Soc. Serv. Law § 411 (McKinney 1976).
\item \textsuperscript{132} N.Y. Soc. Serv. Law §§ 412(1)-(2) (McKinney 1976). The New York legislature recently enacted a law which defines an abused and neglected child as being under the age of 18. N.Y. ch. 518, §§ 1-2 (Consol. 1977).
\end{itemize}
condition of a person, as well as to that person's age, when declaring a
class of persons to be protected by the reporting law. Washington de-
defines such a class as "any person under the age of 18 years," which
"includes mentally retarded persons, regardless of age." Another
state includes in its statute "any crippled or otherwise physically or
mentally handicapped child under 21 years who has suffered any wound,
injury, disability, or condition of such a nature as to reasonably indicate
abuse or neglect." The term "abuse" has been given a wide-ranging meaning under
the reporting statutes. There is much variation in the manner in which
states have chosen to define abuse. The trend nationally has been in the
direction of broadening the definition. In many instances it includes
neglect, acts of emotional abuse, and the perpetration of sexual
abuse or molestation. A number of states qualify their definition of
abuse by inserting the word "serious" prior to the phrase "physical
injury." The Colorado, Idaho, and Wyoming statutes define abuse
in very explicit medical terms. Other states, however, give a broad
definition of what constitutes child abuse. Alaska defines "abuse" as
"the infliction, by other than accidental means, of physical harm upon
the body of a child." States such as Nebraska also give a broad
definition of abuse, but enumerate specific acts which include:
"tortured, cruelly confined, or cruelly punished"; or "left unattended in

which provides a definition of "neglect," as follows:

a failure to provide, by those responsible for the care and maintenance of the
child, the proper and necessary support, education as required by law or medical
or other remedial care, recognized under State law, other care necessary for the
child's well-being; or abandonment by his parent, guardian or custodian; or sub-
jecting a child to an environment injurious to the child's welfare.

136. The language of a number of statutes broadly construes "emotional abuse"
as the endangering of the child's emotional well-being. See, e.g., Kan. Stat. § 38-722

137. Research in the area of sexual abuse has resulted in an increasing awareness
of this form of physical abuse and the emotional impact it has on young children in
particular. See Sussman, supra note 83, at 254.


a motor vehicle, if such minor child is 6 years of age or younger"; or "sexually abused." The Federal Act focuses attention on "child abuse and neglect" as a unified term and defines this singular phrase as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child’s welfare under circumstances which indicate that the child’s health or welfare is harmed or threatened." Nineteen states have followed the lead of the Federal Act in viewing abuse and neglect as conditions falling along a continuum of maltreatment of children. This means that abuse, neglect, sexual abuse, and emotional deprivation are all considered forms of child maltreatment. When these factors of abuse are placed along a continuum, they tend to flow one into the other and lose their distinctive characteristics. Such an approach makes it easier for social service personnel and the courts to interpret what the offense perpetrated against a child is on a case by case basis. A neglected child may also be considered abused, depending upon the severity of injury involved. Sufficient harm may be evident in instances where the child suffers severe emotional deprivation, starvation, death by neglect, or even infant addiction to drugs due to the habit of the mother.

A number of states include in their reporting statutes a provision which recognizes that abuse may not be limited only to individual perpetrators. To protect children from such institutional abuse, thirteen

141. NEB. REV. STAT. § 28-1501(3) (1975).
144. Friedrich & Borniskin, supra note 40, at 199.
145. Id. at 200.
146. Sussman, supra note 83, at 262.
147. See FLA. STAT. § 827.07(5)(a), as amended by ch. 77-429, 1977 Fla. Sess.
states provide that when a government agency is accused of abusing a child an investigation must be conducted by a designated agency other than the one accused of committing the abusive act.\textsuperscript{148}

\textit{(c). The mandatory or permissive reporting of suspected cases and neglect.} The early reporting statutes almost uniformly limited reporting of suspected instances of child abuse to physicians. Many of these statutes were not even mandatory.\textsuperscript{149} Those states having permissive reporting statutes generally permitted a physician to make a report if he felt the need to do so. One writer has noted that in "these cases . . . the aim is more to protect the physician than the child."\textsuperscript{150} From this it would appear that a physician could make a medical judgment his first concern, rather than the underlying social policy of the reporting statutes.\textsuperscript{151} The argument used by opponents of broad-based mandatory reporting rested on two points. First, the physician was usually the only person to see the child. Second, only a physician had the requisite medical training to distinguish injuries caused by abuse from those caused by accidental means.\textsuperscript{152} Later statutes uniformly made reporting mandatory for physicians.\textsuperscript{153}

The trend in defining child abuse has expanded the criteria for reportable situations as well as the list of professionals who are required to report. Medical practitioners remain the most logical and responsible group to come in contact with children whose injuries require treatment. In recent years, the list of mandated reporters has grown steadily from

\begin{footnotesize}
\begin{enumerate}
\item Law Serv., which provides: "Any report which alleges that an employee or agent of the department [of Social and Rehabilitative Services] acting in an official capacity, has committed an act of child abuse shall be investigated by the State Attorney in whose circuit the alleged act of child abuse occurred."
\item Paulsen, supra note 85, at 7.
\item Daly, supra note 40, at 305.
\item Id.
\item Fraser, A Pragmatic Alternative to Current Legislative Approaches to Child Abuse, 12 AM. CRIM. L. Q. 103, 109 (1974).
\end{enumerate}
\end{footnotesize}
persons in the medical and related fields to almost everyone connected
in some professional capacity with large numbers of children.164 It has
been shown that child abuse is often an on-going trauma and that other
persons besides physicians will come into contact with it.155 One survey
has found physicians and hospitals not to be among the most prolific
of reporters.156 When they do come across instances of child abuse, it is
only after the injuries have become serious enough to warrant emer-
gency medical care.157

Enlarging the class of reporters results in placing into the legislative
mandate the moral obligation of all persons to come to the assistance
of the protective services of the community where the child is located.
Besides physicians, social service personnel,158 teachers,159 hospital in-
terns and residents,160 psychologists,161 osteopaths,162 police officers,163

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154. Id.
155. Grumet, supra note 62, at 305.
156. The National Clearinghouse on Child Abuse and Neglect, Children's Divi-
sion of the American Humane Association, gathered information on abuse and neglect
reports which were made to the mandated authorities by many agencies and individuals
in the communities. Data on this aspect of the study were grouped as follows:

<table>
<thead>
<tr>
<th>Sources</th>
<th>Percentage of all reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public and private social agencies,</td>
<td>39.40%</td>
</tr>
<tr>
<td>schools, school personnel, police,</td>
<td></td>
</tr>
<tr>
<td>courts, “hotlines.”</td>
<td></td>
</tr>
<tr>
<td>Neighbors, friends, relatives,</td>
<td>40.60%</td>
</tr>
<tr>
<td>siblings.</td>
<td></td>
</tr>
<tr>
<td>Hospitals, physicians, nurses,</td>
<td>9.70%</td>
</tr>
<tr>
<td>coroners, medical examiners.</td>
<td></td>
</tr>
<tr>
<td>Others (not specified).</td>
<td>8.50%</td>
</tr>
</tbody>
</table>

1977 House Hearings, supra note 73, at 150.
157. Id.
158. Forty-two states presently specifically mandate social service personnel to
report suspected or known cases of child abuse or neglect. See, e.g., Ala. Code tit. 27,
159. Forty-two states require that teachers report any suspected or known cases
160. Thirty-nine states require that hospital interns and residents report suspected
or known cases of child abuse and neglect. See, e.g., Conn. Gen. Stat. Ann. § 17-38a
161. Twenty states require that psychiatrists and psychologists report suspected
medical examiners and coroners, hospitals, clergymen, and lawyers are also mandated to report instances of child abuse. Twenty-six states require reporting by "any other person who has cause to believe" that abuse has occurred. Some states provide for voluntary reports by


165. Six states require hospitals to report suspected or known cases of child abuse or neglect. Other states indirectly require hospitals to report by mandating physicians on a hospital staff to report to the chief administrator of the hospital in which he is employed if a case of child abuse is discovered in the hospital. See, e.g., Conn. Gen. Stat. Ann. § 17-38a(b)-(c) (Cum. Supp. 1978).


any person who has reason to suspect abuse or neglect. One state provides that certain designated professional institutional reporters may make oral reports to department or institution heads.

(d). Mandatory reporting to a medical examiner or coroner. It has been only within the past few years that medical examiners or coroners have been required to receive reports on suspected instances of child abuse which result in death. In 1967, only two states required that reports be made to medical examiners or coroners. This number increased to nine states by 1973. At the present time, eleven states require that reports be transmitted to the local medical examiner or coroner in such instances. The paucity of statutes requiring that reports be made to medical examiners prompted one commentator to note that even though "death ends the possibility of protecting the particular child, an investigation of the circumstances and the family may bring assistance to the remaining children." A nearly uniform provision in these reporting statutes is the requirement that a medical examiner or coroner, upon receipt of an abuse case resulting in the death of the infant, forward all information to the police, state attorney, or responsible social services agency. This procedure is aimed at ensuring that

169. See, e.g., IOWA CODE ANN. § 235A.3(2) (West Cum. Supp. 1977-1978), which provides that in addition to persons mandated to report, "any other person who believes that a child has had physical injury inflicted upon him as a result of abuse may [also] make a report. . . ."

170. VA. CODE § 63.1-248.3 (Cum. Supp. 1977), provides that if information on child abuse is received by a "teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution," such person may "in place of a written report notify the head of the institution or department, who shall be required to make a report." This statute also provides that any other person who suspects a case of child abuse has occurred may make a complaint to the appropriate authorities.

171. Sussman, supra note 83, at 272.

172. Id.


174. Paulsen, supra note 85, at 12.

175. See, e.g., FLA. STAT. § 827.07(4)(b), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., which provides:
child abuse deaths are promptly reported and recognized as such by the protective services of each community.

(e). Authorized reporting procedures. Many of the child abuse reporting statutes treat extensively the procedure to be followed by the state agency receiving a report. The primary receiving agencies involving instances of child abuse are the police, social services agencies, the juvenile courts, and the state attorney. In some states a choice in the order of contacting these agencies is provided to the reporter.\(^{176}\) Twenty-six states provide that reports be made initially to law enforcement officials or police.\(^{177}\) One state requires a report to be made to juvenile courts,\(^{178}\) while seven other states provide that reports be made to the state attorney's office.\(^{179}\) By far the largest recipients of reports are the

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Any person required to report or investigate cases of suspected child abuse or maltreatment, who has cause to suspect that a child has died as a result of abuse or maltreatment, shall report that fact to the appropriate medical examiner. The medical examiner shall accept the report for investigation pursuant to § 406.11 and shall report his finding to the police, the appropriate State Attorney, and the department. Autopsy reports maintained by the medical examiner shall not be subject to the confidentiality requirement provided for in this section.

176. See, e.g., TENN. CODE ANN. § 37-1203 (1977), which provides that a reporter who suspects that an act of child abuse has occurred "shall report such harm immediately, by telephone or otherwise, to the judge having juvenile jurisdiction or to the county office of the sheriff or other law-enforcement official of the municipality where the child resides."


Child Abuse—Federal and State Response

social services agencies. These agencies are charged by law in forty-eight states to receive reports on suspected abuse and neglect cases.¹⁸⁰

The designation of the receiving agency is one of the most critical elements of any reporting statute. The nature and orientation of the agency first receiving the report will often determine the governmental response to child abuse. An overwhelming majority of the reporting statutes emphasize the importance of urgent action in reporting suspected injury.¹⁸¹ The next step depends upon what action is taken by the responsible agency by way of investigating a reported case of child abuse. The speed with which it acts, how responsibly it provides service,


¹⁸¹ Language typical of these statutes may be found in the Michigan reporting statute. MICH. COMP. GEN. LAWS ANN. § 722.623(a) (West Cum. Supp. 1977-1978) provides that a mandated reporter “who has reasonable cause to suspect child abuse or neglect [shall] immediately, by telephone or otherwise . . . make an oral report, or cause an oral report to be made. . . .”
and its interpretation of what is expected of it bear directly on the degree of protection which the reporting statute makes available to abused children.

The immense importance of these two considerations is acknowledged by one commentator:

This is the most sensitive area of the whole discussion of reporting legislation. Yet, analysis shows that this is the most confused in terms of legislative action. A critical determination for the lawmakers is the decision about which resource to designate for receiving reports of child abuse. On this important decision rests the effectiveness of the reporting law with respect to achieving the appropriate goals. The right choice will bring into play the appropriate resources. A poor, or bad choice may produce results not contemplated by the law. It is possible, therefore, for the legislative intent to fail if the tools prescribed to accomplish the goal are inadequate or unsuited for the job.¹⁸²

A consensus among experts in the medical, legal, and social fields concludes that the existing social services agencies or more specialized offices of child protective services within these agencies should be responsible for receiving reports.¹⁸³ This preference is based upon the assumption that some type of protective service or treatment will be provided once the initial report is made.

A typical statute requiring reports to be made to a receiving agency calls for an oral report first to be made, either in person or by telephone.¹⁸⁴ A follow-up written report may be required if the receiving agency requests it.¹⁸⁵ This dual-use reporting procedure allows for speedier attention to the child’s problem yet offers a permanent record which


¹⁸⁴. ARK. STAT. ANN. § 42-812(b) (1977) provides that such reports include the names and addresses of the child and his parents or other persons responsible for his care, if known; the child’s age, sex, and race; the nature and extent of the child’s injuries, sexual abuse or neglect, including any evidence of previous injuries, sexual abuse or neglect, if known; the composition of the family; the source of the report; the person making the report, his occupation and where he can be reached; and the action taken by the reporting source.

can be relied upon during the investigation. The oral report is usually restricted to the essential facts necessary for the receiving agency to gauge whether a condition of child abuse or neglect exists.\textsuperscript{186} Being unencumbered by an overwhelming amount of paperwork, the receiving agency is able to screen the reports coming in for likely cases of abuse requiring immediate attention. The amount of time saved in processing is another key factor which allows for a quick response in emergency situations. A number of statutes provide 24-hour telephone monitoring service seven days a week to receive (usually toll free) reports of suspected abuse.\textsuperscript{187}

(f). Immunity from civil or criminal prosecution for reporting. An essential element in the success of a reporting statute is the active cooperation and participation of those mandated by it to report known or suspected cases of abuse or neglect. Civil and criminal immunity are offered by the vast majority of reporting statutes.\textsuperscript{188} It would be wholly unrealistic to expect such active cooperation without some degree of immunity from criminal and civil prosecution. Commentators agree that there is need for some type of immunity to protect mandated reporters from prosecution.\textsuperscript{189} To encourage those individuals not mandated to report, it has been urged that immunity should be extended to them, as well.\textsuperscript{190}

The Federal Act requires that reporting statutes include an immunity provision "for persons reporting instances of child abuse and neglect from prosecution, under any state or local law, arising out of such reporting."\textsuperscript{191} "Good faith clauses" in immunity provisions have been used by state legislatures to ensure that reports are not made maliciously.\textsuperscript{192} This good faith requirement is strengthened in fourteen states

\textsuperscript{186} Child protective agencies follow a fairly standard procedure in handling cases. There is an initial intake process that involves limited screening and case assignment within the agency. During the intake process, the social service worker may decide that no further action can be taken; the report may not present sufficient information to be investigated—such as a report that does not identify the name and address of the family of the allegedly abused child.


\textsuperscript{188} Fraser, \textit{supra} note 153, at 111.

\textsuperscript{189} See, e.g., Grumet, \textit{supra} note 62, at 306.

\textsuperscript{190} Paulsen, \textit{The Law and Abused Children}, in \textit{The Battered Child} 174 (Helfer & Kempe eds., 2d ed. 1974).


\textsuperscript{192} \textsc{Ariz. Rev. Stat. \S 13-842.01(D)} (West Cum. Supp. 1957-1977). The Arizona statute provides:
by the inclusion of a “presumption of good faith” in their statutes.\textsuperscript{193} Such a presumption places the burden of proving lack of good faith upon the instigator of any suit.

The medical profession, a special target group in the law, thinks itself particularly vulnerable to lawsuits without such protection.\textsuperscript{194} The threat or even remote possibility of long and drawn-out legal battles inhibits necessary reporting. Thus, the inclusion of immunity provides some freedom to physicians from fear of retaliation by angry parents. One commentator has noted that such immunity provisions may be beneficial to the public in general and to physicians in particular “simply because they exist and can be publicized.”\textsuperscript{195} Such a provision may also tend to discourage lawsuits by plaintiffs hoping to gain financial reward over their own wrongdoing, should insufficient proof be offered at trial to convict them.

\textit{(g). Sanctions for failure to report.} Sanctions exacted against a mandated reporter who fails to report a case of child abuse are included in the reporting statutes of many states. Thirty-three states at present impose some form of penal sanctions or fines upon those persons who are mandated to report instances of child abuse but willfully fail to do so.\textsuperscript{196} The criminal penalties imposed upon those who fail to report range

Anyone participating in the making of reports required under the provisions of this section, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability by reason of such action unless such person acted with malice or unless such person has been charged with or is suspected of abusing or neglecting the child or children in question.

\textit{See also} ALASKA STAT. tit. 47, § 17.050 (1975); CONN. GEN. STAT. ANN. § 17-38a(h) (Cum. Supp. 1978); HAW. REV. STAT. § 350-1 (1976).


\textsuperscript{194} Paulsen, \textit{supra} note 85, at 31.

\textsuperscript{195} Id. at 32.

\textsuperscript{196} ALA. CODE tit. 27, § 25 (Interim Supp. 1975); ARIZ. REV. STAT. § 13-842.01(D) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-816(a) (1977); CAL. PENAL CODE § 11162 (Deering Supp. 1977); CONN. GEN. STAT. ANN. § 17-38a(b) (Cum. Supp. 1978); DEL. CODE tit. 16, § 908 (Revised 1974); FLA. STAT. § 827.07(14)(a), as amended
from five days in jail$^{197}$ to one year in prison.$^{198}$ Fines may also be exacted against willful violators. These range from $25^{199}$ to $1,000.$^{200}$ One commentator believes that it is not statutorily prudent to expose one's professional judgment to the ravages of criminal prosecution, even though such sanctions are placed in the context of a civil statute.$^{201}$ He believes that such a penalty provision is virtually unenforceable and, as such, is useless.$^{202}$ This is highlighted by the fact that regardless of the severity of the penalty, action against the physician does little to aid the abused child.

The reporting statutes reflect a difference in philosophy regarding how best to encourage persons required to report to make reports. One philosophy advocates the inclusion of a penalty clause in the belief that no action can be mandated by law without also providing a penalty for failure to comply therewith.$^{203}$ Proponents of the other philosophy believe that the main problem is one of education. Their argument is that when people are made aware of the extent of the problem, and are informed that they are mandated to report, the problem will solve itself.

A mandated reporter who willfully fails to report an instance of child abuse may be liable for damages in a civil suit.$^{204}$ Robinson v.
Wical concerned a suit brought on behalf of a child against four doctors and the local police for failure to report and investigate the report adequately. The child had been taken to the defendant doctors on a number of occasions for treatment of injuries later shown to have been the result of abuse. The doctors acknowledged that they surmised the injuries to have been caused by such abuse. Nevertheless, they allowed the child to be returned to his mother after each visit for treatment. The suit was based on the theory of negligence per se. It was argued that the defendants had a statutory duty to report all known or suspected cases of child abuse or neglect to the proper authorities. The injured child alleged that the doctors breached their legally mandated duty to report and that he was a member of the class intended by the legislature to be protected by the statute. Prior to trial, the defendants agreed to pay $600,000 as a settlement to the child.

In Landeros v. Flood, a guardian ad litem brought suit on behalf of a child against a physician and a hospital for negligently failing to diagnose her abused condition and for negligently failing to report her injuries to the proper authorities. As a result of such negligence, it was alleged, she suffered permanent physical injuries and mental distress. California's reporting statute required physicians to report instances of physical injuries to children which appear to have been inflicted by other than accidental means. In addition to the common law negligence, the plaintiff alleged failure to comply with the mandatory reporting laws.

ing statutes which require reporting and which carry criminal penalties create a cause of action in favor of infants who suffer abuse after a physician has failed to make a report respecting earlier abuse brought to his attention.

One state even provides for punitive damages. Minn. Stat. Ann. § 626.556(5) (Cum. Supp. 1978). The Minnesota statute provides for punitive damages being exacted against a person who either willfully or recklessly makes a false report under the statute, as well as for actual damages in a civil suit.

206. The child had whip marks on his back, puncture wounds in the neck, and burned finger tips. He was found with strangulation marks and was not breathing. Even though his breathing was restored, the brain had been without oxygen for so long that he became mentally retarded due to extensive brain damage. Time, Nov. 20, 1972, at 74 (col. 2).
207. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).
208. For a discussion of the responsibilities of a guardian ad litem, see text accompanying notes 323-29, infra.
The plaintiff appealed an order dismissing her complaint to the California Supreme Court. The first question the court addressed was whether the physician should be held to a standard of care which included knowing how to diagnose and treat the "battered child syndrome." Citing People v. Jackson, the court stated that testimony of a physician identifying the battered child syndrome was admissible. The court recognized that the battered child syndrome had become an accepted medical diagnosis; however, it did not possess the requisite medical knowledge to render a decision, as a matter of law, on the issue. The court stated that the question was one of fact and must be based on expert testimony.

The defendants contended that the injuries suffered by the child after her release were not proximately caused by their failure to diagnose and report her condition. However, the court held that proximate cause was a question of fact and turned on whether the defendants could reasonably have foreseen further injury to the child.

The court went on to find that the plaintiff's allegation of statutory negligence for failure to report was but an alternative theory of recovery for a single cause of action. The mandatory reporting statute was strictly construed by the court: to constitute a violation of the statute it must actually have appeared to the physician that the child had been abused. For the plaintiff to prevail on the count of statutory negligence, she must prove that "defendant Flood actually observed her injuries and formed the opinion they were intentionally inflicted on her." Such a subjective standard requiring actual knowledge in order to show statutory negligence makes a plaintiff's case more difficult to prove. An argument can be made for the inclusion of an objective standard in the penalty clause of a reporting statute. Simply put, the subjective standard will vitiate the intent of child abuse legislation by

210. 551 P.2d at 393.
212. 551 P.2d at 393.
213. Id.
214. Id. at 394.
215. Id.
216. Id. at 395.
217. Id.
218. Id. at 396.
219. Id. at 397-98.
ensuring that any harm suffered by a child in violation of the statute will give rise to a viable claim for civil damages.

(h). Statutory abrogation of privileged communications. In many instances of child abuse, the only eyewitnesses are the parents and the child, and the child may either be too young or too intimidated to testify. To encourage the disclosure of evidence of abuse, many of the reporting statutes abrogate a number of privileges pertaining to the exclusion of confidential communications. A typical statutory exception provides:

The physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege . . . provided for or covered by law, both as they relate to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is in issue or in any judicial proceedings resulting from a report submitted pursuant to this section.

The privileges given to the physician-patient and husband-wife relationships fall by the wayside when a statutory exception abrogates them.

One commentator has noted that the physician-patient privilege did not exist at common law and never existed in the United Kingdom, contrary to what was generally believed. This evidentiary privilege was not established in the United States until 1828. A small minority of states retain the privileged status of confidential communications in any professional or personal relationship even when the communication involves child abuse or neglect. At the present time, forty-three states have enacted legislation waiving this privilege, which is an increase of

221. See text accompanying notes 67-78, supra.
223. Sussman, supra note 83, at 297.
224. Id.
225. These states are Georgia and Maine.
nine states since 1968.227

Even without the existence of such a statutory exception, it is
doubtful whether a parent could invoke the child patient’s privilege (on
the theory that the rights of a minor vest in its parents), particularly
when the privilege is used as a shield for the person accused of injuring
the child in the first place.228 Another reason why a court would proba-
bly disallow the privilege is the fact that such a privilege is meant to
ensure that the best interests of the child be maintained. Allowing the
privilege to stand would not work to the child’s best interest.229

The Supreme Court of Washington, in State v. Fagalde,230 ruled
on the applicability of conflicting state statutes as to whether
psychiatrist-patient communications were considered privileged pertaining
to evidence entered at trial. The evidence at issue stated that the
defendant had revealed his hostility to the abused child and that he had
physically assaulted the child. The young boy had been taken to a
nearby hospital where an examination revealed that he had suffered a
broken leg. Before this incident took place, the defendant had twice
sought counseling at a mental health center and had spoken of his
hostility with a psychologist. The defendant argued on appeal that there
was a statute which maintained the confidentiality of the psychiatrists-
patient relationship.231 The court rejected the defendant’s argument

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227. Daly, supra note 40, at 330.
228. Sussman, supra note 83, at 298.
231. 539 P.2d at 88-89.
that confidential communications between the perpetrator and a psychologist—a doctor, or a mental health employee—"are protected from disclosure and privileged in a judicial proceeding according to the terms of the applicable statutes." The court interpreted the intent of the legislature as having attached a greater importance to the "reporting of incidents of child abuse and the prosecution of perpetrators than to counseling and treatment of persons whose mental or emotional problems cause them to inflict such abuse." 

Such an exception to the privilege may also act to relieve the medical profession from legal or ethical restrictions against revealing confidential information. One commentator has noted that the physician-patient waiver "is likely to encourage reporting from a profession which has a history steeped with protection of confidential communications." 

There exists in many states a privilege similar to that of physician-patient between a husband and wife. Neither may divulge information damaging to the other in any criminal procedure without the release of the spouse against whom the evidence is being given. As this privilege existed at common law, it must be specifically excluded by statute. The number of states allowing the waiver of this privilege has steadily increased from only twenty in 1968 to thirty-two in 1974. Thirty-nine states now statutorily abrogate the privilege.

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232. Id. at 90.
233. Id.
234. Daly, supra note 40, at 330.
235. Id. at 331.
236. Sussman, supra note 83, at 299.
237. Id. at 299.
waiver is primarily that often the parents know the cause of the injuries suffered by the child. To permit the abusive parent to injure the child and then cause the other parent to remain silent by invoking the privilege is tantamount to encouraging further abuse of the child. This would allow the privilege to become a shield for the abusive parent in much the same manner that the physician-patient privilege could be used to muzzle the physician and prevent him from reporting what he had seen.

Waiving the attorney-client privilege presents obvious problems to a client, should his confidences be betrayed by the very person entrusted to keep them. If such confidences were to be made known in court without his consent, it would amount to no less than an abrogation of his right to a fair hearing. Two states have waiver statutes which conceivably can be construed to abrogate the traditional attorney-client relationship. The Alabama statute provides that "[t]he doctrine of privileged communications shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof." Nevada makes inapplicable in abuse cases "all privileges against disclosure recognized by Nevada law." An attempt actually to waive such a privilege in either state would raise serious questions relating to the desirability of such clauses and, perhaps, even raise a question as to their constitutionality. That such an exception is permitted by any statute appears to fly in the face of Canon 27 of the American Bar Association's Code of Professional Ethics, which provides in part:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment. . . . A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client. . . .

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239. Friedrich & Borniskin, supra note 40, at 203.
240. These states are Alabama and Nevada.
If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosure as may be necessary to prevent the act or protect those against whom it is threatened. 243

A difficult question to resolve arises if a lawyer receives information concerning past instances of child abuse which leads him to an inference of continuing abuse. This leads to the possibility of preventing further abuse by disclosing such facts to the proper authorities. 244 One legal commentator believes that it may be less clear that the obligation of confidentiality does not exist where the attorney or any other counsellor is not being consulted in relation to the possibility of future abuse and when he is not being asked to assist in concealment of the abuse of the child. 245

Another privilege to be considered is the social worker-client relationship. Most states do not consider this relationship to be a confidential one. 246 A New York statute does not consider communications between parent and counselor to be confidential if the communication by the parent reveals the contemplation of a crime or harmful act. 247 An Illinois appellate court held that an Illinois statute which prohibits social workers from disclosing information they have gained from persons consulting with them in their professional capacity does not prevent social workers from testifying as to information gained from investigating child abuse cases. 248 By disclosing information obtained by investigating cases of child abuse, social workers are attempting to prevent further abuse. To prohibit such disclosure would effectively frustrate the social worker's duty of protecting the child. 249

(i). Temporary protective custody. A typical method of dealing

243. ABA Canons of Professional Ethics No. 37.
244. McCoid, supra note 81, at 31.
245. Id.
246. Sussman, supra note 83, at 299.
249. 357 N.E.2d at 874.

http://nsuworks.nova.edu/nlr/vol2/iss1/1
with the problem of child abuse is to remove the child from the custody
of the abusing parents either temporarily or permanently. There are two
kinds of temporary protective custody: retention of the child in a medi-
cal facility and removal of the child from its home environment. With
regard to the custody of a child, one statute provides:

Any person in charge of a hospital or similar institution or any physician
treating a child may keep the child in his custody without consent of the
parents or guardian, whether or not additional medical treatment is re-
quired, if the circumstances or conditions of the child are such that con-
tinuing in his place of residence or in the care or custody of the parent,
guardian, custodian or other person responsible for the child’s care pres-
ents an imminent danger to the child’s life or health. 250

The right of a physician or the chief administrative officer of a hospital
or similar institution to retain custody of a child in his care is beginning
to gain wide acceptance. In statutes which include the word “health” in
the phrase “in imminent danger to the child’s life or health,” the stan-
dard to be met is that if the child were released, he might suffer further
injury. 251 It is the intent of these statutes to give physicians and medical
institutions some flexibility in dealing with what they feel to be a poten-
tially hazardous home environment for the child. To ensure that this
custodial detention is actually temporary, statutory provisions delineate
the length of detention without an authorized judicial proceeding. Four
states require that a court order be secured prior to any attempt to
remove the child from the custody of parents or guardian.252 Ten states
provide for protective custody until social services or the police can take
over.253 Nine states provide that social services may assume protective

250. FLA. STAT. § 827.07(6), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.

251. See, e.g., N.Y. SOC. SERV. LAW § 417(1) (McKinney 1976); VA. CODE §

252. LA. REV. STAT. ANN. § 14:403G(6) (West 1974). The Louisiana statute
provides that the child welfare unit “shall request the juvenile court or other court
exercising juvenile jurisdiction to issue an instanter order for the temporary removal
and placement of the child pending completion of the investigation and disposition of the
case.” See also MASS. GEN. LAWS ANN. ch. 119, § 51(C) (West Cum. Supp. 1977-1978);

253. ILL. ANN. STAT. ch. 23, § 2055 (Smith-Hurd Cum. Supp. 1977); MD. ANN.
CODE art. 27, § 35A(1)(1) (Replacement 1976); N.C. GEN. STAT. § 110-118(d) (Cum.
Supp. 1977); OHIo REV. CODE § 2151.42.1 (Anderson 1976); OR. REV. STAT. §
418.760(3) (1977); PA. STAT. ANN. tit. 11, § 2208(b) (Purdon Cum. Supp. 1977-1978);
R.I. GEN. LAWS § 40-11-5 (1977); WASH. REV. CODE ANN. § 26.44.056 (Supp. 1976);
custody of a child when there exists a real danger to the child's well-being.\textsuperscript{254} Four of these states also require that a court order be secured by the next regularly scheduled day to permit further detention of the child.\textsuperscript{255} Two states allow a child to remain in temporary protective custody for ninety-six hours or longer.\textsuperscript{256} Three states permit a maximum period of forty-eight hours before the retention agency must apply for a court order to maintain the child in temporary custody.\textsuperscript{257} Nineteen states provide that a treating physician, hospital, or similar institution may keep a child for a limited amount of time even though the child is not in need of immediate hospital care.\textsuperscript{258}

These statutes also require that a reasonable effort be made to notify the parents or guardian that the child has been placed under temporary protective custody.\textsuperscript{259} The placement of a child in a protective


\textsuperscript{256} Missouri, New York, Tennessee, Pennsylvania.


\textsuperscript{259} See, e.g., Fla. Stat. § 827.07(6)(b), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.; Md. Ann. Code art. 27, § 35A(j)(1)-(3) (Cum. Supp. 1977). The Maryland reporting statute has attempted to alleviate the constitutional issue of parental due process rights by statutorily providing rules and regulations protecting the rights of suspected child abusers. Among these are: notice to the person suspected of being an abuser prior to his name being entered in the state central registry; a guaranteed right.
retention situation has been described as a "possibly dangerous but necessary legal tool."\textsuperscript{260} One commentator notes that those social services agencies which provide child protective services usually carry out "aggressive social casework techniques."\textsuperscript{261} Since these agencies frequently reach out into the lives of those individuals who come within the scope of their operations without being asked, the statutory tool of protective custody is extremely susceptible to misuse.\textsuperscript{262} Another commentator believes that the temptation to misuse this legal device is too great to allow its unbridled use.\textsuperscript{263} He feels that only a social services agency should be permitted to remove the child, and only if it first secures a court order allowing the retention of the child.\textsuperscript{264}

The argument against the protective removal of an abused child is similar to the one against his temporary retention: "the protection of children cannot, and need not, be accomplished at the expense of violating fundamental rights of parents."\textsuperscript{265} There must be some entity between the parent and the person having taken custody of the child. This entity must be the courts or a statutorily appointed authority which will secure the parent's basic rights.\textsuperscript{266} A court order provides the necessary separation of interest between the rights of parents and the possible intemperate or inexperienced actions by the agencies or individuals who have the child in protective custody.\textsuperscript{267} The District Court for the Southern District of Texas in \textit{Sims v. State Department of Public Welfare}\textsuperscript{268} stated that removal of a child without notice from his home environment can take place only if there exists an "immediate threat to the safety of the child."\textsuperscript{269} Even so, some standards of due process must still be recognized. The court also held that the state may not "retain custody of a child for more than ten days without a complete adversary hearing with of appeal upon request by the suspected abuser pertaining to whether his name shall remain in the central registry; and limiting names entered in the central registry to persons adjudicated as abusers.

\textsuperscript{260} Sussman, \textit{supra} note 83, at 291.
\textsuperscript{261} Paulsen, \textit{supra} note 85, at 46.
\textsuperscript{262} \textit{Id.} at 46.
\textsuperscript{263} McCoid, \textit{supra} note 81, at 49-50.
\textsuperscript{264} \textit{Id.} at 50.
\textsuperscript{265} Krause, \textit{supra} note 106, at 243.
\textsuperscript{266} McCoid, \textit{supra} note 81, at 55.
\textsuperscript{268} 438 F. Supp. 1179 (S.D. Tex. 1977) [hereinafter referred to as \textit{Sims v. State}].
\textsuperscript{269} \textit{Id.} at 1192.
notice to the parents." The running of this period would begin with the
day of the service, not the day of the initial orders permitting seizure;
the burden is on the state to make a clear showing that further custody
of the child is necessary to protect the child from harm.

The argument for removal of the child from his home environment
is particularly strong when the child has been physically abused. There
exists a real threat of harm to the child if he is left in a home environ-
ment which has already caused him physical harm. One commentator
has noted that there exists from between a 20% to 30% chance of perma-
nent injury or even death should a child be returned to his home environ-
ment. Another commentator places the injury rate at over 50%.

(j). Evidentiary use of color photographs and x-rays. Even
though the statutory trend in mandatory categories of persons required
to report instances of child abuse is expanding, the physician is probably
best able to discover the evidence of multiple injuries in various stages
of healing which might be identified as constituting the "battered child
syndrome." A physician is able to undertake certain tests to determine
the extent and probable cause of the injuries inflicted upon the child.
The statutes of eighteen states authorize the taking of color photographs
of the areas of noticeable physical abuse. They permit taking of x-rays
to determine the extent of internal injuries which might not be readily
noticeable from an external examination. The purpose for such a provi-
sion is to allow for complete documentation of abuse which can be

270. Id. at 1193.
271. Id. at 1193, 1194.
272. Helfer, The Responsibility and Role of the Physician, in The Battered
273. Id.
274. V. Fontana, supra note 63, at 23.
275. McCoid, supra note 81, at 28.
N.Y. Soc. Serv. Law § 416 (McKinney 1976); Ohio Rev. Code § 2151.42.1 (Anderson
catalogued in a medical file. Such a medical file may then be entered as evidence at a trial should the parents or guardian be prosecuted for causing the injuries observed by the physician while examining the child. One statute provides:

Any person required to investigate causes of suspected child abuse or maltreatment may take or cause to be taken photographs of the areas of trauma on a child who is subject to a report and, if the areas of trauma visible on the child indicate a need for a radiological examination, may cause the child to be referred for diagnosis to a licensed physician or an emergency department in a hospital. Any licensed physician who has reasonable cause to suspect that an injury was the result of child abuse may authorize a radiological examination to be performed on the child. The county in which the child is a resident shall bear the initial cost for the x-rays of the abused child; however, the parent, guardian, or custodian of the child shall be required to reimburse the county for the costs of such x-rays, and to reimburse the Department of Rehabilitative Services for the cost of photographs taken pursuant to this paragraph. Any photographs or reports on x-rays taken pursuant to this section shall be sent to the department at the time the written report is sent or as soon thereafter as possible. 277

Permitting a physician to have photographs of x-rays taken of a child he suspects of having been abused means that he need not first obtain parental permission or release to do so. Other than ensuring that a proper physical record is made documenting any evidence of child abuse in the nature of physical trauma, commentators are divided as to the extent to which physicians should be evidence gatherers or legal-medico detectives. 278

The physician, as the person examining the child, is the individual best able to determine whether the child’s injuries are disparate from the explanation given by the parents. 279 If the parent’s explanation of the child’s injuries is different from what the physician’s examination indicates, the physician’s report to the authorized receiving agency should be given greater weight in the determination of whether physical abuse

278. See Krause, supra note 106, at 257; see also McCoid, supra note 81, at 28. But see Paulsen, supra note 85, at 10.
279. McCoid, supra note 81, at 28.
has been inflicted upon the child.\textsuperscript{280} Those opposing the idea that a physician may also function as a detective believe that it is beyond a physician's competence "to determine who inflicted injuries on a child."\textsuperscript{281} A diagnosis of injury should be limited to no more than a reasonable guess "that the injuries suffered were not caused by an unavoidable accident."\textsuperscript{282}

(k). The central registry. The idea of establishing central registries did not become popular until the mid-1960s. Since then, the trend has been toward the establishment of registries either at the local level or on a statewide basis. Only four states maintained registries in 1966 under legislative mandate.\textsuperscript{283} This increased to nineteen by 1970,\textsuperscript{284} with forty states at present maintaining such registries through statutory enactment.\textsuperscript{285}

\textsuperscript{280} Krause, supra note 106, at 257. While identification of child abuse should be tempered by awareness of the fact that children may suffer physical mars, bruises, and scratches due neither to parental neglect nor intent, the treating physician must be cognizant of discrepancies between the degree of the trauma and the history given to explain the injuries. Essential tasks for the physician to consider are skillful interviewing, obtaining historical data, and performing physical examinations to rule out causes of either abuse or neglect.

\textsuperscript{281} Paulsen, supra note 85, at 28.

\textsuperscript{282} Id.

\textsuperscript{283} Sussman, supra note 83, at 300.

\textsuperscript{284} V. DeFrancis, supra note 267, at 178.

A large number of state laws establishing central registries make reference to their use as diagnostic instruments or as research and planning tools.\textsuperscript{286} As a practical matter, however, few states can show more than sporadic use of their registries by professionals who have requested information regarding suspicious cases of abuse or neglect.\textsuperscript{287} Registries are often hampered by incomplete, inaccurate, and old information which diminishes their effectiveness as part of a viable statewide child protection program.

With the expansion in scope of the state child abuse laws, the purposes and goals of the registries have changed somewhat.\textsuperscript{288} The impetus for their change has come with a reduction of evidentiary standards presently required by many of the reporting statutes—reasonable suspicion of maltreatment, rather than the requirement of specific evidence.\textsuperscript{289}

One of the primary benefits of well-structured statewide central registries is the ability of authorized officials to “trace” the abusive adult so that his ability to avoid detection by continually bringing the abused child to different doctors and hospitals is lessened.\textsuperscript{290} Some states require that assistance be given to sister states when there is a reasonable suspicion that abusive parents are “hospital shopping” across state lines.\textsuperscript{291}

As a research tool, the central registries can be a boon to those attempting to understand better the societal causes and interactions of those who abuse and maltreat children. With properly motivated and organized staff personnel, many of the registries presently in existence could develop demographic and other studies which may increase under-

\textsuperscript{286} NAT'L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T. OF HEALTH, EDUCATION & WELFARE, 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 14 (1975) [hereinafter referred to as 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT].

\textsuperscript{287} Id.

\textsuperscript{288} Id. at 17.

\textsuperscript{289} Id.

\textsuperscript{290} Krause, supra note 106, at 246.

standing of the nature and extent of abuse.292 Such studies, when co-
ordinated with other child protective service plans, could evaluate the
effectiveness of a state's abuse prevention efforts.

The use, or, more accurately, the misuse of information placed in
central registries has been of much concern to those who fear infringe-
ment of the right to privacy of both child and parent. The court in Sims
v. State293 held that although the state may investigate reports of abuse,
there exists no valid reason why the accused family should not have
access to the "fruits of that invasion or the conclusions reached."294 The
court did recognize that where the confidentiality of the source had been
guaranteed either administratively or through a judicial hearing, such
information should not be released to the family.295

Although many of the reporting statutes make provision for the
confidentiality of stored information, there is surprisingly little uniform-
ity in guidelines which govern the dissemination of collected informa-
tion.296 Some states do not legislatively mandate a specific procedure for
disclosure of information.297 Rather, these states leave the promulgation
of regulations to the agency designated to maintain the central regis-
try.298

292. 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT, supra
note 286, at 26.
294. Id. at 1194, 1195, where the court held that the following provisions of TEX.
FAM. CODE tit. 2, §§ 34.05(c) and 34.08, are unconstitutional on their face.
295. Id.
296. Thirty-six states at present require that records gathered on suspected or
known cases of child abuse and neglect be kept confidential, and to varying degrees,
inaccessible to public scrutiny. See, e.g., COLO. REV. STAT. § 19-10-114(4) (Cum. Supp.
1976); FLA. STAT. § 827.07(7), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.;
297. Typical of the statutes which fail to specify the procedure for ensuring the
confidentiality of information gathered by the central registries is ILL. ANN. STAT. ch.
23, § 2061 (Smith-Hurd Cum. Supp. 1977) which provides: "[T]he Department [of
Children and Family Services], by regulation, [shall] regulate the entry and retention
of child abuse and neglect information and access thereto."
298. The absence of legislative direction in the reporting statutes is dangerous to
the concept of individual privacy. Such statutes fail to define terms such as confidential-
ity, and to specify what agencies and professionals may have access to records. In
discussing these potential dangers, Sussman concludes that "in many states the ironic
situation is created whereby those for whom disclosure was originally intended make
little use of the register while other, unintended individuals, are granted relatively free
access." Sussman, KEEPING RECORDS ON SUSPECTED CHILD ABUSE, in COUNCIL WOMAN
There is growing concern among legal and social commentators that irreparable harm may be caused to the child who may be labeled an "abused child" for a lifetime. Of equal concern is the perpetuation of inaccurate and unverified information which, if released, may damage the person's reputation and threaten his livelihood. Since abuse and neglect are now thought to be part of a repetitive cycle whereby one generation passes to another the characteristics of the abusive parent, government agencies may become inclined to make undue observation of a child so labeled as he attains adulthood, marries, and has children of his own.

To alleviate the concerns of those who believe unbridled use of central registries may cause more harm than good, an increasing number of states have very strict guidelines for the classification and expunging of reports. One agency is usually authorized to receive, investigate, and follow up on suspected cases of abuse or neglect. A single agency controlling all aspects of the investigation process will minimize the danger of misuse of the registry.

When a suspected case of child abuse reaches the receiving agency, the case goes through a number of distinct classifications. These classifications in the Florida child abuse statute are termed: under investigation; abuse indicated; and abuse unfounded. Upon completing an investigatory report, the receiving agency makes a determination whether the report is unfounded or indicates abuse. Reporting laws in a number of states provide that information be removed immediately from the registry if it is unfounded or otherwise inappropriately gathered or stored. Some states also provide that information gathered and stored in the registry will be expunged once the child attains a

299. It has been suggested that information received by the central registries may at some future date be used to raise "the issue of competency of a family or the risk to a child." 1977 Senate Hearings, supra note 5, at 710 (statement of Eli Newberger).

300. Id.


302. Fla. Stat. § 827.07(8), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., has established this classification system for categorizing "all reports of child abuse or maltreatment maintained within the central registry. . . ."

303. See note 186, supra.

304. Fla. Stat. § 827.07(8), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., states that "all identifying information contained in reports classified as unfounded shall be immediately expunged."
certain age, usually eighteen.\textsuperscript{305} In other instances, a statutorily determined length of time is established which begins when the case of child abuse is first reported. Seven years is the length of time used in Florida.\textsuperscript{306}

Access to information stored in central registries is usually restricted to receiving agency personnel. Limited access may be permitted to information on file for valid research in some states.\textsuperscript{307} Restrictions placed on such access includes the anonymity of the abused child, abusing parent, or guardian and reporter.

To maintain the confidentiality of the information stored in the central registries, twenty-six states include a penalty provision for persons divulging information in an unauthorized manner.\textsuperscript{308} Fines range from $100\textsuperscript{309} to $1,000, with a jail sentence of up to two years.\textsuperscript{310}

(1). \textit{Failure to provide medical care because of religious beliefs}. Numerous United States Supreme Court decisions have held that the parent-child relationship is a fundamental part of our society.\textsuperscript{311} The care, custody, and nurture of children has been the primary


\textsuperscript{306}. FLA. STAT. § 827.07(8), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., places a limit on how long information may remain within the registry, which at this time is seven years. This section provides, however, that if the individual remains under the supervision of the Department of Health and Rehabilitative Services, then the information shall remain within the registry until the Department determines otherwise.


\textsuperscript{309}. W. VA. CODE § 49-6A-8 (Supp. 1977).


\textsuperscript{311}. \textit{See}, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972), where the Supreme
function of the family. The child’s reciprocal right to this parental support, however, is also a concern of the courts. Recognition of this conflict has led a number of states to include a statutory exclusion from their definitions of abuse or neglect pertaining to “spiritual treatment.” Proper use of this exclusion is of paramount concern when children have been threatened by parental unwillingness to accede to emergency medical care which involves surgery or blood transfusions.

Even though many persons place little faith in spiritual healing, those who do may hold a strong belief which should be interfered with only under extraordinary circumstances. There exists a constitutional obligation to permit a liberal exercise of the freedom of religion among individuals. A dilemma arises where this exercise of religious freedom endangers the welfare of a minor. The courts must balance the rights of the parent to religious freedom with the equally fundamental right of the child to live.

The number of states permitting this “spiritual treatment” exemption has steadily increased. In 1967, seven states had such an exemption in their reporting statutes, while seventeen states did so by 1974. Twenty-seven states at present include the exemption in their reporting statutes. Many of these states seek a compromise which recognizes

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Court stated that it had “frequently emphasized the importance of the family.” The Court further noted “that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”


313. See In re Ivey, 319 So. 2d 53 (Fla. 1st DCA 1975), holding that in a life or death situation, as confirmed by the treating physician, treatment may be ordered under the state juvenile judicial treatment statute to treat the dependent child without first seeking the consent or approval of the parents. The court interpreted Fla. Stat. § 827.07(2) (1975) as not precluding the court from ordering either that medical services be provided or that treatment by a duly accredited practitioner who relies solely on spiritual means of healing be provided to the children. Recognizing the ambiguity of the statute section, the Florida Legislature recently enacted an amendment to the child abuse statute which greatly clarifies the authority of a court to order medical care when the health of children requires it. For the text of pertinent portions of Fla. Stat. § 827.07(2), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., see note 317, infra.

314. V. DeFrancis, supra note 267, at 180.

315. Sussman, supra note 83, at 306.

a parent’s right to seek in “good faith” care for an ill child by means of Christian Science or by the teachings of a “well-recognized religion.”

Regulations issued by the Social and Rehabilitation Service of the Department of Health, Education and Welfare on January 19, 1977, implementing the Federal Act addressed the issue of “spiritual treatment.” In defining the phrase “harm or threatened harm to a child’s health or welfare,” the regulations provide a qualified exemption for “spiritual treatment.” This regulation states “that when a parent or guardian legitimately practicing his religious beliefs fails to provide specified medical treatment for a child, such failure alone shall not be considered neglect.” The House Bill proposing the extension of the Federal Act recognizes the validity of this administrative decision by expanding the Federal Act’s definition of abuse and neglect. The House Bill provides that a child who does not receive medical treatment by a parent or guardian “solely as a result of the legitimate practicing of religious beliefs of the parent or guardian” will not be considered an


317. See, e.g., FLA. STAT. § 827.07(2), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv. The Florida statute provides in part:

A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not, for that reason alone, be construed a negligent parent or guardian; however, such an exception shall not preclude a court from ordering, when the health of the child requires it, that:

(a) Medical services from a licensed physician as defined herein, or

(b) Treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well recognized church or religious organization, be provided.


319. Id. at 101:0062.

320. Id.

321. 1977 HOUSE AMENDMENTS, supra note 90, at 10.
abused or neglected child. The House Bill also states that this exception will not preclude a court from ordering that medical services be provided to a child, where the child's health and well-being require it. 322 (m). The guardian ad litem. The guardian ad litem is a special guardian appointed by the court for the specific purpose of protecting the child's interest. 323 His position is unique in that his obligations to the child are transient in nature and limited in scope. He usually has no contact with the child prior to his appointment, nor does his representation of the child continue after the conclusion of the case. A guardian ad litem need not be an attorney, except where it is specifically required by statute. 324 Increasingly it is being recognized that as juvenile courts become more complex in their proceedings and cognizant of protecting all parties' rights of due process, the special skills of an attorney are best suited to ensure the satisfaction of the child's best interests. 325

It has been shown that a child's interests will be endangered in cases of willful child abuse. 326 The juvenile court is responsible for the well-being of a child in an abuse proceeding, and one commentator suggests that an independent representative be appointed by the court. 327 Two reasons have been given for the need of such independent representation. First, as the child in many cases is abused by his own parents, it would be unwise to believe that his best interests would be protected by having an attorney represent him as well as his parents. 328 Second, in states where the petitioner is the local social service agency, there is a real question as to whether its resources of time and personnel are available to represent the child adequately in an abuse case. 329 The guardian ad litem, being a third party to a court action, is technically an advocate for the interests of the child rather than an adversary pitted against the

322. Id.
323. BLACK'S LAW DICTIONARY 834 (4th ed. rev. 1968) defines a guardian ad litem as "a guardian appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party."
325. See Krause, supra note 106, at 263; Fraser, supra note 83, at 21; Sussman, supra note 83, at 304.
326. See text accompanying notes 67-78, supra.
327. Fraser, supra note 83, at 17.
328. Fraser, supra note 153, at 118.
parents, social services, or the prosecutor's office.

At the present time, twenty-two states provide for the mandatory appointment of a guardian *ad litem* to represent the interests of the child in an abuse proceeding.330 Six other states allow the appointment of a guardian *ad litem* for children in cases of abuse resulting in the commencement of judicial proceedings.331 The reporting statutes vary as to the degree of legislative instruction given to those appointed as guardians *ad litem*. One state simply provides that a guardian *ad litem* be appointed in a judicial proceeding involving a child in a child abuse case.332 Other states, however, specify more exactly the parameters of a guardian *ad litem*’s authority and responsibilities. These responsibilities include (1) an investigatory role wherein the guardian *ad litem* may have access to all pertinent records, may interview witnesses, and may examine and cross-examine witnesses at hearings;333 (2) an advocacy role whereby the guardian *ad litem* ensures that all necessary facts are brought to the attention of the court;334 (3) a counselor role wherein

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333. E.g., Me. Rev. Stat. tit. 22, § 3858 (Supp. 1975). The Maine statute provides: "[H]e shall make such further investigation as he deems necessary to ascertain the facts," which may include "reviewing psychiatric, psychological and physical examinations of the child, parents or other persons having custody, interviewing witnesses, examining and cross-examining witnesses. . . ."

the guardian ad litem recommends various options to the court;\(^{335}\) and (4) a guardian role whereby the guardian ad litem represents the child and seeks to ensure the protection of his interests.\(^{338}\)

The guardian ad litem provisions also hold him to be knowledgeable about the condition of the child and the facts of the case.\(^ {337}\) A guardian ad litem may order the examination by a physician, psychiatrist, or psychologist of any parent or child or other person having custody of the child at the time of the alleged abuse.\(^ {338}\) By statute, every opportunity should be afforded to the guardian ad litem so that he can perform properly a complex task whose outcome may have a crucial effect upon a generation of abused children.

(2). LEGISLATIVE TRENDS IN THE STATE REPORTING LAWS

After having examined the current reporting laws, certain future trends in the area are discernible. The state legislatures, partly due to the impetus of grants provided by the Federal Act,\(^ {339}\) are shaping their reporting laws toward a more clearly defined "interventionist" role with respect to the family unit. This intervention by the state into the lives and welfare of individuals is the result of a general pattern of increased dispositional or adjudicatory in nature. He shall also participate in the proceeding "to the degree appropriate for adequately representing the child."

\(^{335}\) E.g., MICH. COMP. LAWS ANN. § 722.630(10) (West Cum. Supp. 1977-1978). The Michigan statute requires that the guardian ad litem make recommendations to the court which are in the best interests of the child.

\(^{336}\) E.g., COLO. REV. STAT. ANN. § 19-10-113 (Cum. Supp. 1976). The Colorado statute provides that "the guardian ad litem shall be charged in general with the representation of the child's interests."

\(^{337}\) E.g., CONN. GEN. STAT. ANN. § 17-38a(f) (Cum. Supp. 1978). The Connecticut statute provides that "the child shall be represented by counsel appointed by the court to speak in behalf of the best interests of the child, which counsel shall be knowledgeable about the needs and protection of children. . . ."

\(^{338}\) E.g., WASH. REV. CODE ANN. § 26.44.053 (Supp. 1977). The Washington statute calls upon the court, by its own motion, "or the motion of the guardian ad litem, or other parties, [to] order the examination by a physician, psychologist or psychiatrist, of any parent or child or other person having custody of the child at the time of the alleged child abuse or neglect," upon clear evidence that an instance of child abuse or neglect has occurred.

\(^{339}\) E.g., Sims v. State, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), where the court declared that due process must extend to the "investigative stage of state action." Should psychiatric or physical examinations be objected to by the parents, an "adversary hearing before a judicial body" must be held.

\(^{339}\) See text accompanying notes 102-13, supra.
governmental action programs which, until recently, have been almost exclusively affairs of the community or of the individual.

With respect to the future course of the state reporting laws, this writer believes that there are three areas which will come under increased legislative scrutiny at the state level. These areas are: (1) the use of protective services as a means of preventing the recurrence of child abuse within the family; (2) the continuing expansion of the definition of child abuse and neglect which will encompass the concept of "mental injury;" and (3) the establishment of evidentiary standards which will make it easier for the state to show abusive or neglectful conduct by a parent or guardian in a legal action. Other trends include the further expansion of the reporters mandated to report known or suspected instances of child abuse known personally to them; universal immunity from civil or criminal prosecution for reporting a case of child abuse or neglect in good faith, or participating in a judicial hearing based upon a report given pursuant to the provisions of the law; and the increased use of the state central registries as repositories of data on verified cases of child abuse. It is anticipated that stringent restrictions will be placed on access to the files in the registries. To accomplish this, specific measures must be developed at the legislative level to purge from the files unfounded, unmeaningful, and inapplicable information which meet the parameters of an individual's right to privacy.

(a). Protective services. Legislators in many states have come to the realization that there exists a profound limitation on what legislative action can accomplish in solving deep-seated social problems. Most child abuse laws are reporting laws and do not cover other aspects of the problem, such as therapeutic assistance for the child and his family. Without the proper institutional framework, the law and the legislative process cannot create better services or better trained child protection staffs. Some states have already created the institutional framework for the reporting and investigation of suspected cases of child abuse and neglect. Most of these laws establish a mechanism for the provision of some type of treatment services.

340. E.g., COLO. REV. STAT. § 19-10-109(6)(a) (Cum. Supp. 1976) ("It is the intent of the general assembly to encourage the creation of one or more child protection teams in each county or contiguous group of counties."); N.Y. SOC. SERV. LAW § 423 (McKinney 1976) ("Every local department of social services shall establish a 'child protective service' within such department."); PA. STAT. ANN. tit. 11, § 2216(a) (Purdon Cum. Supp. 1977-1978) ("Every county public child welfare agency shall establish a 'child protective service' within each agency.")
It must be recognized, however, that treatment services are the least developed part of the child protective system. Counseling, protective supervision, foster care, and temporary shelter care have been the predominant treatment services available in most communities for the past twenty years.

There exist two diverging points of view as to what should be the ultimate goals of the child protective services at the community level. One view is that the role of child protective services should be expanded to include provisions for long-range ameliorative treatment services. The other view calls for the establishment of services designed to deal with the short-term effect of abuse and neglect. These diverging views are related to the primary and secondary prevention of abuse. Primary prevention refers to the prevention of abuse before it occurs; secondary intervention fills the short-term needs of preventing abuse, as it is after-the-fact intervention. Expansion of legislation along these lines will probably be limited by the extent to which the states are able to provide necessary funding in the face of the current fiscal difficulties.

(b). Expansion of the definition of child abuse and neglect. The definition of abuse used in many of the early reporting statutes has gradually been expanded to include neglect, sexual abuse, and emotional deprivation. The dilemma faced by mandated reporters, social service personnel, and the courts alike is how best to determine whether an instance of abuse has occurred in any given suspected case. The reason for this uncertainty rests primarily with the definition of abuse set out in the reporting laws. In many states, abuse has become synonymous with any harm to a child that resulted from a parent’s or guardian’s acts of commission or omission which cause injury.341

A number of states have expanded their definitions of abuse to include the concept of mental injury. This particular type of injury has been described as a state of substantially reduced psychological or intellectual functioning in relation to a number of factors which may vary from state to state.342 Some of these include failure to thrive,343 the

343. "Failure to thrive" refers to the condition of a child (usually under the age of one year) "who fails to grow in height and weight and to develop in personal-social, adaptive, language, or fine and gross motor areas, as compared to pre-established standards over a period of time (generally several weeks)." Nat’l Center on Child Abuse and Neglect, U.S. Dept. of Health, Education & Welfare, 2 Child Abuse and Neglect: The Problem and its Management 39-40 (1975).
ability to think and reason, and the control of aggressive or self-destructive impulses. These injuries must, however, be clearly attributable to the inability or unwillingness on the part of the parent or guardian to exercise a minimum degree of care toward the child.341

(c). Evidentiary standards in a child abuse case. One commentator has noted that it is extremely difficult to prove a case of child abuse committed by a parent, owing to the high standard of proof which must be met by the prosecution in a judicial proceeding.345 There is an argument that while criminal prosecution of the battering parent346 may satiate society's desire for retribution, it does not cure the problem of individual cases of child abuse; nor does it take into consideration the child's independent interests.347 Further, it has been argued that there exists a risk that criminal prosecution of the parents may result in irreparable harm to the best interests of the child.348

In most family courts, even though the standard of proof to be met is that of a preponderance of the evidence rather than proof beyond a reasonable doubt, "this standard must be met by legally sufficient evidence."349 The prosecution in many instances is bound to rely on circumstantial evidence. To alleviate the prosecutor's burden somewhat, a number of states have enacted legislation designed to allow "evidence that the child has been abused or has sustained a nonaccidental injury [to] . . . constitute prima facie evidence . . . sufficient to support an adjudication that such [a] child is uncared for or neglected."350

345. Fraser, supra note 153, at 117.
346. The Court of Appeals for Maryland in a 1975 decision held in State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975) that the state's child abuse statute applied to a mother's failure to obtain medical help for her badly injured daughter. "The mother, embarrassed by the condition of her daughter's body" after she had left the child in the custody of another man and woman, refused to take her child to the hospital even after noting that her daughter was in a semicomatose state. Recent statutory changes have made the parent liable for the "unattended worsening of obviously serious medical conditions." The court viewed such conduct as being the equivalent of inflicting physical injury. The court further stated that this was "especially true since the statute makes the parent responsible for providing the necessities of life including medical care." Therefore, the Court of Appeals found that criminal child abuse was properly found by the trial court.
347. See Friedrich & Borniskin, supra note 40, at 216; Fraser, supra note 153, at 119; Grumet, supra note 62, at 307.
348. Fraser, supra note 153, at 119.
349. Paulsen, supra note 190, at 155.
A number of jurisdictions have recognized the battered child syndrome in criminal cases when the syndrome is enunciated by an expert witness. Such an expert witness is usually the treating physician but may as well be a pathologist or other medically-trained person. The Supreme Court of California in *Landeros v. Flood* recognized that there exists widespread knowledge of what constitutes the battered child syndrome within the medical community. It is likely that other states will judicially recognize the battered child syndrome as being capable of diagnosis in the ordinary course of a physician's practice, and the testimony based upon the symptoms of the syndrome will be admissible into evidence in court.

3. CONCLUSION

Social problems and some of their more disturbing trends across the country are amenable neither to easy solutions nor to legislative actions at the state or federal level. Realistically, it must be recognized that the term "child abuse" is as much a political concept, defined to draw attention to the existing social problem, as it is a scientific concept which can be used to measure a specific phenomenon. The use of child abuse as a tool to make the public conscious of the problem has allowed state reporting laws to define the term as broadly or loosely as desired in order to magnify concern on this issue.

Mere reporting laws are not enough satisfactorily to combat abuse and neglect in this country. Positive programs at the state and local level must implement protective services for the child and therapeutic services to both child and parent. Without such programs it is clear that no "law can be better than its implementation, and its implementation can be no better than its resources permit." Effective measures to find a feasible solution to the problem must be based on long-term prevention. Recognizing child abuse as an infectious disease in which the victim becomes the carrier, with each generation passing on the illness to its children, underlines the need to detect, intervene in, and prevent the disease. The reporting laws, when they

351. *See, e.g.*, People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. Ct. App. 1971) and State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973), where expert testimony given by physicians concerning the battered child syndrome was admitted into evidence.

352. *See text accompanying notes 207-20, supra.*

include provisions for protective services, can be utilized only if the full resources of the state can be brought to bear to meet the needs of the abused child and family on a case-by-case basis. Such a concerted effort can be accomplished only in light of certain fundamental rights of the abusive parents, the parents patriae interests of the state in protecting the health and well-being of children, and, lastly, the unspoken interest of the child. Protection of the child’s interest must include adequate and timely representation by a guardian ad litem at any hearing which may result in removing the child from the family.

William C. Redden
An Attorney’s Liability to Third Parties: The Expanding Field of Malpractice

Malpractice suits against attorneys have increased dramatically in the last decade. In Florida, they have more than tripled in the last three years alone (Chart 1). As a consequence of the overwhelming amount of litigation resulting from such suits and the substantial judgments awarded to winning plaintiffs, professional liability insurance premiums for Florida attorneys have almost quadrupled since 1973 (Chart 2). This expanding field of liability has become of justifiable concern to members of the legal profession.

[The authors wish to express their appreciation to Mr. Jack Driscoll, Poe Insurance Company, Tallahassee, Florida, for his generous assistance in providing the statistical data for the charts.]
In this country, the overabundance of lawsuits against attorneys has not emanated from clients alone, but also from third parties who lack privity or any contractual relationship with the attorney. Although the question of an attorney's duty to one other than his client has already been settled in two leading jurisdictions, New York and California, Florida only recently decided the issue as one of first impression. Consequently, the question of an attorney's liability to third parties remains a controversial and speculative issue.

The purpose of this article is to provide an overview of past and current professional malpractice litigation by third parties as it has occurred in other states, and to offer insight into the recent developments in Florida, including a discussion of related Florida statutes.

1. HISTORY IN OTHER JURISDICTIONS

Historically, there has been widespread agreement in the legal community that an attorney will not be held liable to third persons for acts committed in good faith. Consequently, an attorney's negligence in the performance of an obligation to a client will not provide a third party with a cause of action against the attorney.

Early in this century, the United States Supreme Court struggled with the question of where an attorney's liability should end. In National Savings Bank of the District of Columbia v. Ward, an attorney negligently certified that his client held good title to a certain piece of property when, in fact, the client had conveyed it to another individual. The bank, relying on the certificate, made a loan to the client. When the client later defaulted on the loan payments and the bank discovered it was unable to foreclose on the property, it brought suit against the attorney, claiming he owed it a duty to make a careful title search.

After considering whether the bank was a beneficiary of the attorney's actions, the Court ruled that the suit failed to state a cause of action, since "[w]here there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of a designated service is to the client and not to a third

1. See text accompanying notes 8-32 infra.
3. 7 C.J.S. Attorney and Client § 52 (1948).
4. Id.
5. 100 U.S. 195 (1879).
This lack of privity proved to be a barrier to any actions the bank sought to bring against the attorney. The case exemplified the general principle that a person who is not a client can still be substantially affected by an attorney's actions or advice. Therefore, it became necessary to establish a realistic limit to the attorney's liability. Without privity, the Court reasoned, no duty existed and, with no duty, no cause of action could arise.

In the years following Ward, privity again became a focal point in determining the liability of individuals to third persons. Mr. Justice Cardozo authored two often-quoted opinions which set the standards for many courts. In the first, when faced with a plaintiff claiming to be a third-party beneficiary to a contract, Cardozo stated that the requirement of privity in order to bring suit was a necessity, for to allow otherwise would mean that "[e]veryone making a promise having the quality of a contract will be under a duty to the promisee . . . but under another duty apart from the contract, to an indefinite number of potential beneficiaries. . . ."

Two years later, the New York Court of Appeals heard the second case involving an action brought against an accounting firm that had negligently prepared a financial statement for an individual who had applied to the plaintiff for a loan. In his complaint the plaintiff demanded damages, alleging that the firm should be liable because it knew that creditors like the plaintiff would rely on the financial statement. However, the court refused to allow the plaintiff to sue because he lacked privity with the accountants. The court feared that allowing such a suit would "expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." The court felt the "assault upon the citadel of privity" was growing at such a rate that it had to be contained before the consequences of such suits outweighed the remedy they sought to provide. The danger Cardozo foresaw—that of unlimited liability—has remained in the minds of many courts to this day. The New York courts have remained steadfast.

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6. Id. at 198.
7. Id. at 199.
11. Id. at 444.
12. Id. at 445.
in their belief that attorneys should not be subjected to suits by third parties lacking privity.

In *Victor v. Goldman,* an attorney was sued by a relative of a deceased client who claimed that the attorney negligently failed to change provisions in the decedent's will, as the latter had instructed, naming the plaintiff as the beneficiary of the right of first refusal to purchase the decedent's estate. The court, in dismissing the case, stated that "an attorney owes no duty to third parties for acts committed *bona fides* in the performance of an obligation to his client . . . and this remains the rule even where negligence results in damage to the third party."14

Recently, a New York court reiterated its stand on attorney liability in *Drago v. Buonagurio,* where a doctor who had been unsuccessfully sued for malpractice filed a countersuit against the attorney alleging that the action had been frivolous and that, due to the attorney's negligence in failing to check out the facts, the doctor had been financially damaged. The issue at bar was whether an attorney who instituted a frivolous malpractice suit on behalf of a client could be held liable for damages to the doctor against whom he instituted the lawsuit. Deciding that he could not, the court said:

The Courts of this state have consistently held that an attorney is not liable for the negligent performance of his obligations to a client, even where such negligence results in damage to a third party . . . and there is no indication that such a rule would be adopted in this state.16

To do so, the court feared, would unquestionably discourage the use of the courts as a means of resolving conflicts, and thus be "contrary to public policy."17 Clearly, the New York courts believe that an extension of an attorney's liability to third parties would be a fatal blow to the attorney's role as advocate, since the fear of personal liability could overshadow the attorney's duty to practice law in the best interests of his client.

While New York clings to its long-standing policy of privity as a requirement for attorney liability, California appears to have gone from

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14. 344 N.Y.S. 2d at 673.
16. 391 N.Y.S. 2d at 63.
17. Id.
one extreme to the other. In 1895, the California Supreme Court held that an attorney who negligently drafted a will would not be liable to an injured beneficiary solely because he lacked privity of contract. The court stated that the plaintiff was also precluded from bringing suit under the theory that he was a third-party beneficiary, since the purpose of the will was expressly for the client's benefit.

However, the requirement of strict privity began to erode with the case of Biakanja v. Irving. Here, a notary public, in preparing a will, had failed to have it properly witnessed, rendering it invalid. The California Supreme Court reversed a lower court's dismissal of the case, reasoning that the time had come to liberalize the privity requirements by permitting a third-party beneficiary of a will to recover his losses. As a means of controlling suits and the conditions under which they are brought, the court stated that the allowance of such suits was "a matter of policy and involves the balancing of various factors . . ." among which are the extent of the intended benefit to the third party, the risk of harm to him, the certainty of his injury, the proximity of the negligent party's conduct to the injury, the moral blame involved, and the need to prevent future harm.

Although the Biakanja decision did not deal directly with attorneys and third parties, it took the court only a short time to include attorneys in the category of those who could be sued by third parties lacking privity. In Lucas v. Hamm, the court determined that a beneficiary to a negligently drafted will could make the negligent attorney answer in damages for his mistakes. After listing the "balancing factors" it set forth in Biakanja, the court held that such a cause of action could be founded in either contract or tort. In addition, the court dealt with the

19. 42 P. at 901.
21. 320 P.2d at 19.
22. Id.
23. Id.
25. See text accompanying note 23 supra.
26. 15 Cal. Rptr. at 824. The court held, however, that plaintiff's claim for relief was not such as to allow recovery:
The complaint . . . alleges that defendant drafted the will in such a manner that the trust was invalid because it violated the rules relating to perpetuities and restraints on alienation. In view of the state of the law relating to perpetuities
question of whether extending privity could impose an undue burden on the legal profession. Upon comparing the possibility of an undue burden on attorneys with the probability of harm to an innocent beneficiary, the court resolved the conflict by stating that “[s]ince, in a situation like those presented here . . . the main purpose of the testator . . . is to benefit the persons named in his will . . . this intent can [only] be effectuated, in the event of a breach by the attorney . . . by giving the beneficiaries a right of action.”

In 1971, a California Court of Appeals extended the right to sue to all third-party beneficiaries, in addition to those whose claims arose from negligently drafted wills. In this case, the plaintiff had employed a collection agency to recover a debt owed to him. However, the plaintiff lost his chance to recover the debt when, due to the negligence of the agency’s attorney, the action was dismissed for lack of diligent prosecution. Although a lower court dismissed the case, the appellate court ruled that the plaintiff had a cause of action on the theory that the agency’s attorney fully realized that his services were for the benefit of a third party. In its opinion, the court stated that “an attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity of contract between the attorney and the party to be benefited.” The decision paved the way for a multiplicity of lawsuits against attorneys in that state and, at some point, limitations were required to reduce the ever-rising number of malpractice actions.

In one case that reached the California Supreme Court, an attorney had negligently advised both his clients and the plaintiffs’ attorney that the sale of certain stock by his clients to the plaintiffs would not be subject to a particular securities registration and tax regulation. The plaintiffs purchased the stock, subsequently learned it was not exempt, and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise.

364 P.2d at 690, 15 Cal. Rptr. at 826. The third count was also held not actionable in negligence. 364 P.2d at 692, 15 Cal. Rptr. at 828.

27. Id. at 825.
29. 19 Cal. App. 3d at 772, 97 Cal. Rptr. at 192.
30. 19 Cal. App. 3d at 771, 97 Cal. Rptr. at 192.
and, as a result, suffered heavy financial losses. In their case against the
to the attorney, the plaintiffs alleged that they were third-party beneficiaries
of the advice given by the attorney to his clients and, as such, it was
foreseeable that the negligently rendered advice would cause them in-
jury.

In a lengthy opinion, the court held that the plaintiffs were not
third-party beneficiaries and, more important, that the liability of an
attorney to third parties had discernible bounds.

The attorney’s preoccupation or concern with the possibility of claims
based on mere negligence . . . by any with whom his client might deal
“would prevent him from devoting his entire energies to his client’s inter-
ests.” The result would be both “an undue burden on the profession” and
a diminution in the quality of the legal services received by the client.32

2. FLORIDA DECISIONS

In 1976, Florida dealt with the issue of third-party liability in the
case of McAbee v. Edwards.33 Here, a trial court had dismissed a
malpractice suit against an Orange County attorney who, in response
to a request from his client, had failed to inform her that subsequent to
her remarriage certain provisions in her will would have to be altered
to ensure that her daughter would inherit her estate as sole beneficiary.
When the woman died and her second husband successfully claimed a
portion of the estate, the daughter brought suit against the attorney
alleging that his negligence prevented her from succeeding to the entire
estate. The attorney’s main defense to the action was that even though
the plaintiff was a beneficiary, she lacked privity of contract with the
attorney and thus did not have standing to sue. Furthermore, he
claimed, a Florida attorney owes a duty only to his client.

In an opinion which indicated that this was a case of first impres-
sion, the appellate court squarely addressed the question of whether a
person without privity of contract may bring a malpractice action
against an attorney. The court’s research led it through three California
cases34 which had decided this issue some years ago. Citing the Califor-

32. 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
33. 340 So. 2d 1167 (Fla. 4th DCA 1976).
34. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Lucas
   v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368
   U.S. 987 (1962); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16; see also text accompa-
   nying notes 20-27 supra.
nia opinions extensively, the court held that a third-party beneficiary to a will can sue the attorney who drafted it, if his negligence resulted in a loss to the intended beneficiary.35

The Florida court fully agreed with the California courts' contentions that an attorney who is employed to draft a will takes on a relationship with the beneficiaries as well as his client, since it is readily foreseeable that the purpose of the will lies more in benefiting the beneficiary than it does in benefiting the client. Equally important, the court felt, was the fact that an attorney holds himself out as one having training and knowledge superior to that of the layman and, therefore, assumes a duty to avoid the foreseeable consequences of his own negligence.36 Unfortunately, the Florida Supreme Court was unable to rule upon what could have been the test case for setting the state standard, since the parties reached a settlement after the appellate court remanded it for a hearing on the merits. But for now, the case stands out as an indication of the direction which Florida courts may take in terms of expanding the liability of attorneys. The bulk of the court's opinion in this case was quoted from prior California cases, and it is puzzling why the court failed to establish its position using existing Florida case law. As will be evident below, had the court wished to do so, it could have reached the same conclusion by other means.

3. THIRD-PARTY BENEFICIARIES

The courts of this state follow the well-accepted rule that, when a contract has been created solely for the benefit of the contracting parties, a third party—even though he receives some incidental benefit—cannot sue for the negligence of the parties in the performance of their contractual duties.37 However, Florida has long recognized that third-party beneficiaries have standing to sue on a contractual duty. As early as 1887, the Florida Supreme Court stated that third parties could bring suit where there was a "clear intent" for the third party to be benefited.38 The mere fact that he might be benefited, held the court,

35. 340 So. 2d at 1170.
38. Wright v. Terry, 23 Fla. 160, 2 So. 6 (1887), where Terry contracted with Wright to have logs "driven" down a river to a designated place and, upon their arrival, Wright was to pay Terry's employees for their work. Terry's employees were deemed
is not enough.\textsuperscript{39}

In order for a plaintiff to bring a suit as a third-party beneficiary, stated the court in \textit{Weimar v. Yacht Club Point Estates},\textsuperscript{40} his pleading must allege that the contract was one created "expressly for his benefit and one under which it clearly appears that he was a beneficiary."\textsuperscript{41} Here, although the court pointed out that it was in no way relaxing the requirement of privity in order for a plaintiff to sue on a contract, it found that the status of a third-party beneficiary was sufficient to create the privity necessary for such an action.\textsuperscript{42} But the Florida courts have placed definite limits on the types of people they consider to be third-party beneficiaries. For instance, in the case of a plaintiff who was not in privity with an abstract company,\textsuperscript{43} but relied on its title search, the court held that "the liability of a title abstractor extended only to the person employing him or one who is a party or privy to the contract of employment"\textsuperscript{44} and not to a party who might subsequently rely on the abstract.

In a more recent case,\textsuperscript{45} an action was brought against an accountant who had prepared a financial statement for lenders that was subsequently relied on by the plaintiff in making a loan. The plaintiff suffered a loss and sued, alleging that the accountant was negligent in preparing the statement. But the court of appeals held that in order for the plaintiff, a third party who had not employed the accountant, to recover from the accountant, he had to show either that the accountant was guilty of gross negligence or that he knew the plaintiff intended to rely on the statement.\textsuperscript{46}

To date, the most far-reaching decision on third-party liability in Florida was made in a case involving a contract between plaintiff's employer and the defendant,\textsuperscript{47} whereby the defendant was to make

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by the court to be third-party beneficiaries of the contract between Terry and Wright.

\textsuperscript{39} \textit{Id.} at 8.

\textsuperscript{40} 223 So. 2d 100 (Fla. 4th DCA 1969), where a plaintiff homebuyer would have been allowed to bring suit against a subcontractor who was involved in building the home, even though the plaintiff's only privity lay with the general contractor, if the plaintiff's pleadings had been drafted correctly.

\textsuperscript{41} \textit{Id.} at 102.

\textsuperscript{42} \textit{Id.} at 103.

\textsuperscript{43} Sickler v. Indian River Abstract and Guar. Co., 142 Fla. 528, 195 So. 195 (1940).

\textsuperscript{44} \textit{Id.} at 198.

\textsuperscript{45} Canaveral Capital Corp. v. Bruce, 214 So. 2d 505 (Fla. 3d DCA 1968).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} Gallichio v. Corporate Group Serv., Inc., 227 So. 2d 519 (Fla. 3d DCA 1969).
safety inspections of a drydock. He conducted his inspections negligently and, as a result, the plaintiff was injured. The court found the plaintiff to be a third-party beneficiary of the contract and held that "one who may foreseeably be injured by the negligent performance of a contractual duty has the right to maintain an action against the negligent performer, even though he is not in privity with the performer."\(^{48}\)

In matters involving beneficiaries under wills, it is apparent that such persons fall into the category of third-party beneficiaries within the meaning given to the term by the courts of this state.\(^{49}\) Unquestionably, the intent of the contracting parties, the attorney and his client, is to create an instrument capable of passing a portion of an estate into the hands of the beneficiary upon the death of the testator. Moreover, it will be clear on the face of the instrument that the concern of the contracting parties is for the protection of those rights which they vested in the beneficiary. In accepting employment to draft a will, the attorney also undertakes a duty to ensure that the document is carefully researched and skillfully prepared, so that the party's interests as a third-party beneficiary will be protected. Thus, under existing case law, the plaintiff in *McAbee* had the right to sue for the alleged negligent advice the attorney had given his client.\(^{50}\)

4. THE FLORIDA LEGISLATURE'S ATTEMPT TO CONTROL PROFESSIONAL LIABILITY

In 1975, the Florida legislature took notice of the unprecedented rise in malpractice litigation against physicians.\(^{51}\) Lawsuits had become so numerous, and malpractice insurance rates so high, that an outcry from both physicians and the public brought together a committee charged with creating legislation to help relieve some of the economic hardships physicians were facing.\(^{52}\) The public's concern about doctors' rising malpractice insurance premiums was the inevitable result of high

\(^{48}\) *Id.* at 521.

\(^{49}\) *See* Auto Mutual Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852, 856 (1938); McCann Plumbing Co. v. Plumbing Industry Program Inc., 105 So. 2d 26, 27 (Fla. 3d DCA 1958); Di Camillo v. Westinghouse Elec. Corp., 122 So. 2d 499, 500 (Fla. 2d DCA 1960); Boston Old Colony Ins. Co. v. Guitierrez, 325 So. 2d 416, 417 (Fla. 3d DCA 1976).

\(^{50}\) *See* text accompanying note 35 *supra*.

\(^{51}\) *Medical Malpractice Reform Act*, Ch. 75-9, 1975 Fla. Sess. Law Serv. 13.

\(^{52}\) *Id.* at 14.
insurance rates, since, as rates went up, physicians passed the increased costs on to their patients in the form of higher charges for services. But insurance rates alone were not the cause of increased costs for medical care. A large part of the problem was that doctors, in order to protect themselves from the possibility of lawsuits, began practicing "defensive" medicine—ordering extra x-rays and tests, or hospitalizing parties who may have fared just as well if allowed to stay home.\(^{53}\)

The legislative committee, whose recommendations eventually resulted in a far-reaching bill titled the "Medical Malpractice Reform Act"\(^{54}\) (MMRA), included representatives of the Florida Bar, Florida Medical Association, and Trial Lawyers Guild. Their goal was to organize a system of checks and balances that would reward legitimate suits by patients, while limiting non-meritorious actions brought against Florida physicians.\(^{55}\) The bill set up a study commission, a self-insurance program for doctors, medical liability mediation panels, and a two-year limitation on malpractice actions against physicians. An important feature of the section dealing with the statute of limitations was the statement that such malpractice actions were limited to "the health care provider and persons in privity with the provider of health care."\(^{56}\)

Buried deep within the bill was an amendment to an already existing Florida statute of limitations.\(^{57}\) The amendment created a new and distinct category of parties whose liability would be regulated by the new section and, more important, the amendment limited itself solely to physicians and other professionals. Although the word "professional" was left undefined in the statute itself, presumably the bill's sponsors intended it to cover any person licensed by the state, including attorneys.\(^{58}\)

The new statute is divided into two sections, the first dealing with

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53. Id. at 15.
54. Id. at 13.
55. Id. at 16.
56. Id. at 20, 21.
58. A "professional" act or service within malpractice policy is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill is predominantly mental or intellectual, rather than physical or manual. Marx v. Hartford Acc. & Indem. Co., 183 Neb. 12, 157 N.W.2d 870, 872 (1961).

A "professional" is one engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency. Reich v. City of Reading, 3 P. Comm. Ct. 511, 284 A.2d 315, 319 (1961).
actions “for professional malpractice other than medical malpractice,” and the second for medical malpractice. It is the first of these sections which is relevant to the present discussion, and it reads as follows:

95.11 STATUTE OF LIMITATIONS
(4) WITHIN TWO YEARS.—
(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

A problem as to the proper interpretation of the statute exists, because it is not clear if it was intended to limit the liability of an attorney to only those persons with whom he is in privity of contract.

In attempting to answer this question, the opinions of various attorneys in South Florida, including those who had participated in the drafting of the MMRA, were solicited. There was one common thought linking the various interpretations of the statute: at some point during the drafting of the privity requirement for physicians, it was felt that it would be proper and justifiable to limit the liability of all professionals by making privity a prerequisite to bringing a malpractice action. In other words, under the statute, the intent of the draftsmen was to limit an attorney’s liability to third parties. The point of disagreement is whether the wording of this section successfully carries out this intent.

Attorneys on one side of the issue feel that the phrase “the limitations of actions herein for professional malpractice” means that the privity requirement is applicable only when a negligent attorney is sued under this particular two-year statute of limitations, but that a party lacking privity could still bring an action under the more general four-year “negligence” provisions of the statutes. That is to say, those who

60. Id. at (4)(b).
61. Id. at (4)(a).
62. For the purposes of this section relating to the statute of limitations, the attorneys interviewed requested that they not be named in the article.
64. “§ 95.11 Limitations other than for the recovery of real property.
   (3) WITHIN FOUR YEARS.—
   (a) An action founded on negligence.”
hold this view feel that the legislature's intent to limit actions against attorneys to this section alone failed by the wording of the statute.

The opposing viewpoint is that the word "herein" is insignificant, since this is the only place throughout the entire statute of limitations where a section has been exclusively tailored to professionals. Therefore, one who has a professional malpractice case is forced to bring suit only under the professional malpractice section of the statutes and not under the general "negligence" section. Those who support this interpretation also point out that it seems illogical that a person in privity would have only two years in which to bring an action, while one not in privity would have four years. Why should a person without a contractual relationship be allowed a longer period of time in which to bring a suit? Some argue that the longer period is necessary, since a party not in privity might not have the opportunity to discover the injury done to him and, therefore, should be entitled to a longer time in which to sue. However, the argument is moot in view of the general rule that statutes of limitations begin to run when the injury is discovered or should have been discovered. Therefore, a party without privity is in no way disadvantaged and should not be given a longer period in which to bring an action.

5. PRESENT STATUS OF THE LAW

Throughout this article, an attempt has been made to present a broad overview of the historical development of a third party's ability to sue an attorney for his negligent performance of a contractual duty. Today this issue remains unresolved, as no uniform rule exists throughout the country. Two leading jurisdictions, New York and California, represent totally opposing viewpoints on the matter. New York courts continue to take the position that under no condition will an attorney be held liable to third parties; California insists that any legitimate third-party beneficiary should have a cause of action against a negligent attorney. Florida, in its first dealings with the subject, has followed the lead of the California courts in permitting a third party to bring an action. While these cases are representative of what has occurred in the past, they do not necessarily reflect what future decisions the courts will make. Will the courts strengthen the privity requirement so as to limit an attorney's liability? Or will they abolish the privity restrictions in

order to ensure that anyone injured as a result of an attorney's professional negligence can bring a malpractice action?

6. FUTURE TRENDS

As one might expect, there is a definite split of opinion regarding where the law is or should be headed, each view supported by socio-economic as well as legal reasons. On the one hand, as Chief Justice John Marshall stated in *Marbury v. Madison*, there is a strong constitutional argument that every person who has been wronged is entitled to a viable remedy through the courts. Marshall wrote: "The very essence of civil liberty consists in the right of every individual to claim the [equal] protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Keeping in line with the doctrine of *Marbury v. Madison*, the drafters of the Florida Constitution have provided the citizens of this state with a constitutional right "for redress of any injury, and justice . . . without sale, denial or delay."

The innocent third-party beneficiary who is injured by the negligent performance of an attorney acting on behalf of a client deserves the opportunity to gain redress through the courts. If the law fails to provide the injured third party with access to the legal system, he will then be left abandoned and without a remedy. The California decisions and *McAbee* show that the courts recognize the potential injustice that can arise from such a situation and have begun to remove the age-old privity requirement as to third parties in the same way that they have abolished the privity requirement in other areas of the law.

Consider that, in cases involving the growing field of products liability, the courts have recognized that a plaintiff who has been physically injured by a defective product may bring an action against either the retailer or manufacturer of the product, regardless of whether privity exists. The law, in effect, now makes both retailer and manufacturer strictly liable for defective products they sell, or produce, that result in

66. 5 U.S. (1 Cranch) 137 (1803).
67. Id. at 163.
68. FLA. CONST., art. 1, § 21.
69. For instance, the concept of strict products liability no longer requires plaintiff-consumers to be in privity with the manufacturer; see notes 70-72 infra.
70. RESTATEMENT (SECOND) TORTS § 402A, B, Strict Liability.
physical injury. However, at this point, the lifting of the privity requirement has been extended to only those cases dealing with physical injury, not with purely financial loss. Logically, it seems that abolishing the privity requirement where physical injury has occurred is only the first step in abolishing the need for privity under other circumstances. Commercial loss can be just as devastating to an individual as a physical disability, and the right to bring an action should be made just as available. It is probably this attitude that has produced the California and *McAbee* decisions.

The most serious concern of the courts, and perhaps the most valid reason for limiting an attorney's liability to third parties, is protection of the client. Should the scope of attorney liability expand, followed by an inevitable rise in malpractice actions, the increased cost of these lawsuits and judgments will be passed on to clients—much as physicians have passed costs on to patients. Thus, the cost of malpractice insurance for attorneys will ultimately be borne by the client. Of even greater potential concern is the fact that the attorney who is placed in the unenviable position of fearing personal lawsuits by third parties may tend to become overconservative, because his apprehension over the impact of his actions on third persons will have overshadowed his concern for taking the course of action most likely to benefit his client. If an attorney must focus upon interests other than those of his client, a devastating blow is dealt to the adequate representation of a client's best interests that an attorney is expected—and is under a duty—to provide.

Ethically, the attorney who allows his representation of a client to be constrained or altered by third parties is violating the very Code of Professional Responsibility he has sworn to uphold. *Canon 5, EC-5-1* states that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free from compromising influences and loyalties." In addition, the Canons

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71. West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976) (manufacturer held liable to injured bystander); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (manufacturer liable to third party for negligent design); Marrilla v. Lyn Craft Boat Co., 271 So. 2d 294 (Fla. 2d DCA 1973) (privity not required to maintain action against retailer).

72. 336 So. 2d at 89.

73. "The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity." Smyrna Dev. Inc. v. Bornstein, 177 So. 2d 16, 18 (Fla. 2d DCA 1965).

74. ABA Code of Professional Responsibility, EC 5-1.
point out that "[t]he obligation of a lawyer to exercise professional judgment solely on behalf of the client requires that he disregard the desires of others that might impair his free judgment." Should an attorney suddenly be confronted with the threat of personal liability for a decision he has made with the best interests of his client in mind, he will surely, when faced with alternatives, choose the one least likely to expose himself to a lawsuit by third parties. No longer may he act as an undaunted advocate for his client's cause, or represent his client as zealously as possible within the bounds of the law.

Last year, a Florida District Court of Appeal placed limitations on an attorney's liability to third parties, using both pragmatic and ethical reasoning. In the case of *Adams v. Chenowith*, the court concerned itself with the issue of whether an attorney representing the seller in the sale of a home owed a duty to the buyer. Here, the seller's attorney had completed a closing statement using incorrect figures given to him by the seller. The buyer was supplied with a copy of the statement prior to the closing, but failed to confirm the figures himself and, as a result, overpaid the seller. Upon learning of the overpayment, the buyer brought an action against the seller's attorney, alleging that the attorney's negligence in preparing the closing statement caused him subsequent financial injury.

The appellate court affirmed a lower court's dismissal of the case, holding that the attorney owed a duty to no one other than his client. In addition to the fact that this was an arm's-length business transaction, the buyer had the opportunity to verify the closing figures on his own. Moreover, the court pointed out that it was never intended for the seller's attorney to represent both parties to the transaction, since to do so would violate the Code of Professional Responsibility. Citing from *Canon 5, EC-5-14*, the higher court agreed that an attorney may not represent multiple clients with differing interests if such employment would adversely affect the attorney's judgment on behalf of, or loyalty to, a client. In holding that the interests of a seller and buyer in the sale of a home are opposing interests that cannot properly be represented by the same attorney, the court said: "Here there are two sides, two interests to be protected and we cannot hold a lawyer responsible to all parties in a transaction. . . ."
For members of the legal community, it is not hard to imagine the burdensome impact an unqualified extension of third-party liability could have upon attorneys and the courts. Besides the endless amount of litigation that would result, such an expansion of liability could, conceivably, severely cripple the basic foundation of the legal system by preventing an attorney from trying to the best of his ability to represent the view of the client.

No one can seriously contend that attorneys should be provided with complete immunity for their actions. Attorneys must be made to answer to the same system of justice they represent. Yet, at the same time, logical and equitable restraints on a lawyer's personal liability, particularly to third persons, must be established and enforced. Now may be the time for the states to take an interest, as they have with physicians, in controlling, directing, and limiting the actions that can be brought against attorneys. Short of that, the courts must rely upon their own precedent-setting authority to ensure that the legal system, and those working within it, are given the opportunity to advocate the best interests of clients—now, and in the future.

Marshall J. Emas
Harvey A. Nussbaum
Pesticide Regulation: Why Not Preventive Legislation?

Technological advancements are, by and large, inspired by economic considerations. They are spurred by motives to reduce labor and production costs, and to increase profits. In the twentieth century, man has implemented many such technological improvements, which have usually brought about their expected benefits. In his haste to advance and improve technology, however, man has created new problems, more complex and dangerous than those he originally sought to solve. It seems that pollution, ominous and difficult to control, lies invariably in the wake of technological innovation.

This discussion deals with one type of pollution—that of our food supply by the chemical residue of pesticides. It will show that the traditional means of regulation used to eliminate the hazards posed by pesticide residue are inappropriate and ineffective. If protection of human health is the rationale for environmental control and regulation, then adequate means of achieving this worthy goal should be adopted. It is suggested that the traditional political process of regulation should yield to a more scientific process of regulation. Regulation, preventive in nature and based on scientific data, would achieve more efficiently the purpose of environmental control by giving greater consideration to preventing potential harm, rather than merely attempting to rectify past harm, as the political process has done.

1. THE DILEMMA

The question boils down to whether to proceed with regulation given an imperfect and ambiguous scientific base or wait until further data has been collected... waiting for a body count before regulating is an approach which is hardly the mark of a civilized society.1

This critique on the federal regulation of environmental contaminants expresses the growing concern over human exposure to hazardous

substances. However, the solution to this problem can be achieved only within specified guidelines and boundaries, which also mark a civilized society.

Laws which embody these guidelines reflect a balancing of adverse interests. Specifically in pesticide regulation, legislatures and courts are confronted with the task of balancing the chemical producers' demands for a free and unfettered market, with the environmentalists' pleas for strict constraints to avert the frightening proposition of an indiscriminately polluted environment. The difficulty of this balancing process increases when a present benefit is counterbalanced by a potential future harm. Within the legal framework of assessing the propensity and gravity of a future uncertainty, the ability of present circumstances to indicate reliably the occurrence of a future event is determinative. The understanding of present circumstances, however, is limited by existing technological knowledge and scientific expertise. Predicting future events from them is extremely difficult, especially in the field of environmental health, where dealing with the unknown and unpredictable is not uncommon. Invariably, under the legal process, such a balancing standard has resulted in the scales of regulation being favorably tilted to the chemical producer's demands.

The legal approach to resolving problems has failed to protect the American people and their environment from exposure to pesticide pollution. Its major flaw is that it does not adequately compensate for the lack of conclusive scientific evidence of potential harm. Those entrusted to make environmental decisions, particularly legislators, should adopt a standard that would emphasize the potential health hazards posed by the heavy use of pesticide chemicals. Such an approach which allots greater concern to future consequences would better protect the environment for future generations.

The scientific approach to decision-making, by comparison, is oriented much more toward the future. The scientific method discourages

2. Questions involving the environment are particularly prone to uncertainty. Technological man has altered his world in ways never before experienced or anticipated. The health effects of such alterations are often unknown. This language was used by the Court in Ethyl Corp. v. Environmental Protection Agency, [1976] 8 ENVIR. REP. (BNA) 1785, 1801. (Not officially reported. For further discussion of case, see note 120 infra.)

For discussion on the amount of scientific knowledge available for regulatory decisions, see E. Burger, Regulation and Health: How Solid Is Our Foundation, 5 ENVIR. L. REP. 50, 179 (1975).
hasty action, especially if the consequences of that action cannot be predicted. Rather, if uncertainty exists, the major concern of the scientific method is to refrain from action until such time as scientific knowledge allows a reasonable prediction of future events.

The differences between the legal and the scientific approaches may be best distinguished in their different interpretations of such terms as "cause" and "proof." For example, to prove a hypothesis successfully, a scientist must use certified evidence, in which the probability of error by standard statistical measurements must generally be less than 5%.

Likewise, to show cause, a scientist must prove his hypothesis by rigid laboratory experiments. In the judicial or administrative process, however, testimony by a scientist, given in his professional capacity, can be deemed competent proof and can establish that the likelihood of occurrence of a certain event is simply more probable than not.

The legal requirements of cause and proof have burdened the efforts of those attempting to regulate suspected harmful substances. Regulation through the legal framework has been proven inadequate in other areas of society, with the resulting problems being resolved only by stricter legislation. The regulation of environmental contaminants, e.g., pesticide chemicals, has apparently run that same frustrating gamut. Legalities have hampered not only the regulators' enforcement procedures, but their administrative and perfunctory duties as well. Implementation of stricter legislation, employing scientific concepts, would remove the burden of having to show that a harm is more likely than not to occur. Conversely, pesticide manufacturers would clearly have to establish that their products are safe. This type of legislation would include standards mandating the complete testing of all substances before they could be mass-produced. If their full effects were not ascertainable, their production would not be permitted. Such legislation would foster the application of a scientific approach, because it would force the support of research which hopefully would remove the limitations of existing scientific predictive knowledge. At present, those to


4. Id. In most civil proceedings, a preponderance of the evidence test is used, which demands only a certainty of 51%.

whom is allotted the task of regulating pesticide residues found in foods are confronted by the dilemma of which approach to use, scientific or legal. Agricultural codes and federal regulations, entangled among legal and technical considerations, essentially ignore the serious ecological shortcomings inherent in the use of modern pesticides. It has become clear that legislation which merely regulates the labeling and application of pesticides is not sufficient to protect the American people and their environment. A regulatory pattern must be implemented that also limits the extent of pesticide residue to which man is exposed. Up to the present, the effectiveness of residue limitations has been greatly curtailed, due to the "legally insufficient" certainty of detrimental results.

Hopefully, hindsight will no longer continue to be our guide, and reparation of the damage afterward our burden. The thought underlying future legislation should be that we must stop treating the population as guinea pigs and the environment as a laboratory. Regulation of environmental contaminants offers a tangible and achievable opportunity to practice preventive medicine through preventive legislation.

2. EXTENT OF PESTICIDE USE

In the mid-1940's, as one war had come to an end, another was being initiated. The new war was not against man, at least not intentionally so. It was against insects, pathogens, and weed pests. Its principal weapons were not artillery or armies, but chemicals. Since then, this chemical warfare has intensified. Today in the United States alone, over 1.2 billion pounds of synthetic pesticides are used annually for the


13. These estimates were based on the amount of pesticides then employed in pest control, 833 million pounds. Hearings on Proposed Amendments to Federal Insecticide Fungicide and Rodenticide Act (FIFRA), before the House Committee on Agriculture, 92d Cong., 1st Sess. (1971).


15. Before a pesticide can be registered, the manufacturer must submit with the application the results of various safety studies. However, the EPA can, at its discretion, register a pesticide with chemicals similar to those of a pesticide already registered, without requiring additional safety tests. Conditional registrations can also be granted, pending the outcome of safety tests. These two procedures, by which a manufacturer can legitimately avoid showing a particular pesticide's safety, seem to have reduced greatly the effectiveness of the registration process.

A senate subcommittee staff recommended that safety-testing data on pesticides should be done for each compound prior to registration. Theoretically, this is an ideal proposition. The task may, however, under existing registration procedures, prove insurmountable. The estimates of the General Accounting Office in 1975 predicted that over 46,000 pesticides were to be registered. For a further breakdown of the workload, see note 71 infra. See also U.S. General Accounting Office, Federal Pesticide Registration Program: Is It Protecting the Public and the Environment Adequately from Pesticide Hazards? (Dec. 4, 1975) [hereinafter cited as GAO Report]; [1977] 8 Envir. Rep. (BNA) 350 on subcommittee recommendations. See generally Rogers, supra note 7, at 850, 856, 872; W. Butler, Federal Pesticide Law, Federal Environmental Law, 1240 (ELI 1974), discussing conditional permits and experimental use.

descriptive term "persistent pesticide." Two other common descriptive terms used for pesticides are "subacute" and "general." Subacute means that the toxicity of the pesticide causes adverse effects in an organism only upon repeated exposure. The pesticide is considered general when its composition is such that it does not specifically attack one pest.

The persistent attribute provides an economic advantage to the farmer or other applicator because the pesticide retains its toxic effect for a long time. Thus, once a sufficiently lethal dosage is applied to eradicate the intended pest, continual application is unnecessary. The subacute characteristic of a pesticide is beneficial because it is safer for those who handle the pesticides in transportation or application. The chemicals, not being as acute, are not as potentially lethal to one who accidentally comes in contact with the substance. Most pesticides also have a general characteristic because it is financially favorable to the manufacturer. A general pesticide can attack various pests, thus making the development of innumerable different pesticides unnecessary. This can be a substantial saving, considering that the cost of development may be anywhere from $2.1 million to $4 million.


19. Comment, supra note 17.

20. "Acute" is that property of a substance or a mixture of substances which causes adverse effects in an organism through a single exposure. GAO Report, supra note 15, at glossary.

There is no reliable system capable of reporting, collecting, collating, and disseminating accurate information on the status of pesticide poisonings today in the United States. A recent EPA study, however, was conducted nationwide. From 1971 to 1973, the study estimated, there were 8,248 hospital-admitted pesticide poisonings. Of that figure only 28% (2,295) were occupationally related poisonings. Farmers and agricultural workers accounted only for 36% (817) of that group. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NATIONAL STUDY OF HOSPITAL ADMITTED PESTICIDE POISONINGS at 4, 168, 169 (April 1976).


Today the cost of producing a pesticide can run as high as $12 million and is heading upward. One contributing factor is that the time between discovery of a new pesticide and the time it gets to market can be more than eight years. BUSINESS WEEK, September 27, 1976, at 56.
3. EFFECT OF RESIDUES

The beneficial aspects of pesticides are subverted to the extent that they remain active and potentially poisonous to man. This dangerous situation arises, as previously indicated, because the chemicals utilized in pesticides do not rapidly decompose. For instance, DDT, one of the first and most commonly applied, takes two to five years to break down.

Man unwittingly ingests these pesticide residues. He consumes them daily with his food, which has been sprayed in the field or in storage. Man can also absorb residues from the meats and dairy products that he eats. Processed foods may be another source of residue intake, since they are generally packed or stored in containers which are treated to prevent loss to rodents and contamination.

Man is subjected to an arguably low amount of pesticide residue per food product. Nevertheless, United States Department of Agricul-

22. Just how beneficial pesticides have been is debatable. Some say that many of the diseases seemingly eradicated by the synthetic chemicals would have been eliminated by natural causes, e.g., better nutrition, improved health care, and good hygiene. See R. Carson, Silent Spring (1970). Also, the overall percentage of crop losses to pests has been increasing. Post-harvest losses (13%) plus pre-harvest losses (35%) indicate that pest populations are consuming and/or destroying nearly half the world’s food supply. Pimentel, World Food Crisis: Energy and Pests, supra note 11.

For an opposite view praising DDT and other pesticides, see War on Pesticides, DDT was Number One on the Casualty List, Barron’s, November 10, 1975, at 3.


24. Crops are in contact with pesticides or their residues all along their route from seedlings in the field to products in a store. The soil that grows them and the water that nurtures them contain chemical residues. The foodstuffs are sprayed in the fields, after harvest in storage, and in the boxcars on their way to market, to prevent loss to rodents, micro-organisms, and insects. Pimentel, World Food Crisis: Energy and Pests, supra note 11.

25. For example, the two pesticides Heptachlor and Chlordane are found in 73% of all dairy products and 77% of all meats, fish, and poultry samples. 5 Envir. L. Rep. 10,163 (1975).

26. See, e.g., Natick Paperboard Corp. v. Weinberger, 525 F.2d 1103 (1st Cir. 1975), holding that paper packaging material containing polychlorinated biphenyls (PCB) in excess of tolerance levels will in many instances be an “unsafe food additive” within the meaning of the Federal Food, Drug, and Cosmetic Act; see also Pimentel, World Food Crisis: Energy and Pests, supra note 11.

27. EPA determines the acceptable daily intake for residues of each pesticide which may be present in or on agricultural commodities. Acceptable daily intake for man is usually one per cent of the pesticide concentration which was found to have no toxic effect in the most sensitive animal species tested. Total possible exposure to...
ture (USDA) figures show that the average American consumes 1,435 pounds of food annually. Although the food is readily broken down, the pesticide chemicals contained therein are not. Virtually every person in the United States has residues of pesticides in his body tissue. The potential harm posed to man from such continued exposure to low levels of pesticides is presently being debated. Exposure at these levels, however, has been proven to be toxic to other species. In laboratory tests it has been shown that 0.1 parts per billion in seawater of the pesticide Mirex, which is used to control the fire ant in the southeastern United States, had a lethal effect on crabs, and killed 11% of the shrimp population in ten days and 50% after three weeks of exposure. The potentially poisonous effect may be more startling and ominous in human consumption of pesticide residues.

pesticide residue is computed in the average diet of a 132-pound man. However, as will be shown below, the safety tests upon which the tolerances are set are of dubious validity and the FDA, whose duty it is to monitor the foodstuffs for pesticide residue, only test for the presence of about 90 of the 230 residues in food for which tolerances have been set. GAO Report, supra note 15, at 38-44.

30. "Scientists are concerned that so little is known about the ecological effects of pesticides on the plants and animals (200,000 species) making up man's life system. Information on the effect of pesticides is available for less than 1% of these species, and at best most of this information is incomplete." Pimentel, Bioenvironmental Control of Pests: A Research Assessment, supra note 11, at 14.

Since so little is known, most debates center on the question of whether "the facts must come first, and social judgments later," or whether to allow the marketing of a pesticide, whose effects are unknown, based upon the possibility and seriousness of the threatened harm. The latter argument seems to have support because of the underlying premise that man can resolve (eventually) any problem he has created.

Such illusions are antiquated. Recently, we have realized that our resources are finite and that they must be conserved and utilized rationally. As David Pimentel indicated, large quantities of fossil fuel energy is used in controlling pests. Most pesticides are formulated with a petroleum base and their development and application expend great quantities of fuel. Also, many other activities necessary to our system of food production consume enormous amounts of fuel. If the present world population ate a diet derived from a food production system equivalent to that of the United States, petroleum reserves would be exhausted in thirteen years.

See also Comment, 21 S.D. L. REV. 425, 427-28 (1976). (Debate between Prof. Green and Dr. Handler on which approach is better: to restrict production until facts are known, or to allow production so that facts can be gathered which will form the basis of subsequent social judgments.)

31. Duvall, supra note 21, at 82.
Man is at the top of the food chain, at each step of which the pesticide residue is stored and the chemical concentration increases. This process, known as biomagnification, continues until it reaches man at the top. In addition, the effects of pesticides are sometimes magnified by interaction with other chemicals or drugs, resulting at times in synergistic effects. This occurs when the co-operative action of separate substances produces a total effect much greater than the sum of the effects of the two compounds acting independently. The opportunity for synergistic interaction is apparently greater today, with the ever-increasing amount of chemicals that the American public consumes, either in the form of food additives or by means of "medical drug intoxication."

4. HISTORY OF REGULATION

The Food and Drug Act of 1906 was the forerunner of statutory

33. That is to say, he is at the top of the sequence in which each organism in the chain feeds on the member below it. See Office of Science and Technology, Ecological Effects of Pesticides on Non-Target Species (1971). For example, pesticide residues can enter the waterway from industrial waste, agricultural runoff, direct application to control mosquitoes, and the like. Once in the aquatic environment, the residues will settle to the bottom. There they will be picked up by algae, plankton, and water bottom plants. In time, these organisms will be eaten by shrimp, shell fish, and small fish. At this point (or after the smaller water life have been consumed by a species higher in the chain, e.g., larger fish) man, at the top of the chain, will consume the pesticide residue contained in the water organism which he ate. Only by now, the chemical concentration will have been increased by every organism through which it passed. C. Edwards, Persistent Pesticides in the Environment (2d ed. 1973).

34. Duvall, supra note 21 at 79, 80.


36. This comment on the American infatuation with the "Almighty Curative Chemical" reflects a critical analysis by many observers. The American public today consumes more drugs than ever before, most of which are taken unnecessarily and merely as a result of profit-seeking advertisement. For example: Headache?-take the little white aspirin; Hangover?-the bubbly pill will make it vanish! Fat?-some diet food or pills (amphetamine) will get you back in shape. Skinny?-steroids will beef you up.

No wonder the American people are hesitant and unsupportive in the fight against the existence of chemical residues in their food. This is a drug-oriented society with a fervent faith in the politically powerful chemical and drug companies. Miami Herald, Sept. 15, 1977, Br. Sec. at 2.


Originally, FIFRA was designed to provide for safety and product quality through labeling and registration. It called for the registration of all pesticides with the United States Department of Agriculture (USDA). The FDCA, administered by the Department of Health, Education and Welfare (HEW), complemented FIFRA in protecting the public from food contamination by pesticides. Its civil and criminal sanctions, however, were operative only if an “adulterated” food was introduced into interstate commerce bearing a level of pesticide residue exceeding HEW’s established tolerance.

In the 1960’s, as national concern grew about the effects of pollution and the extent of “uninvited additives” present in food, environmental groups attempted to use FIFRA to prevent the indiscriminate application of pesticides. Their efforts in a series of court cases were

40. The 1954 Amendment gave the administrator of the Food and Drug Administration the power to establish tolerance limits for pesticide residues on raw agricultural commodities and processed foods. H. A. TOULMAN, A TREATISE ON THE LAW OF FOODS, DRUGS AND COSMETICS § 19.6 at 396 (1963). The 1959 amendment brought defoliants and other newly developed pesticides under the regimes of FIFRA. Id. § 19.7 at 397. The 1964 amendment laid the foundation for today’s registration process, by trying to restrict marketability prior to registration. 100 CONG. REC. 2948 (1964). See generally Comment, supra note 17.
41. See Bennett, supra note 23, for an explanation of how the administrator of the FDA set the tolerances while the registration of the pesticide was under the control of the USDA. Both departments split the monitoring of foods for excess residues duties.
42. 21 U.S.C. § 331 (1970 & Supp. 1975. The term “adulterated” applies to a food or pesticide containing chemicals or substances inconsistent with the tolerance levels prescribed by law. The definition can be found under the FEPCA, 7 U.S.C. § 136 (C) (1976).
43. For a description of pesticide residues existing in our food supply, see Rogers, The Persistent Problem of Persistent Pesticides: A Lesson in Environmental Law, 70 COLUM. L. REV. 567, 595 (1970).
futile.\textsuperscript{44} The inadequacy of FIFRA's narrow scope was exemplified by those decisions. The Act was impotent because (1) it failed to meet its original product safety purposes, \textit{i.e.}, the setting of tolerances; (2) it could not enforce its provisions; and (3) it did not provide for monitoring of food residues.\textsuperscript{45}

Overlap of agency control also caused the Act's failure to meet its original product safety purposes. HEW was to base its decision, whether to grant a tolerance of a pesticide, upon safety.\textsuperscript{46} However, USDA had the initial determination of whether to register a pesticide, and based its decision on other considerations.\textsuperscript{47} Thus, if HEW found the residue of a certain pesticide to be unsafe, it could not effectively prohibit its use if the USDA continued to allow its registration. Such an occurrence

\begin{itemize}
  \item \textsuperscript{44} Stearns Electric Paste Co. v. Environmental Protection Agency, 461 F.2d 293 (7th Cir. 1972). The court rejected the Environmental Protection Agency's attempt to cancel the manufacturer's registration of a rodenticide. The court held that the agency had overstepped its authority in attempting to apply the "intricate balancing test" in this instance. FIFRA is basically a labeling act, the court continued, and a registration can be cancelled only if the product is misbranded. It is inappropriate, however, to determine that a product is misbranded when it is being used in accordance with commonly recognized practices.
  \item Continental Chemist Corp. v. Ruckleshaus, 461 F.2d 331 (7th Cir. 1972). The court said the basic purpose of FIFRA is to regulate the labeling of poisons. The fact that the use of the poison in compliance with the directions on its label would cause certain food to become "adulterated" within the meaning of the Food, Drug and Cosmetic Act does not mean that the poison was necessarily misbranded, within the meaning of FIFRA. Thus, the manufacturer's registration, the court held, could not properly be cancelled. \textit{See also} Wellford v. Ruckelshaus, 439 F.2d 598 (D.C. Cir. 1971) (administrative process must be concluded to properly suspend registration of a herbicide).
  \item Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). The EDF petitioned for review of an order of the Secretary of Agriculture which failed to suspend federal registration of a pesticide or to commence formal administrative procedures that could terminate that registration. The court favorably remanded the case for further proceedings. The court held that it would require the administrators to articulate the factors on which they based their decisions, but noted that on matters of substance the courts regularly would uphold agency decisions.
  \item \textsuperscript{45} See W. \textsc{Butler}, \textit{supra} note 15, where the author discusses the problems created by agency overlap and designates these areas as critical.
  \item Safety was based upon the consideration of three factors: "the nation's need for food; effects of the pesticide on the consumer; and the USDA's opinion concerning the pesticide's usefulness." Bennett, \textit{supra} note 23, at 359.
  \item The determination was to be based upon agricultural usefulness and probable residue levels involved in the establishment of tolerances. \textsc{Sen. Rep. No. 1635}, 83d \textsc{Cong.}, 2d \textsc{Sess.} (June 25, 1954), \textit{reprinted in} [1954] \textsc{U.S. Code Cong. & Ad. News} 2626, 2629.
\end{itemize}
was not uncommon.  

Also, the USDA failed to enforce adequately the provisions of FIFRA. Such inadequacy was noted in a report to Congress in 1971. “[T]he Department not only failed to initiate a single criminal prosecution for 13 years despite evidence of repeated violations, but . . . it did not even have any procedure for determining the basis for action.”

Finally, its powers to monitor were also virtually ineffective. The Department of Agriculture relied heavily on inadequate and incomplete data to determine if the pesticide should initially be registered. Also, a great deal of information regarding the toxicity or other characteristics of a pesticide was supplied by manufacturers, who had a substantial investment in the pesticide and a vested interest in securing a speedy registration. A monitoring plan utilizing only such biased information would assuredly not lead to the cancellation or suspension of a pesticide.

If the USDA administrator determined that the weight of evidence supported the cancellation or seizure of a hazardous pesticide, his action would be reviewable by the courts. However, this system of court review before a pesticide could be taken off the market was a sham, because the procedural process could delay any affirmative action up to 390 days. Apparently, the agencies were still at the mercy of the manufacturers and had to rely largely on voluntary recalls.

To patch these gaping holes in FIFRA, Congress responded in 1970 by approving the President’s Reorganization Plan, which expanded the government’s environmental concerns and consolidated fifteen federal organizations under the Federal Environmental Protection Agency (EPA). This consolidation of power would have been fruitless had it

48. Rogers, supra note 43, at 570. See also 117 Cong. Rec. 2009-10 (introduction of the National Pesticide Control and Protection Act).
49. Id. at 2010.
50. Id.
not been accompanied by significant improvement of the law. The congressional response to criticism of FIFRA by courts, legal commentators, and environmental groups was the Federal Environmental Pesticide Control Act (FEPCA),\textsuperscript{56} which completely overhauled the federal environmental authority.\textsuperscript{57} An in-depth study of the Act is not within the scope of this report. Some of its more important aspects, however, deserve mentioning.

Under the FEPCA, regulation of pesticides will no longer be restricted to those involved in interstate shipment, but will include all aspects of transfer, solicitation, and sales even if totally intrastate.\textsuperscript{58} The FEPCA also expands the previous registration procedure. By employing a system of use control, it cures one of the major deficiencies of FIFRA. The use, either "general" or "restricted," is determined by demonstrating whether the pesticide, when applied according to its labeling instructions, will cause an unreasonable effect on man or the environment.\textsuperscript{59} If affirmatively determined that the pesticide will cause substantial adverse effects on the environment, it will be classified for restrictive use. As of October 1977, 23 pesticides had been classified for restrictive use and 38 more were being considered. Such categorization of a pesticide requires that it be applied only by those competent to handle such materials and restricted by other limitations as determined by the administrator of the EPA.\textsuperscript{60}

The major advancement in the pesticide registration process brought about by FEPCA is the provision stating that any pesticide

\begin{itemize}
\item \textsuperscript{57} 40 Fed. Reg. 28, 242 (1975).
\item \textsuperscript{58} 7 U.S.C. § 136a(a) (1976), states in pertinent part: "[N]o person in any State may distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person any pesticide which is not registered with the Administrator."
\item \textsuperscript{59} 7 U.S.C. § 136a(d)(1)(B) (1976) states:
If the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, will not generally cause unreasonable adverse effects on the environment, he will classify the pesticide, or the particular use or uses of the pesticide to which the determination applies, for general use. The FEPCA defines unreasonable adverse effects as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb) (1976).
\item \textsuperscript{60} 7 U.S.C. § 136a(d) (1976); 3 EPA JOURNAL 3 (1977).
\end{itemize}
which fails to meet certain criteria will be subject to a "rebuttable presumption" against registration.\(^6\) This provision also applies to pesticides that are already on the market, since the Act requires that all pesticides registered with the EPA before the 1972 amendment be reregistered before October 21, 1976.\(^6\) After that date, all pesticides must be reregistered every five years.

The reregistration procedure may tactically be used as an alternative to cancellation or suspension, as a means of removing a pesticide from the market. Instead of becoming entangled with the expensive and unchanged lengthy cancellation process, the EPA will allow the pesticide to be used up until the time reregistration is required. Then the application for reregistration will be denied, based upon the rebuttable presumption that the pesticide will cause adverse effects on the environment. This "phase out" of a pesticide is currently being used against Mirex.\(^6\) It succeeds not only in saving money and time, but also shifts

61. 6 ENVIR. L. REP. 10,087 (1976). A notice of intent to deny registration or cancel an existing registration will be issued by the EPA if the applicant fails to prove the safety of his product. The presumption of unacceptability is based upon risk. However, even if the chemical's use gives rise to a presumption of risk, this presumption can be rebutted by showing the pesticide's economic, social, and environmental benefits. 40 CFR § 162.11 (1977).

Note that, although this is a patently strong provision, it is doubtful if its application can be effective in eliminating from the market a pesticide with hazardous effects. Manufacturers can avoid the ramifications of this provision and refute contentions of a pesticide's possible safety risks by producing evidence of attainable economic costs and benefits.

This provision still does not rectify the problem that has plagued EPA's analysis of information submitted in support of registration of a pesticide. Adequate review of safety tests data continues to be difficult because (1) EPA lacks its own scientific research and evaluating knowledge and (2) private environmentally interested groups are of no assistance, since the data supporting the registration are not published in the Federal Register until 30 days after the product is registered. Compounding this flaw is the fact that a good portion of the data is not published. Trade secret protection is allotted to that test data which the originator of the product claims. Under this provision, health and safety data are often excluded from the published information. See ROGERS, supra note 7, at 861, 862; [1977] 8 ENVIR. REP. (BNA) 280; E. Burger, supra note 2.

62. 7 U.S.C. § 136(a) (1976). All FEPCA provisions were to be effective by October 21, 1976. This meant that all pesticides were to be registered according to its provisions, including presently active pesticides. As will be shown later, this task proved to be impossible. 41 FED. REG. 7218 (1976).

the burden on the pesticide manufacturer to prove the safety of his product. 64

5. CONTINUING PROBLEMS

Theoretically, under the FEPCA, the residues from pesticides in our foods will be restricted to limited and safe levels. The registration process requires the manufacturer to provide the EPA with safety studies on the active ingredients in each type of pesticide. The EPA then reviews the studies to ensure the pesticide’s safety and effectiveness. Based upon the studies submitted, the EPA establishes tolerances for the maximum pesticide residue concentration allowed in a food product. The monitoring of the residues in food for violations of the tolerances is done via the food inspection functions of the Food and Drug Administration (FDA), and by the meat and poultry inspection and chemical monitoring services of the USDA. 65 If a violation of a tolerance level is detected, then appropriate regulatory action will be initiated. If the administrator of the EPA determines it necessary, he may notify the registrant of his intentions to cancel or suspend the registration of the pesticide or change its classification. 66

The above system, however, does not operate as successfully, routinely, or effectively in practice as it hypothetically was proposed. The FEPCA has apparently filled the gaping holes of previous legislation. Unfortunately, crevices still exist which permit persistent pesticides to continue to seep into our environment and food supply. The EPA realized its deficiencies in the review of tolerance regulations and procedures in 1975, but said that it would devote its attention to reassessing the existing tolerances and making a comprehensive evaluation of the whole scientific basis for tolerance setting. 67 Good intentions, however, do not make good regulations. A Senate subcommittee staff report released

64. Id. For a discussion of the effects of Mirex, see H. WELLFORD, supra note 32, at 296, 297.
65. Id. at 354.
66. The EPA can initiate cancellation or suspension hearings of the pesticide or, if necessary to prevent further contamination, it can issue a “stop sale, use or removal order” to any person who owns, controls, or has custody of such pesticide. 7 U.S.C. § 136k (1976). The Food and Drug Administration can remove the adulterated foodstuff from the market under the authority of the Food, Drug, and Cosmetic Act. 21 U.S.C. § 331 et seq. (Supp. V 1975).
67. 7 U.S.C. §§ 136d(b) & (c) (1970) [before 1972 amendments].
68. GAO Report, supra note 15, at 49.
two years later in 1977 came to the "unfortunate conclusion that pesticide regulation in the U.S. is still fundamentally deficient." 69

The foundation of such criticism lies in the basis of pesticide regulation—the registration process. The FEPCA, enacted in 1972, required the EPA to register all pesticides during the two-year period ending October 1976. 70 That called for, in addition to the normal workload, 71 the registering of 46,000 pesticides. To magnify the enormity of the project, EPA failed to have the proposed guidelines for registering and classifying pesticides ready for public viewing until June 25, 1975. 72 Since registrants needed such information to know what was necessary to support their registration, and the FEPCA registration program could not start without such regulations, "the EPA lost about nine months of the 2-year period provided by the Act." 73 The problem still exists. An EPA official told a Senate subcommittee in March 1977 that "the registration of pesticides could take as long as 15 years." 74

This excessive workload has given rise to other problems. The comprehensive evaluation of the scientific basis for tolerance-setting may once again be shoved to the rear of the workload. Time and resources are limited, so the EPA must make a policy decision of whether to proceed with the registration process as quickly as possible, and accordingly sacrifice the integrity of the data submitted by a manufac-

69. Senate Judiciary Subcommittee on Administrative Practice and Procedure prepared a report on the EPA, a summary of which can be found in [77] 7 ENVIR. REP. (BNA) 1284-86.
70. See text accompanying note 62, supra.
71. GAO Report, supra note 15, at 67. The report also stated: "In addition to the 46,000 FEPCA registrations, EPA's projected workload during the 2 year period include[d] 13,000 . . . new pesticide registration applications and 14,000 [applications for amended registrations as to product formulation, uses labeling, etc.]. Id. The 46,000 figure represented 29,000 currently registered pesticides that [had to be] reregistered and 17,000 intrastate pesticides . . . not previously required to be registered. . . ." Id.
72. Id. at 68 (40 FED. REG. 26,801-928. The final proposals were not published until July 3, 1975 (40 FED. REG. 28,241-86 and did not become effective until August 4, 1975.
73. Id. at 69. The two-year period specified by the FEPCA was from October 22, 1974 to October 21, 1976. The lapse between the passage of the Act in 1972 and the time the registration period was to begin allowed ample time for the EPA to devise some standards of safety and risk benefit, to which the registrants could conform. They did not, however, do so.
74. Assistant Administrator for Water and Hazardous Materials Andrew W. Brienenback noted: "In no case could the process take less than five years." [77] 7 ENVIR. REP. (BNA) 1742.
turer in support of registration.76 Such sacrifice is questionable in light of past experiences by the EPA with the safety data submitted by registrants. A General Accounting Office study in 1975 showed that many manufacturers failed even to submit safety studies on active pesticide ingredients.76 The reliability of many of those submitted was questionable. EPA Deputy Administrator John R. Quarles noted "that in virtually every instance, independent pathologists77 diagnosed many more cancerous and pre-cancerous tumors in test animals than did the original laboratory pathologists."78 Reliance by the EPA on the safety data for registration qualification and tolerance-setting by those who have a "vested interest" in having the pesticide registered is without substantial foundation. Concealment of certain hazardous attributes have been made without prosecution for violation of the Federal Environmental Pesticide Control Act.79

75. [1977] 7 ENVIR. REP. (BNA) 1286. Note that the former EPA Administrator cancelled the reregistration program in August of 1976 pending resolution of the data validity issue.

A year later, the problem of laboratory test deficiencies still exists. However, the agency recently has requested 31 pesticide manufacturers and two federal agencies (FDA and USDA) to review and certify the accuracy of tests conducted by a suspect independent laboratory. If review uncovers "serious human health or environmental hazards," then evidence of faulty testing will be handed over to the Department of Justice for appropriate action. This could lead to the first civil or criminal penalties assessed against a testing laboratory under FIFRA. [77] 8 ENVIR. REP. (BNA) 585. See also [77] 8 ENVIR. REP. (BNA) 644.

76. GAO Report, supra note 15, at 7-11. The requirements of safety data have been becoming more and more stringent on the active ingredients. The GAO report, however, shows that compliance has not been on a reciprocal increase. The two most recent testing requirements for teratogenicity, 1970 (to determine if exposure to the chemical will cause birth defects), and mutagenicity, 1972 (to determine if exposure will cause permanent genetic change), have been generally ignored. Safety data were missing for the 36 active chemicals present in the 100 sample pesticides chosen for the GAO study, in 14 instances (39%) for teratogenicity and 23 instances (64%) for mutagenicity.

77. A pathologist is someone in the branch of medicine who studies the nature of the structural and functional changes caused by disease, and the conditions and processes that result in disease. See J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE at 38 (1975).

78. A comment made when seeking a criminal investigation of the Veliscol Chemical Corporation of Chicago. The firm was suspected of withholding data of possible cancer-causing properties of the pesticides, Heptachlor and Chlordane. PREVENTION—THE MAGAZINE FOR BETTER HEALTH, May 1976, at 202 [hereinafter referred to as PREVENTION].

79. W. BUTLER, supra note 45, at 1267-68.

Experience has shown that because of the paucity of EPA enforcement personnel
In light of the Act, the motive for such an incomplete presentation by the manufacturer is obvious. Under the FEPCA, the biggest burden on the pesticide manufacturer is getting his product registered. Once that is accomplished, the pesticide is permitted to be used. It then is relatively safe from being removed from the market. The cancellation procedure is still a seemingly endless and almost non-existent process. The possibility of suspension is also slight, since the EPA must resort to "courthouse" proof that the pesticide presents a risk to man or the environment. Moreover, even if a cancellation or suspension enforce-

and the low priority which the Justice Department gives to even criminal violations of the pesticide laws, violations, when uncovered, provoke nothing more than a slap on the wrist, a warning to go and sin no more, and a minor fine.

Id. There are also legal ways to conceal. The agency requires animal tests in the safety studies for registration. The registrant is given the choice of which two species to use in the experiments. The law's requirement for animal testing may be fulfilled if the manufacturer, as is frequently done, chooses the species which has been found to be the most resistant to the substance at issue. The validity of the chemical's "safe" characteristic is only a partial truth. Id. at 1277. EPA's reporting requirements are less stringent for inert ingredients than they are for active ingredients, and non-existent for synergistic effects, i.e., toxic effects caused by chemicals in combination which are greater than the effects of the individual chemicals acting independently. GAO Report, supra note 15, at 6, 12. In addition, the present system allows the granting of conditional registrations, which "permit exposure of the public to occur and user reliance to develop before the safety of the product has been established." Extension of the Federal Insecticide, Fungicide, and Rodenticide Act: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 1st Sess. 223 (1977) (statement of Maureen Hinkle, pesticides monitor, Environmental Defense Fund), reprinted in [1977] 8 ENVIR. REP. (BNA) 281.

80. In the CBS broadcast, "The Politics of Cancer," reporter Lesley Stahl interviewed three senior EPA lawyers who resigned in February 1976. Their resignation was to protest the EPA's inaction under its existing authority to control toxic chemicals. For quite some time, the EPA had a list of over 100 suspected carcinogenic pesticides and no action was taken. Even if action were taken, the process is "very long."

Frank Sizemore, one of the three attorneys who resigned, said: "The conservative estimate is that if a chemical goes into that procedure [referring not to the process to take the pesticide off the market, but merely the procedure before the administrator is allowed to decide whether he wants to do something] it won't come out until 12 or 18 months later, and then we start a big hearing." CBS REPORTS, "The Politics of Cancer," as broadcast over the CBS Television Network, pp. 2, 13 of transcript (June 22, 1976).

81. Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247, 1250 (D.C. Cir. 1973), stating: "[T]he order of the Administrator cancelling registrations must be based on substantial evidence of record developed at a hearing if a public hearing is held, and the order must set forth detailed findings of fact." See [1977] 8 ENVIR. REP. 586, where an EPA Office of General Counsel attorney noted that
ment procedure is undertaken, some comfort is still provided for the powerful pesticide manufacturer. A conciliatory and undermining "indemnity provision" was included in the final version of the FEPCA to facilitate its acceptance. It provides that if a pesticide is not found to be unsafe upon registration, but is subsequently discovered to have hazardous effects, then the manufacturer is to be reimbursed. Ironically, the reimbursement is to come from the public, whom the manufacturer has endangered.

There are other flaws in the FEPCA regulatory scheme. For example, no provision exists for environmentalists or consumers to bring suit to challenge the refusal, granting, or cancellation of a pesticide's registration, although provisions were present in earlier drafts of the Act. In the recent past, citizen participation has been encouraged by the EPA. Such a vital element as an interested party should not be included or excluded from a registration hearing at the whim of the administrator.

Administrative agency overlap, which impedes the implementation of action, still exists. When the EPA was formed in 1970, only a partial transfer of the pesticide regulation function was effectuated. The entire registration process was assumed from the USDA, but portions of the

“EPA would have to meet a stringent imminent hazard standard to suspend registration.”

82. 7 U.S.C. § 136 m (1976). The provision allows not only the manufacturer, but anyone who owns a portion of the pesticide at the time it is suspended or cancelled to be reimbursed for its costs by the EPA. One author notes that the indemnity provision does not apply where it can be shown that those claimants caught with quantities of the pesticide had prior knowledge of its hazards or had some reasonable way of attaining such knowledge. Even then, the exclusion depends upon whether the EPA bears its burden of proving the manufacturer's knowledge. W. BUTLER, supra note 15, at 1260, 1261.

83. Comment, supra note 52, at 308-9.
85. Id. "EPA has encouraged citizen participation in the implementation of FEPCA, as provided by § 21(b) of the Act, especially by inviting comment upon implementing regulation." Id.
86. Surely citizens concerned with leading a healthy and safe existence have an interest in proceedings (administrative as well as judicial) whose outcome will determine if a pesticide, with potential detrimental environmental effects, will be permitted to be produced and applied. See Casenote, 52 J. URB. L. 609 (1974) (discussing Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974) (no fundamental right to a healthful environment)).

responsibility for setting tolerances of residues in food were left with the FDA. Also, the entire program for the monitoring of residues of pesticides was scattered among several different agencies, with the FDA and USDA primarily handling the monitoring function for foods.

This division of authority created co-ordination problems. The FDA and EPA have attempted to alleviate some of them by reaching an inter-agency agreement to exchange all information and investigative reports. Similar co-operation with the USDA has not blossomed. To the contrary, the USDA has been at times more a hindrance than a help. Perhaps such lack of co-operation emanates from the loss of pesticide regulation to the EPA, or, as many have commented, from the fact that USDA's principal obligation is the protection of agricultural business.

6. A NEW APPROACH

A current crisis exists in pesticide regulation. The inadequate evaluation of safety testing data for registration results practically in the invalidation of the tolerance-setting program. The consequence of falsely-based tolerances is the inundation of the market with pesticides that are dangerous to health and the environment. Congress blames the EPA for poor planning and management. The EPA seeks exoneration by citing the lack of resources, time constraints, and the enormity of the task. Regardless of how this political problem of regulation is resolved,
the burden of inadequate protection from pesticide hazards ultimately falls on the public and the environment.

It is apparent that regulation is not keeping pace with scientific development and thus is not achieving the goals intended for environmental legislation. The greatest impediment to successful regulation appears to be the regulations themselves! The EPA is strangling in its own red tape. It needs help in the form of stronger legislation which abandons the traditional legalistic approach. Regulations based upon legal concepts of cause and proof in the context of environmental protection are inappropriate and inefficient. A "substantial adverse effect on man or the environment" must be shown "likely to occur" before strict enforcement practices can be implemented to prevent further contamination by the hazardous substance. Pressure has already been applied to modify the standards of proof and methods of review applied by the courts in public health hazard litigation. It seems anomalous,

95. The purpose of environmental legislation is:
   (1) [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
   (2) [to] assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings;
   (3) [to] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. . . .


97. In the case of Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 500 (8th Cir. 1975), an action was brought seeking a permanent injunction. This action was brought against Reserve to abate the industrial discharge of asbestos fibers into the waters of Lake Superior and the emission of the fibers into the ambient air.

At issue were the long-term effects of low level exposure to asbestos fibers. The effects of such exposure, like the harm of pesticide residue consumption, have not been conclusively established by scientific proof. The court concluded that it could not be said that "the probability of harm is more likely than not." Reserve was granted a "reasonable time" for abatement despite claims by the EPA that any delay could endanger the surrounding community. Thus, as other commentators have noted, the burden on the environmental litigant remains a proof that the risk of harm is "more likely than not" to occur. See generally Comment, supra note 30; Comment, UTAH L. REV. 58 (1975); Casenote, 25 CATH. U. L. REV. 178 (1975).

98. For discussion of proposed legislation after the Reserve Mining decision, see Note, 59 MINN. L. REV. 893, 923 n. 138 (1975) discussing S. 841, 94th Cong., 1st Sess. § 3 (1975), a bill to make the risk-benefit approach applicable to all environmental suits. Especially instigating the legislative response was the court's decision to resolve "all uncertainties . . . in favor of health safety." This was a "legislative policy judgment
though, to wait until the litigation stage to enjoin the use of a pesticide. Legislation requiring the manufacturer to prove that his substance will not have a detrimental effect on man and the environment could prevent a dangerous pesticide from ever being used. At the present time, prevention of the use of hazardous pesticides cannot be successful, owing to (1) the limited tests now required of a pesticide's safety and (2) the rigid standard of proof required by courts in reviewing agency decisions on the safety of a product.

These problems can be resolved by drafting legislation which (1) includes requirements of extensive testing, as recommended by the General Accounting Office and (2) concomitantly provides for the adoption of the scientific concept of proof to determine the pesticide's safety. The former provision would require tests on every individual pesticide product, not merely on the product's active ingredients. Also, information would have to be supplied on the product's inert ingredients and mutagenic effects. The latter provision calling for the use of a scientific approach in restricting environmental contaminants would allow the EPA, in reviewing a pesticide application for registration, to require nearly "scientific proof" that the manufacturer's product is safe. This approach, which would limit the exposure of the environment to substances the effects of which were unascertainable by present technology, could be characterized as an "absolutist stance against uncertainty." This stance would prevent a pesticide from being produced or applied if its safety test results did not meet "the conditions for valid scientific predictive inferences" that the product's use would be safe.

100. An active ingredient in a pesticide is one which will:
   (1) prevent, destroy, repel, attract or mitigate any pest,
   (2) regulate the growth of a plant,
   (3) cause foliage to fall from the plant (defoliant),
   (4) artificially accelerate the drying of plant tissue (dessicant).

101. See Comment, supra note 3.
102. Such terminology is used to describe the level of criteria that would substan-
The use of such a stringent standard as scientific certainty would also be beneficial when the agency's decision to cancel, suspend, or deny registration of a pesticide is subjected to court review. Fewer decisions would undergo unresolvable scientific debate in the courtroom because the agency's decisions would be based on more definite data. With judicial review limited to a determination of whether the manufacturer proved the safety of his product by more than a mere preponderance of the evidence, it seems likely that fewer agency decisions would be overturned.

In banning a pesticide, strong scientifically-based legislative action will prove more effective than the risk-benefit analysis presently used by the courts\textsuperscript{103} in reviewing whether a chemical substance poses an adverse effect to man and his environment. Professor Owen Olpin summed up the reasons why the risk-benefit test is less than acceptable:

First, available knowledge is often inadequate to permit a meaningful balancing of benefits and costs, since the costs are often unknown and incapable of measurement. Second, the balancing often requires the comparison of incomparables, and raises serious ethical questions, such as those arising from weighing the value of production of certain items for human convenience and monetary gain against serious risks of human death and injury.\textsuperscript{104}

Indeed, the choices available with a balancing test are not rational ones. First, although the expenses of research, development, and lost profits can be evaluated, what value should be assignable to a healthy human existence? In a recent hijacking of a Japanese airplane, the Japanese government paid $6 million for release of the hostages.\textsuperscript{105} Life should not be of any less value to Americans. Chemicals on the market should not be cloaked in the same presumption of innocence as people; they should not be presumed innocent until proven guilty.\textsuperscript{106}

Second, a court that uses the risk-benefit test while weighing the value of a suspect chemical is not as qualified as an administrative
agency to consider the risks posed or the available alternatives that are equally, if not more, effective. In this area, a Washington newspaper report indicated that human death and injury are present risks, which the now utilized legalistic methodology of enforcement has failed to curb.

Ominous recent reports of a sharp increase in the cancer rate in 1975 tend to support those who say that we are now seeing the start of a cancer epidemic caused in part by massive use of synthetic chemical pesticides since World War II.

Dr. Samuel S. Epstein, an environmental toxicologist, has criticized the introduction of potent chemical agents which are largely untested for adverse public health effects. He remarked: "[C]ancer rates have gone up one percent a year since 1933 . . . and by 3.8 percent in 1975. There is no question that cancer is a major epidemic, and the environment and what man has done to it is indeed a major source for this great killer."

The Council of Environmental Quality concurred with this view in its sixth annual report. It noted that of approximately two million known chemicals, only 6,000 have been tested in the laboratory for carcinogenic properties. Furthermore, the report continued, a thousand people every day are killed by cancer; one out of four is likely to con-
tract it, and sixty to ninety per cent of all cancer is attributed to environmental causes.\textsuperscript{111}

7. RECENT DEVELOPMENTS

Congress is cognizant of the controversy surrounding the regulation of chemical pollution. Its awareness was evidenced by the passage of the Toxic Substance Control Act of 1976 (TSCA).\textsuperscript{112} The relative strength of this legislation reflects the intent of Congress to provide for the regulation of toxic substances, a health priority.

The Act requires that a manufacturer submit to the EPA administrator a “notice of intent” to market a new chemical, or one having a significant new use.\textsuperscript{113} The notice should contain, among other information, “all known data on health and environmental effects.”\textsuperscript{114} This significant provision places an affirmative duty on the manufacturer to submit all information and test results, even if they are damaging to the chances for marketability of the chemical. Hopefully, such explicit and encompassing requirements will eliminate the concealment of safety data that has plagued pesticide regulation and control. The manufacturer also has a continuing duty to inform the administrator of “information which reasonably supports the conclusion that “[the] substance . . . presents a substantial risk of injury to health or the environment.”\textsuperscript{115} The incentive for filing the required information is considerable, with a maximum $25,000 fine for each violation,\textsuperscript{116} and treatment of each day of continued violation as a separate offense.\textsuperscript{117}

The Toxic Substance Control Act takes a significant step in achieving the aspired goals of pesticide regulation, by giving broad authority to the administrator to act during the notification period. The administrator may limit, delay, or prohibit the manufacturing of a suspect

\textsuperscript{111} Id.
\textsuperscript{114} 15 U.S.C. §§ 2604(a), (b), (d), 2607(b) (1976).
\textsuperscript{115} This provision, like the registration process in pesticide regulation, may prove to have all the impact of a Hollywood set—all great facade and no substance. As Rogers, supra note 7, at 906-907 points out, “this reporting obligation can succumb to the rationalizations that the risk isn't all that 'substantial' or the threat of it not 'reasonably' justified.”
\textsuperscript{117} Id.
chemical, and his basis for doing so will not be scrutinized by stringent requirements of proof. If the administrator, having evaluated the data supplied (1) deems it insufficient or (2) considers that the substance’s use presents an unreasonable risk, then he may limit or prohibit the manufacturer’s marketing of the chemical. 118 The administrator may be compelled to go to court to justify (1) the injunction pending further information or (2) the prohibition against manufacturing because anticipated uses present an unreasonable risk of injury to health or the environment. 119

Under the TSCA, the courts will not be able to place an excessive burden of proof on the administrator to show that the chemical will adversely affect the environment. In taking steps toward a new approach to pollutant regulation, Congress lessened the burden of justification imposed on the administrator for his actions. He will be able to justify his limiting or prohibiting decisions on the same basis that has been evolving in the courts, 120 that is, whether an adverse result is “more likely than not” to result from an action. The administrator will not be required to offer impossible proofs. He can make his decision in the balancing of risks and benefits, which disregards the traditional concepts of causal connection, 121 and resolve “the uncertainties in favor for possible harm to the environment and public health, and not for immediate economic advantage.” 122

120. Environmental Defense Fund v. Environmental Protection Agency, 510 F.2d 1292 (D.C. Cir. 1975). The court ignored the traditional concepts of proof in this action to suspend the registration of the pesticides Aldrin and Dieldrin. The EPA administrator, as the party alleging the harm, was not required to bear the burden of demonstrating a direct link between the particular substance and the specific damage. He would not, as determined by the court, be required to prove facts that scientists have been unable to prove. Id. at 1298. Where the risk involved is so great as to create a strong possibility that the substance causes a harm, the registrant has a duty of proving the safety of his product. See also Ethyl Corp. v. Environmental Protection Agency, 176 U.S. App. D.C. 373, 541 F.2d 1, cert. denied, 96 S. Ct. 2263 (1976).

The Eighth Circuit pondered whether an injunction should be granted when the risk of future environmental harm is not readily ascertainable. The court resolved in favor of the EPA administrator’s decision to phase out the use of lead as a gasoline additive. The administrator could base his conclusion upon suspected, but not completely substantiated, relationships between facts, and could make determinations upon theoretical projections based upon imperfect data.


122. This language, first used in Reserve Mining, does reflect a “legislative policy
Congress also extended broad authority to the administrator and established the grounds necessary to substantiate his decisions. Such measures were necessary to assure fulfillment of the Act's purpose, namely, that all suspect chemicals be tested adequately before the commencement of the manufacturing process. In order to prevent exposure to suspect chemicals, action must be taken "before commercial production begins." If an injunction were not possible at that stage, not only would the purpose of the Act be frustrated, but the cost of removing the chemical from the market would be substantially greater. The standards which restrict a manufacturer's production of a chemical reflect an intent by Congress to supplant, at least in the instance of chemical regulation, the traditional elements of proof required to be shown before a court will exercise its equitable jurisdiction to grant an injunction.

The impetus for the Toxic Substance Control Act was, as Professor William H. Rogers had observed, "the technological revolution in the chemical industry that [had] outflanked thoroughly the traditional legal

judgment not a judicial one." Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d at 500. However, even in the immediate aftermath of Reserve Mining, the legislature still seemed hesitant to make just such a determination. The courts, in interpreting the environmental statutes (see Ethyl Corporation (Clean Air Act), Environmental Defense Fund v. Environmental Protection Agency (FIFRA)), continued to prod for a legislative policy decision by noting their restrictions. "We are a court of law, governed by rules of proof, and unknowns may not be substituted for proof of demonstrable hazard to the public health." Reserve Mining v. Environmental Protection Agency, 498 F.2d at 1084 (from a preliminary injunction hearing which was denied because the activity of Reserve was not found to be an imminent hazard to health).


123. Id.
124. The Act expresses an intent to avoid a "body count" approach to determine the health and safety hazards posed by a substance whose effects are dubious. Id. at 4550.
125. The purpose of the Act is to "assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment. . . ." 15 U.S.C. § 2601(b)(1) (1976).
126. Not only is human and environmental harm avoided or alleviated, but the cost of any regulatory action in terms of loss of jobs and capital investment is minimized. [1976] U.S. CODE CONG. & AD. NEWS, supra note 122, at 4550.
regimes such as the pesticide laws." Congress, with this legislation, clearly intended to put the burden on the manufacturer to develop toxic substance information, to emphasize the manufacturer's responsibility for the chemical's possible detrimental effects, and to assess them and to take corrective measures to alleviate their hazards. For the first time, the government is able to gather extensive information necessary to make a valid determination of a substance's potentially hazardous tendencies. The Act also contains a citizen-suit provision that will have substantial impact, since the participating party may be provided with compensation for attorney's fees, expert witness fees, and other costs. Thus, concerned environmental groups will be able to compete economically with the rich agribusiness and chemical corporations.

Ostensibly, the "political science of regulation" is losing ground to a much needed "science of regulation." The Toxic Substance Control Act, by requiring the administrator to collect and record all information on the attributes of the toxic chemicals, indicates a growing support by Congress for government acquisition of scientific knowledge. Although the information is still for the most part supplied by concerned

128. ROGERS, supra note 7, at 899.
130. The administrator under section 8 of the Act (15 U.S.C. § 2607 (1976)) has broad power to gather information, keep records, and report health and safety studies. This power under the TSCA is all encompassing. Unlike § 10 of FIFRA, health and safety test data will not escape scrutiny and recording because the manufacturer makes the claim that it is a "trade secret." Douglas Costle, the administrator of the EPA, is presently pushing to have the pesticide regulations amended to be consistent with the Toxic Substance Control Act. Again the deficiency of FIFRA is noted. In this instance, the law is too general and does not expressly state what data may qualify as trade secrets. Also exhibited is the court's comforting but not curative assistance. The "narrower view" of what are trade secrets, Costle predicted, would be upheld by courts, but only after a lengthy legal process. [1977] 8 ENVIR. REP. (BNA) 280.
133. Burger, supra note 2. The political science of regulation is the term used to categorize the conflict among various interest groups to have legislation and regulations passed which are favorable to their respective causes. They are more concerned with regulation for regulation's sake than in the quality and quantity of information available upon which to render a regulatory decision. Burger contends that "he who controls the information controls the regulatory activity." The government which has few independent sources of its own must make speculative and inconclusive decisions based upon information supplied by those to be regulated. This has resulted in a prominent lack of scientific information for regulatory decisions.
interests (manufacturers), the administrator now has the authority to conduct research, development, and monitoring in pursuit of the objectives of the Act. Realizing that "he who controls the information for regulation controls the regulatory activity," Congress acted to retrieve control from the industry by authorizing the EPA to develop its own sources of gathering data.

The political clout of the chemical manufacturers and their constituents has not disappeared from the spectra of regulations. The scope of TSCA is incredibly limited. The act specifically excludes the regulation of a number of substances, particularly pesticides, which is covered by another law whose ineffectiveness has been manifested. President Carter may have erred in his environmental address when he noted that, with the TSCA, no further comprehensive federal legislation should be necessary. Only time will reveal if the Act can be efficaciously en-

136. Burger, supra note 2, at 50,184.

Since information control is so important, it is advantageous for the parties concerned with the character of the regulation to supply the information. Id. Both environmentalists and businesses have an interest in health and environmental regulation. The environmentalists favor strict legislation fostering economic complacency, while the businesses encourage a laissez-faire approach, which would promulgate unrestricted progress, and profit. Therefore, to serve best their own interests, they would neither encourage the government to collect nor develop its own resources for scientific data.

137. 15 U.S.C. 2602(B) (1976). The term chemical substance does not include:
   (I) any mixture.
   (II) any pesticide [as defined by 7 U.S.C. § 136(u) (1976)].
   (III) tobacco or tobacco product.
   (IV) nuclear material or by-product.
   (V) article subject to tax under § 4184 of IRC of 1954 (as amended through December 31, 1976).

138. [1977] 8 ENVIR. REP. (BNA) 132 at 133. In his environmental address to Congress, President Carter noted the necessity of a co-ordinated federal effort to exclude these chemicals from our environment. Idealistically, interagency co-ordination would offer a better guarantee that hazardous materials would not be allowed to be mass-produced into our environment. Environmental Protection Agency Administrator Douglas Costle even proposed a transfer of that agency's administration of pesticide programs to the Office of Toxic Substances.

The integration, however, may only prove to be beneficial for clerical convenience. In the area of enforcement, the Federal Insecticide, Fungicide and Rodenticide Act will continue to provide the guidelines for registration, record keeping, and cancellation or suspension of pesticide registration. See note 137 supra. Any attempt by the Administration to apply wider discretion allowed under the TSCA, or use of any of its other strong
forced to achieve successfully the purposes sought by Congress. Also the Act's authoritative parameters are subject to speculation. If merely applicable to the straggler substances that have eluded other regulatory controls, the gap-filling legislation is an enormous gesture with no impact.

While the operative capabilities of the Toxic Substance Control Act are being determined, the Federal Insecticide, Rodenticide, and Fungicide Act remains the governing legislation over pesticides. Its inadequacies will continue to allow many pesticides to be registered without knowledge of their full effects, and tolerances for human consumption to be based on limited questionable information.

8. CONCLUSION

Pesticide regulation has undergone heated debate and radical reconstruction in recent years. Whether the result has achieved a successful goal of protecting the health and environment of the American people is dubious at best. Conflicting interests between environmentalists and chemical industrialists have produced only conciliatory legislation.

The pattern is classic. The concerned public relieves its fears by pressuring for a dramatic gesture from the government, while representatives of the affected industry quietly prepare devices to absorb the pressures. Typically they take the form of enforcement procedures, where exasperating technicalities and labyrinthine delay mask Federal inaction in a camouflage of tedium—until the public tumult subsides.

Such a pattern undermines the regulation of pesticide residue allowed in foodstuffs. The "indemnity provision" was not the only at-

provisions (e.g., citizen suit), will inevitably result in litigation. This is a time-consuming and expensive venture which the EPA would rather avoid. See note 141 infra. Apparently § 2602 of the TSCA, limiting its application, may prove to be the Achilles heel of the Act, by which a chemical classified as a mixture, pesticide, drug, food additive, and the like can escape TSCA jurisdiction.

139. GAO Report, supra note 15, at 7, 15, 21. See also note 76, supra.

140. See note 75, supra. Note that the Environmental Chemistry Review Section identified 120 of approximately 250 pesticide chemicals, for which tolerances have been established for their residue content in food and animal feeds, that have never undergone environmental chemistry data review. GAO Report, supra note 15, at 18.

141. H. WELLFORD, supra note 32, at 330.
tempt to undermine insidiously the power of the EPA. Other instances include: the establishment of a Pesticide Policy Advisory Committee, which has pesticide industrialists as members; an attempt to give the secretary of the USDA veto power over any pesticide classification decision; the creation of a Scientific Advisory Commission; the requirement of a sixty-day notification before any action can be taken by the EPA; and, most recently, the inclusion of a provision on the FIFRA Extension Bill which would provide for congressional review and possible disapproval of EPA regulations. The "legislative wisdom" purporting to establish an efficacious regulatory scheme has created a severe conflict of interest by allowing the proponents of chemicals to test their own product for defects that may keep them off the market. Hopefully, these compromising practices will not continue until the pesticide industry exclusively controls the entire spectra of regulation.

The courts offer little redress. In the area of environmental contaminants, prevention—not subsequent reparation of the damage—is the logical method of control and enforcement. Most law suits, however, focus exclusively on past events. Courts, sympathetic to environmen-

144. Id. at 1371; 7 U.S.C. § 136 (d) (1976).
145. Id. All of these provisions deal with administrative review. The details of the intricacies involved in notification of the Secretary of the U.S.D.A., publication of notice of intent to cancel registration, and consultation with the Scientific Advisory Committee are prime examples of "the exasperating technicalities and labyrinthine delay" that hinder prompt action to remove a pesticide from the market.
146. H. R. 12944 vetoed, H. Doc. No. 585, 94th Cong. 2d Sess. (1976) to extend FIFRA was vetoed by President Ford, because it contained the provision requiring an executive agency to submit its regulations to Congress for review and possible veto. See [1976] Envir. Rep. (BNA) 627.
147. It is doubtful whether the chemical industry, one of the largest and most powerful in the United States, will, in its economic self-interest, foster restrictions on productivity, while they expend substantial capital to market a product. See 6 Envir. L. Rep. 10,138, 10,042 (1976).
148. Id. Courts in suits for injunction have had difficulty in assessing a risk-
tal concerns, palliate the deficiencies of pesticide regulation, but cannot
cure the flaws that allow people to be exposed to the pesticides and their
residues.

Even when successful in removing a pesticide currently on the mar-
et, the court battles are a time-consuming and expensive method of
regulation for the EPA. The cancellation process of a pesticide registra-
tion is lengthy and the suspension process difficult, since courts are
restricted in their decision-making to the burden of proof required to
establish the likelihood of an event’s occurrence.

Pesticide proponents understandably prefer to use the courts as the
means to enforce regulations. They know that the court’s assessment of
the potential gravity of a situation is entangled in legalities. Conse-
quently, when the judicial process is circumvented, as was done in the
Mirex “phase-out” used by the EPA, pesticide proponents vociferously
condemn the termination of cancellation hearings. In the Mirex situ-
tion, they criticized the EPA’s use of the registration process as a means
to phase out Mirex from the market. The Mirex manufacturers, how-
ever, did not confront the propensity of the harmful effects caused by
the pesticide. They complained, instead, that the EPA’s approach was
a wholly inadequate substitute for adjudicatory findings—not legally
justifiable and not based on facts. 1 4 9

Facts are history—an established actuality; the state of things as
they are. A stringent standard requiring an absolute factual determi-
nation should not be the basis of proof required before restricting the use
of a potent killer. To remove a pesticide from use, it should not be
necessary to establish, merely to satisfy a legal technicality, that the
residue in food consumed by man is a carcinogenic, mutagenic, or tera-
togenic substance.

At present, the responsibility of enforcement of FEPCA is lodged
with the administrator of the EPA. In justifying his decisions, he is not

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benefit analysis, as pointed out in Environmental Defense Fund v. Environmental Protec-

Environmental law marks a domain where knowledge is hard to obtain and appr-
raise, even in the administrative context; in the courtrooms, difficulties of understand-
ing are multiplied. See Environmental Defense Fund v. Environmental Protection
Agency, 465 F.2d 528 (D.C. Cir. 1972). See also Note, Imminent Irreparable Injury:

For courts limiting review to procedural basis, see Latham v. Brinegar, 506 F.2d. 677
(9th Cir. 1974), National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973).
confined to legal standards of proof. Scientific expertise, familiarity with specific issues, and insight into the development of an environmentally sensitive situation assist him in the risk assessment, which focuses toward future consequences. However, his decisions are subject to review by the courts, which lack his insight. Also, whether to take action against a pesticide is almost exclusively at the discretion of the administrator. This “tremendous discretion” has resulted in selective enforcement, which has been greatly criticized by some. Clearly, what is needed is stricter and more concrete legislation. Regulations that include a provision for citizens’ suits would add another dimension to the enforcement of FIFRA. Environmentalists and other interested persons could then compel the administrator to take action against a suspect pesticide.

If strictly legal concepts continue to be employed in pesticide regulation, then the outlook for the acceptance of legislation that will prevent future ill health is bleak. If, in the future, scientific discovery exhibits with certainty that an extensive and continuous exposure to a low level of pesticide residues is carcinogenic, the banning of their use

150. Id. See also 6 ENVIR. L. REP. 10,138, 10,042, and Ethyl Corp. v. Environmental Protection Agency, 176 U.S. App. D.C. 373, 541 F.2d 1, cert. denied, 96 S. Ct. 2263 (1976). In discussing the administrator’s ability and authority to assess risks, the court stated that he is not confined by reliance on facts. Those entrusted with enforcement of the laws protecting against “gross environmental modification” are not endowed with “a prescience,” which removes speculation from the decision-making. Yet, there must be regulations and decisions. Consequently, it must be based upon theoretical and even conflicting data. Such a delicate balancing, the court held, should be left to the administrator, whose familiarity better qualifies him to make the risk assessment. Although his decisions may not be based on intuition, most courts will limit their review to procedural questions, or to whether his decision was arbitrary or capricious. Environmental Defense Fund v. Environmental Protection Agency, 465 F.2d 528, 539 (D.C. Cir. 1972).

For examples of courts favoring substantive review of agency action, see Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (4th Cir. 1973).

151. 7 U.S.C. § 136 (1976). Agency regulation has its advantages over judicial implementation of pesticides statutes. However, the administrator has great discretion whether to take action and has resisted attempts to undermine that power. See Environmental Defense Fund v. Corps of Engineers, 470 F.2d at 289; Environmental Defense Fund v. Froehlke, 473 F.2d at 346.

152. A citizen suit would allow individual citizens to bring suits against persons, companies, and governmental agencies, for violations of the Act or for failure to enforce its provisions. See Comment, supra note 52, at 303. See also note 13 supra, at 2010, remarks by Senator Nelson; Comment, 68 MICH. L. REV. 1254, 1259-62 (1970).
will be a futile exercise, as the harm will already have occurred. The effects of exposure to such carcinogens are insidious, irreversible, and cumulative.153

It may be possible to avoid this disastrous effect if a scientific approach to legislation is adopted whereby the future health, safety, and general welfare of the population are considered. An approach such as this, if adopted, would ban a chemical whose repercussions were not presently ascertainable. Furthermore, the quest of overcoming the technological limitations of prognostication of pesticide and chemical absorption would be propelled. Regulation prior to production and marketing would logically compel manufacturers to discover and rectify defects or develop alternatives in order to remain economically competitive.

Immediate consideration should be given to the incorporation of a novel scientific concept in the regulation of environmental contamination by pesticides and their residues. Then and only then would EPA enforcement no longer be evaluated critically as “too little, too late and unpredictable.”154

John P. Wilkes

153. For a discussion of different mortality studies of cancer, see A. LILIENFIELD, M. LEVIN & I. KESSLER, CANCER IN THE UNITED STATES (1972); for an easy non-scientific reading on cancer, see R. GLASSER, THE GREATEST BATTLE (1976). See also U.S. GOVERNMENT PRINTING OFFICE NATIONAL PANEL OF CONSULTANTS ON THE CONQUEST OF CANCER, NATIONAL PROGRAM FOR THE CONQUEST OF CANCER (1971).
154. [1976] 7 ENVIR. REP. (BNA) 42.

In June 1967, Larry Hardison was hired by Trans World Airlines to work at its vital, round-the-clock Stores Department at the Kansas City International Airport. The job was covered by a seniority system in a collective-bargaining agreement maintained by TWA and a labor union. In the spring of 1968, Hardison began to study a religion known as the Worldwide Church of God, which requires its members to refrain from working on certain designated holidays as well as on its Sabbath, sundown Fridays through sundown Saturdays. In December 1968, pursuant to his request to be assigned to a day shift, Hardison was transferred from Building 1 of the Stores Department (where he had seniority) to Building 2 (where he was number two from the bottom). Shortly thereafter, he was called to substitute for a vacationing fellow employee.

1. Hardison's job was subject to a collective-bargaining contract maintained by TWA with three different unions: the International Association of Machinists and Aerospace Workers, the International Association of Machinists and Aerospace Workers, District 142, and the International Association of Machinists and Aerospace Workers, Local 1650, all of which were sued along with TWA. When the Court of Appeals for the Eighth Circuit reviewed the case, it noted that, in view of its holding, the unions could be referred to simply as "the union." Hardison v. Trans World Airlines, Inc., 527 F.2d 35 (8th Cir. 1975). Under the seniority system, a union steward, representing all the unions, accepted bids from employees for particular shift assignments as they became available. First choice for job and shift assignments was offered to the most senior employees, and the most junior employees were required to fill those positions and shifts that the union steward was unable to fill through the voluntary bidding method. The TWA-IAM agreement provided in part:

The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department.

whose working hours included Friday evenings and Saturdays, *i.e.*, Hardison's Sabbath.²

Because of his recent transfer to Building 2, Hardison lacked sufficient seniority to bid himself out of the substitution assignment. Subsequently, his superior at TWA informed the union steward that the company would be amenable to any trading of employee work schedules that the latter could work out within the framework of the seniority system,³ provided that the accommodations did not call for payment of overtime wages or the undermanning of any TWA operations.⁴ Eventually, Hardison was transferred to the twilight shift, but on his first Friday under that schedule he left work at sundown, thereby precipitating his discharge by TWA.⁵

After exhausting the administrative remedy provided by Title VII of the 1964 Civil Rights Act, Hardison sued for injunctive relief, claiming that his discharge constituted religious discrimination in violation of Title VII, 42 U.S.C. Sections 2000e-2(a) (1)⁶ and 2000e(j)⁷ and of the

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². *Id.* at 68.

³. Although it would seem that a viable alternative would have been merely to reassign Hardison to Building 1 where he might have regained his seniority, such a solution was not available. The union, pointing to the seniority system, would not approve his early return because it would violate a rule in the agreement prohibiting transfers twice within six months. *Id.* at 95 n.11 (Marshall, J., dissenting).

⁴. *Id.* at 68-69. Justice Marshall, in his lengthy dissent, considered an important factor that goes to the heart of this solution-searching by TWA and the union: "[Hardison] lost the non-Sabbath shift when an employee junior to him went on vacation. The vacation was to last only two weeks, however, and the record does not explain why respondent did not regain his shift at the end of that time." *Id.* at 94 n.9 (Marshall, J., dissenting).

⁵. *Id.* at 69. Justice White, writing for the majority, questioned Hardison's failure to seek assistance of the Union Relief Committee which had dealt successfully in the past with scheduling problems. *Id.* at 68 n.3. Finally, Justice Marshall, in his dissent, also noted that TWA, the union, and Hardison had apparently not approached the Union Relief Committee to approve an exemption. See text accompanying notes 103-4, infra.

The Union Relief Committee should be distinguished from the union's grievance committee, which did become involved in the dispute. 375 F. Supp. 877, 884 (1974).


(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

1967 Equal Employment Opportunity guidelines.\textsuperscript{8} The United States District Court ruled in favor of both the union and TWA.\textsuperscript{9} The Court of Appeals for the Eighth Circuit affirmed the judgment for the union as Hardison had not attacked it on appeal, but reversed the judgment for TWA.\textsuperscript{10} On certiorari,\textsuperscript{11} the United States Supreme Court reversed the judgment against TWA and HELD that the company had satisfied the Act’s reasonable accommodation duties; that further efforts to accommodate Hardison’s beliefs would have resulted in “undue hardship” to TWA; and that an agreed-upon seniority system is not required to yield to accommodate religious practices.\textsuperscript{12} By reaching this particular decision, the Court found that it had obviated the necessity of addressing TWA’s constitutional challenge of Title VII based on the establishment of religion clause\textsuperscript{13} and of pursuing further the union’s status.\textsuperscript{14} Thus, the only issue addressed by the Court was “the extent of the

Congress in its 1972 amendment to Title VII, provides:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

8. The 1967 Equal Employment Opportunity Commission guideline on religious discrimination provides:

The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer’s business. Such undue hardship, for example, may exist where the employee’s needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer. 29 C.F.R. § 1605.1(b), 32 Fed. Reg. 10,298 (July 13, 1967).

10. 527 F.2d 33 (8th Cir. 1975).
11. The Court granted both TWA’s and the union’s separate petitions for certiorari. Although the union prevailed in both of the lower federal courts, it nevertheless filed its own petition for certiorari, contending that if the court of appeals’ ruling as to TWA were upheld, it might eventually be obligated to waive provisions in its collective-bargaining agreement. 432 U.S. at 70-71 n.5.
12. Id. at 77-79.
13. The first amendment to the United States Constitution provides in part: “Congress shall make no law respecting an establishment of religion. . . .” Both the district court and the court of appeals ruled against TWA’s argument that Title VII’s prescribed duty to accommodate an employee’s religious beliefs is a violation of the establishment clause. 375 F. Supp. at 887; 527 F.2d at 44.
14. 432 U.S. at 70-71 & n.5.

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employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays."

In deciding the issue, the Court turned its attention to an examination of the statutory and administrative language of the Act and the guidelines which served as the basis of Hardison's claim. With regard to Section 703(a)(1) of the Act, which makes it an unlawful employment practice for an employer to discharge an employee because of his religion, the Court noted, in its opinion, `McDonald v. Santa Fe Trail Transportation Co.,' `Franks v. Bowman Transportation Co.,' `McDonnell Douglas Corp. v. Green,' and `Griggs v. Duke Power Co.,'

15. `Id. at 66.
16. `Id. at 71 n.6.
17. 427 U.S. 273, 278-79 (1976). In `McDonald,' two white employees charged with misappropriating their employer's property were dismissed from their jobs while a black employee, charged with the same offense, was retained. The whites brought suit against both the employer and the union alleging that their discharge constituted discrimination on the basis of race. The Court held that Title VII and § 1981 prohibited racial discrimination in private employment against whites as well as against nonwhites.
18. 424 U.S. 747, 763 (1976). The Court undoubtedly relied heavily on the `Franks' dissenting opinions to support its decision in `Hardison.' Significantly, the dissenters in `Franks' help to comprise the majority in `Hardison,' and, conversely, Justice Brennan, who wrote for the majority in `Franks,' joins Justice Marshall in his dissent in the present case. In `Franks,' the lower federal court had held that several blacks had been discriminated against by an employer's hiring practices. When the case reached the Supreme Court, the sole issue was whether an award of retroactive seniority (as well as back pay) was an appropriate remedy to correct that past discrimination. Justice Brennan, writing for the majority, granted that relief, even though he recognized that to do so would implicate the seniority expectations of Bowman's other employees. Chief Justice Burger and Justice Powell, joined by Justice Rehnquist, in their dissenting opinions protested the inequity of permitting the retroactive seniority relief, charging that such a remedy placed an unfair burden on "innocent employees," and afforded "preferential" treatment to a minority of employees at the expense of the majority. Chief Justice Burger accused the majority of "robbing Peter to pay Paul." `Id. at 781 (Burger, J., dissenting).
19. 411 U.S. 792, 800 (1973). The Court in `McDonnell' ruled that, while Title VII prohibits an employer from refusing to hire a qualified applicant because of his race, it does not prohibit rejection of that same applicant if he has previously engaged in deliberate, unlawful activity against the employer, and the employer's refusal to hire him is based upon his participation in that activity.
20. 401 U.S. 424, 429-30 (1971). In `Griggs,' the Court held that Title VII prohibits an employer from requiring a high school education or the passing of a standardized intelligence test as a condition of employment when neither standard relates significantly to job capability. Although the Duke Power Company's tests appeared neutral in terms of intent, they operated to disqualify black job applicants at a significantly higher rate than white applicants, and implemented the employer's longstanding practice of
as well as an excerpt from the Congressional Record. These cases established that the main purpose of Title VII was to eliminate discrimination in employment and that “similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex or national origin.” The Court underscored this declaration by stating: “This is true regardless of whether the discrimination is directed against majorities or minorities.” Central to the Court’s concerns was that Title VII be applied equitably, taking into account the impact it could have on all parties that would be affected.

In considering the 1967 EEOC guideline that requires employers to “make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer’s business,” the Court first established the propriety of using the guideline in its determination of the issue. While administrative guidelines are not ordinarily entitled to great weight, the Court singled out this one noting that Congress, wishing to give the guideline force, ratified it by passing “positive legislation,” i.e., Section 701(j), which adopted the specific language of the 1967 EEOC guideline. The Court pointed to the legislative history of the Act as evidence that Congress wanted to clear away doubts left by inconclusive case law. Precisely because it had found sufficient legislative intent, the Court held that it would consider the guideline and Section 701(j) without considering “whether Section 701(j) [had to] be applied giving preference to whites. The Court condemned the tests, calling them “fair in form, but discriminatory in operation.” Id. at 431.

21. “[T]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.” 432 U.S. at 71 n.6.
22. Id. at 71 (emphasis added).
23. Id. at 71-72 (emphasis added). In making this statement, the Court relied on the McDonald and the Griggs cases. Given the holding in Hardison, it would seem that the Court chose to overlook its Griggs ruling that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). However, the discriminatory device in Griggs was an intelligence examination which job applicants were required to pass and not the provisions of a collective-bargaining agreement.
25. 432 U.S. at 76 n.11.
26. Id. at 73-74.
27. Id. 73.
retroactively to the facts of this litigation." 28

As the Court traced the applicable statutory and administrative language, and examined the supporting case law, it arrived with seeming consternation at what it saw as an inescapable conclusion: "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines." 29 The Court noted that the Commission, in proposing its 1967 guideline, "did not suggest what sort of accommodations [were] 'reasonable' or when hardship to an employer becomes 'undue.'" 30

When the Supreme Court affirmed, by an equally divided court, the Sixth Circuit's decision in Dewey v. Reynolds Metals Co., 31 the question as to how far this accommodation should extend was left unanswered. The Court in Dewey affirmed the lower court's judgment because there had been a finding that the manner in which the employer allocated his Sunday work assignments was not discriminatory either in its purpose or in its effect. 32 Furthermore, consistent with the 1967 guidelines, the employer had fulfilled his duty to make reasonable

28. Id. at 76 n.11.
29. Id. at 75.
30. Id. at 72.
31. 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided Court, 402 U.S. 689 (1971). In this case, the employee, Dewey, was subject to the terms of a collective-bargaining agreement between his union and his employer. Under the agreement, employees were required to work overtime when scheduled, or, in the alternative, to secure a replacement for themselves. When he was assigned Sunday overtime, Dewey refused to work or to find a replacement, contending that either act would violate his religious convictions. Following his subsequent discharge, he brought an action against his employer, alleging religious discrimination under Title VII. The Sixth Circuit Court of Appeals held that the employee had wrongfully violated the non-discriminatory terms of the collective-bargaining agreement so that his subsequent discharge was permissible under Title VII.
32. 432 U.S. at 73. In a footnote to this observation, the Court in Hardison pointed out that regardless of what the Dewey decision stated, it must be disregarded because "'[j]udgment entered by an equally divided court is not 'entitled to precedential weight,' Neil v. Biggers, 409 U.S. 188, 192 (1972)." 432 U.S. at 73 n.8. The impact of Dewey is inconclusive also because (1) the case "was decided prior to the addition by Congress to the Civil Rights Act of 1964 of § 701(j) (42 USCA § 2000e(j)); and (2) the Court held the 1966 EEOC version of 29 CFR § 1605.1 applicable, and that version of the regulation did not require an employer to make reasonable accommodation to the religious needs of its employees. . . ." Annot., 22 A.L.R. Fed. 580, at 606 (1975).
accommodations when he provided that the employee was permitted to secure his own replacement.33

In its discussion of the 1972 amendments to Title VII embodied in Section 701(j), the Court lamented that, in neither the statute nor the ample legislative history4 backing it, was any guidance given for determining the degree of accommodation required of an employer.35

Finally, case law appeared on both sides of the issue, providing no clear-cut theories of decision:

In circumstances where an employer has declined to take steps that would burden some employees in order to permit another employee or prospective employee to observe his Sabbath, the Fifth, Sixth, and Tenth Circuits have found no violation for failure to accommodate. . . . But the Fifth and Sixth Circuits have also reached the opposite conclusion on similar facts.36

33. 432 U.S. at 73.
34. Id. at 74-75 n.9, which states:
   The Congressional Record . . . contains reprints of Dewey and Riley v. Bendix Corp., . . . as well as a brief synopsis of the new provision [Section 701(j)], which makes reference to Dewey, 118 Cong. Rec. 7167 (1972). The significance of the legislative references to prior case law is unclear. In Riley the District Court ruled that an employer who discharged an employee for refusing to work on his Sabbath had not committed an unfair labor practice even though the employer had not made any effort whatsoever to accommodate the employee's religious needs. It is clear from the language of § 701(j) that Congress intended to change this result by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation.

   The reference to Dewey is even more opaque:

   “The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429 F.2d 325 (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971).” 118 Cong. Rec. 7167 (1972). Clearly, any suggestion in Dewey that an employer may not be required to make reasonable accommodation for the religious needs of its employees was disapproved by § 701(j); but Congress did not indicate that “reasonable accommodation” requires an employer to do more than was done in Dewey, apparently preferring to leave that question open for future resolution by the EEOC.

This interpretation of the legislative history is in sharp contrast to that of Justice Marshall in his dissent. See note 72, infra.

35. 432 U.S. at 74-75 & n.9.
36. Id. at 75 n.10. The cases in which no violation was found were: Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976), cert. denied, 429 U.S. 959 (1976) (employee's dismissal did not constitute religious discrimination by employer if he did not regularly ask employee to work on Saturday (employee's Sabbath) but only
After looking in vain for helpful rules of law, the Court focused on the facts of the case. It observed that the court of appeals felt that TWA had failed to seek reasonable accommodations short of undue hardship, because the company rejected three alternatives. Its refusal to permit Hardison to work only four days a week, utilizing an employee on duty elsewhere; its refusal to bring into work an employee not normally assigned to that shift as a Saturday substitute; and finally, its refusal to arrange a swap between another employee and Hardison, made TWA's conduct violative of the Act. The court of appeals further found that TWA had not sought, and the union had not entertained, the idea of a possible variance of the collective-bargaining agreement, and that both TWA and the union were relying on one another to find a solution, with the result that neither did anything.

The Supreme Court chose to "disagree with the Court of Appeals in all relevant respects." In giving its reasons, it defined the limits to which an employer, bound by a collective-bargaining agreement containing a seniority system, must go to reasonably accommodate religious observances. The three above-mentioned alternatives were rejected: the first two would have worked an undue hardship on the company in the form of undermanning its operations or forcing the asked employee to work a particular Saturday in order to complete a critically important project; Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), cert. denied, 429 U.S. 964 (1976), petition for rehearing denied, 97 S. Ct. 2989 (1977) (employer's failure to hire not discriminatory where prospective employee, a newspaper copyreader, refused to work on Saturdays, his Sabbath, and where employer, a newspaper publisher, required a limited number of copyreaders, who are specialists, to be available for a six-day workweek); Johnson v. U.S. Postal Serv., 497 F.2d 128 (5th Cir. 1974) (small postal facility of limited manpower which had hired employee to work as "part-time flexible clerk" was justified in discharging employee who failed to show up for work on several Saturdays after making attempts to accommodate employee's religious practices by allowing him as many Saturdays off as possible and recommending his transfer to a larger postal facility). The opposite conclusion was reached in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided court, 97 S. Ct. 342 (1976), judgment vacated and case remanded to the court of appeals for further consideration in light of TWA v. Hardison, 432 U.S. 63 (1977), 97 S. Ct. 2965 (1977) (employer held liable for religious discrimination under Title VII where he discharged employee in response to "mild and infrequent complaints" from fellow employees forced to substitute on employee's Sabbath); and Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) (employee's discharge constituted religious discrimination under Title VII where employer admitted that he had made no effort to transfer employee to different shift, or to obtain a substitute and, furthermore, that no actual need for a substitute appeared during employee's Sabbath absences).

37. 432 U.S. at 77.
ployer to pay overtime to some employee; the last, in which TWA would have unilaterally arranged a "swap," would have involved an impermissible breach of the seniority provisions of the contract. TWA had sought to comply with the statutory requirements by holding several meetings, by accommodating Hardison's observance of his special religious holidays, by authorizing the union steward to search for someone who would be willing to swap shifts, and, finally, by attempting (without success) to find Hardison another job. Furthermore, Hardison's superior at TWA, in meeting with the union's steward, had expressed his willingness in approving any possible job swaps, but the union official had stood firmly by the collective-bargaining contract and had been unwilling to work out a shift or job trade. Thus, in the eyes of the Supreme Court, TWA had gone as far as it could. Regarding the collective-bargaining agreement that tied the employer's hands, the Court remarked: "[I]t appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all TWA employees." According to the Court's finding, TWA, by working within the framework of the seniority system, had found a neutral way to minimize the occasions during an employee's working life when he would be required to work on a day that he wanted to take off. Furthermore, TWA had reduced its weekend force to a bare minimum in order to complement that goal of the seniority system.

Having concluded that the seniority system was itself a manifestation of reasonable accommodation, the Court rationalized its holding by listing strong public policy and equity arguments. It began by responding to a Hardison-EEOC contention that compliance with the statute took precedence over the collective-bargaining contract and the seniority rights of TWA's other employees. The Court agreed that case law indicated that neither a collective-bargaining agreement nor a seniority system could be used to violate the statute. However, the Court felt that the case supporting that rule, Franks v. Bowman, needed to be distinguished from the Hardison issue. In Franks, actual

38. Id. at 76.
39. Id. at 76-77.
40. Id. at 77.
41. Id. at 78.
42. Id.
43. Id.
44. Id. at 79.
45. 424 U.S. 747 (1976). See also note 18, supra.
past discrimination by the employer had already been found, and the Court had agreed to an abrogation of the seniority system only because it was necessary to "make whole" the victim of that past discrimination. The Hardison case was not subject to similar treatment because no discrimination had been found that needed to be corrected. Moreover, the Court had no intention of finding any discrimination in Hardison's case:46 "[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement."47 Thus, the Court, by simply refusing to find discrimination, successfully evaded the constraints of prior judicial rulings and, consequently, saved the TWA-IAM collective-bargaining agreement from alteration. Directing its attention to the strong public policy interest to be achieved by this interpretation, the Court stated:

Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.48

In further support of seniority systems, the Court pointed out that an employer like TWA allocated work schedules either through involuntary assignments or through an equitable seniority system. In the opinion of the Court, to circumvent such a system would be to deny an innocent employee his contractual rights under the agreement. To favor Hardison's religious preferences would be to do so only "at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends"; another employee would have been deprived of his shift preference "at least in part because he did not adhere to a religion that observed the Saturday Sabbath."49 The Court summed it up by finding that

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such dis-

46. 432 U.S. at 79 n.12.
47. Id. at 79.
48. Id.
49. Id. at 81.
Trans World Airlines, Inc. v. Hardison

Discrimination is proscribed when it is directed against majorities as well as minorities.\textsuperscript{59}

Finally, the Court supported its conclusion by observing that Section 703(h)\textsuperscript{51} of the Act afforded special treatment for seniority systems. Citing \textit{International Brotherhood of Teamsters v. U.S.}\textsuperscript{52} and \textit{United Airlines, Inc. v. Evans},\textsuperscript{53} the Court indicated that the statute signified

\begin{quote}
the Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1970), provides in pertinent part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

\textsuperscript{52} 431 U.S. 324 (1977). In this case, it was shown that an employer had violated Title VII by engaging in discriminatory hiring and promoting practices against black and Spanish-surnamed persons. Those who could show themselves to be victims of the company's discrimination after the passage of the Civil Rights Act were rewarded retroactive seniority relief, but victims of pre-Act discrimination were denied that remedy. In response to that denial, the pre-Act discriminatees alleged that the seniority system was unlawfully serving to perpetrate the effects of pre-Act discrimination and that the union's conduct in agreeing to and maintaining a seniority system violated the Civil Rights Act of 1968. The Court responded by referring to § 703(h) which, it held, reflected Congress' intent to immunize seniority systems from charges of that nature.

\textsuperscript{53} 431 U.S. 553 (1977). Evans was a female flight attendant who was discharged from United Airlines in 1968 because she had married. She was rehired in 1972 subsequent to a judicial determination that such practice on the part of airlines was violative of Title VII. After the rehiring, she filed suit against United when she was treated for seniority purposes as though she had had no prior service with the company.
\end{quote}
that routine application of a seniority system would not be regarded as unlawful. After referring once again to Franks, which held that Section 703(h) was a definitional provision and could therefore be relied upon to demonstrate which employment practices were discriminatory and which were not, the Court declared: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." Adopting this line of reasoning and finding that there had been "no suggestion of discriminatory intent" on the part of either TWA or the union, the Court ruled that the employer had not discriminated against Hardison because of his religion. The Court concluded by stating that, in the absence of what it considered to be clear statutory language and legislative history to the contrary, it would not construe Title VII to require an employer "to discriminate against some employees in order to enable others to observe their Sabbath."

Believing that the majority's interpretation of the statute had actually nullified it, Mr. Justice Marshall, joined by Mr. Justice Brennan, filed a lengthy dissent, in which he wrote:

Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really

In rejecting her Title VII claim, the Court pointed to its untimely filing and, significantly, to the fact that her attack on the seniority system as discriminatory was insufficiently drawn. Citing § 703(h), the Court stated:

That section expressly provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination. Since respondent does not attack the bona fides of United's seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race, color, religion, sex, or national origin, § 703(h) provides an additional ground for rejecting her claim.

431 U.S. at 559-60.
54. 432 U.S. at 82.
56. 432 U.S. at 82.
57. Id.
58. Id.
59. Id. at 83.
60. Id. at 85.
mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.61

First, Marshall urged a common-sense reading of the statutory language by pointing out that an accommodation issue by its very definition arises only when some special interest must be allowed special consideration.62 The typical pattern appearing in case law is one in which an employer’s neutral rule of general applicability conflicts with a particular employee’s religious practices. The issue is always whether the employee is to be exempted from the rule’s demands.63 To allow such an exemption, Marshall contended, is to allow its natural consequences, i.e., “unequal” or “preferential” treatment for the individual involved and a privilege being “allocated according to religious beliefs.”64 Accordingly, Marshall found that the statute, by calling for “accommodations,” demanded that Hardison be granted preferential treatment unless TWA could show that “‘undue hardship’ would result.”65

Second, Marshall asserted that the Court seemed “almost oblivious to the legislative history of the 1972 amendment of Title VII.”66 He recounted that two employer-favoring decisions, Dewey v. Reynolds Metal Co.67 and Riley v. Bendix Corp.,68 rendered shortly after the promulgation of the 1967 EEOC guidelines,69 questioned whether the guideline was consistent with Title VII.70 Congress, in response to those questions and wishing to resolve the issue firmly in favor of an employee’s viewpoint, tracked the language of the guideline and unanimously passed the 1972 amendment, i.e., Section 2000e(j). Finding the

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61. Id. at 86-87.
62. Id. at 87.
63. Id. at 87-88.
64. Id. at 88.
65. Id.
66. Id.
69. See text accompanying note 8, supra.
70. 432 U.S. at 88.
language of the Court in *Hardison* to be "strikingly similar" to that in *Dewey*\(^\text{71}\) (which Congress had specifically rejected in its 1972 amendment),\(^\text{72}\) Marshall concluded that the Court had "follow[ed] the *Dewey* decision in direct contravention of congressional intent."\(^\text{73}\)

Third, Marshall criticized the Court's treatment of TWA's contention that to require it to accommodate Hardison's religious needs would constitute an establishment of religion contrary to the first amendment of the Constitution. He noted that the Court, instead of responding to the Constitutional challenge, simply bypassed it by deciding the case in such a way as to nullify effectively the problem statute itself.\(^\text{74}\) Marshall then proceeded to defend the constitutionality of Section 701(j) as applied to employment situations fitting the profile of Hardison's. First, he recognized that valid constitutional questions would be raised if the statute were interpreted to compel employers to incur substantial expenses to oblige religious observers;\(^\text{75}\) conversely, if the expenditures were "de minimis" (as he found the $150 cost of accommodating Hardison's beliefs to be),\(^\text{76}\) no constitutional argument could be valid.\(^\text{77}\) Second, by

\[\text{71. Id. at 89.}\]
\[\text{72. Id. Referring to both *Dewey* (see text accompanying notes 34-35, supra) and *Riley* (see text accompanying notes 34-35, supra), Marshall reviewed the legislative history supporting Section 2000e(j):}\]

These courts reasoned, in language strikingly similar to today's decision, that to excuse religious observers from neutral work rules would "discriminate against . . . other employees" and "constitute unequal administration of the collective-bargaining agreement." *Dewey v. Reynolds Metal Co.* [at 330]. They therefore refused to equate "religious discrimination with failure to accommodate." *Id.* at 335. When Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed the Congress of these decisions which, he said, had "clouded" the meaning of religious discrimination. 118 Cong. Rec. 706 (1972). He introduced an amendment, tracking the language of the EEOC regulation, to make clear that Title VII requires religious accommodation, even though unequal treatment would result. The primary purpose of the amendment, he explained, was to protect Saturday Sabbatarians like himself from employers who refuse "to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.* at 705. His amendment was unanimously approved by the Senate on a roll call vote, *Id.*, at 731. . . .

This interpretation of the legislative history is in sharp contrast to that of Justice White, writing for the majority. *See* note 34, supra.

\[\text{73. 432 U.S. at 89.}\]
\[\text{74. Id.}\]
\[\text{75. Id. at 90.}\]
\[\text{76. Id. at 92-93 n.6.}\]
\[\text{77. Id. at 90.}\]
relying on Wisconsin v. Yoder,\textsuperscript{78} Sherbert v. Verner,\textsuperscript{79} Zorach v. Clauson,\textsuperscript{80} Gillette v. United States,\textsuperscript{81} Welsh v. United States,\textsuperscript{82} Braunfeld v. Brown,\textsuperscript{83} and McGowan v. Maryland,\textsuperscript{84} Marshall demonstrated that the Court, on previous occasions, had failed to find establishment clause problems in exempting religious observers from state-imposed duties,\textsuperscript{85} and contended, finally, that logic dictated a similar holding with regard to duties owed a private employer.\textsuperscript{86}

Finally, Marshall narrowed his analysis to an examination of the facts and a determination of whether TWA had met its burden of exhausting all reasonable accommodations short of "undue hardship" to its business. He concluded that it had not.\textsuperscript{87} He rejected the Court's conclusion that compelling the company to assume the costs of overtime pay or replacing Hardison during his Sabbath would have resulted in "undue hardship."\textsuperscript{88} The record indicated that an accommodation

\textsuperscript{78} 406 U.S. 205, 234-35, n.22 (1972) (two Amish children, aged 14 and 15, who had completed eighth grade, were exempted from state compulsory school attendance law requiring all children to attend school until the age of 16).

\textsuperscript{79} 374 U.S. 398, 409 (1963) (Seventh-Day Adventist whose religion prohibited Saturday employment and who had rejected job offers for Saturday work was allowed to collect state unemployment compensation benefits even though state law, regarding benefits explicitly rendered ineligible any person who failed to accept work offered to him).

\textsuperscript{80} 343 U.S. 306 (1952) (city program permitting public schools to release and excuse from class attendance certain students so that they could go to religious centers for religious instruction was found to be constitutional with regard to the establishment clause).

\textsuperscript{81} 401 U.S. 437 (1971) (section of Military Selective Service Act of 1967 which provided exemption from military service to conscientious objectors to \textit{all} war was not violative of the establishment clause).

\textsuperscript{82} 398 U.S. 333, 343-44 (1970) (draft registrant who held "with the strength of more traditional religious convictions" strong beliefs opposing the taking of human life was exempted from military service).

\textsuperscript{83} 366 U.S. 599 (1961) (Sunday closing law proscribing Sunday retail sale of certain enumerated commodities upheld after Court rejected contention that the statute was law respecting establishment of religion and therefore violative of the first amendment).

\textsuperscript{84} 366 U.S. 420 (1961) (Frankfurter, J., concurring) (convictions of store employees who had made retail sales on a Sunday in violation of the state Sunday closing laws were upheld after the Court rejected the argument that the statute violated the establishment clause).

\textsuperscript{85} 432 U.S. at 90.

\textsuperscript{86} \textit{Id.} at 91.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.} at 92.
would have been necessary for a three-month period, at the end of which Hardison could have transferred back to his old building, where his seniority would have been reinstated. 89 The costs for an arrangement over that time period would have been $150, 90 a sum which Marshall, in contrast to the Court, found compatible with the purpose of the statute.

Marshall also took aim at TWA for its failure to seek out actively an employee who would have been willing to trade shifts with Hardison. 91 The reason for that failure was denounced by Marshall (although clearly accepted by the Court): any trade, whether voluntary or not, would have violated the collective-bargaining agreement which authorized only transfers to vacant jobs. 92 In addition to the possibility of a voluntary trade, Marshall proposed two other options that he believed would have satisfied the statutory requirements. The first was that TWA could have paid overtime to a voluntary replacement and passed on the cost to Hardison, who would earn it by working overtime at regular pay. 93 The second option would have called for TWA to transfer Hardison immediately back to his previous department in Building 1, where he had attained sufficient seniority. 94 Marshall fully recognized that both solutions would have abrogated the collective-bargaining contract: the first, because of a provision directing that any employee who worked overtime was to receive premium pay; and the second because the agreement prohibited employees from transferring more often than once every six months. 95 However, he inferred that the statute required resort to such options, arguing that neither of them would have deprived any other employee of his rights under the agreement or violated seniority expectations of others. 96 Furthermore, although he conceded that both solutions would cause some administrative inconvenience to TWA, he argued that such a burden would not make the statute violative of the establishment clause. 97 The Court, he stressed, on numerous previous occasions, had approved of exemptions from state-imposed duties that placed "not inconsiderable burdens on private parties." 98 Citing

89. Id. at 92-93 n.6.
90. Id.
91. Id. at 93-94.
92. Id. at 94 n.10.
93. Id. at 95.
94. Id.
95. Id. at 95-96.
96. Id.
97. Id. at 96 n.13.
98. Id.
Selective Draft Law Cases, an old decision with recent implications, he attempted to buttress his argument that the statute did not violate the Constitution merely because it gave preferential treatment to Hardison. That case held that to excuse conscientious objectors (whose reasons for objecting were religious in nature) from military service during time of war forces non-objectors to serve in their place, but that such exemptions would in no way cause a violation of the establishment clause. Certainly, Hardison's desire to be excused from work one day a week at the expense of his fellow employees could not, in Marshall's opinion, be as radical a proposal as being excused from combat duty at the expense of one's fellow citizens. Marshall also cited Gallagher v. Crown Kosher Market, which upheld a law prohibiting private citizens from engaging in certain activities within fixed distances from places of worship, to support his contention that the law often discriminates against private parties to uphold special religious interests.

One unpursued avenue of relief that Marshall mentioned, but surprisingly did not emphasize, was that TWA could have brought Hardison's problem before the Union Relief Committee after realizing that Hardison had made no attempt to do so himself. Marshall noted that the record indicated that the function of the Committee was to alleviate problems caused by the seniority system, and that it had at least on one occasion arranged for a permanent transfer outside the seniority system.

In his conclusion, Marshall called the decision a tragedy—not

100. Id. at 389-90.
102. 432 U.S. at 96 n.13. Although they seem impressive, these two cases do not supply the persuasive argument in favor of Hardison that Marshall hoped they would because the essential component that determined their outcome was lacking in Hardison's case. In Gillette v. United States, 401 U.S. 437 (1971), the Court indicated why it has respected the interests of conscientious objectors: it is for the "valid secular" reason that it is hopeless to try to transform such individuals into effective fighting men. Id. at 453. With regard to laws that restrict certain activities on Sundays, the Gallagher case revealed the judicial attitude by citing, at 630, McGowan v. Maryland, 366 U.S. 420, 450 (1961), which upheld Sunday closing laws because they serve the "legitimate secular interest" of the State, not to aid religion, but to provide one day a week for people to rest, recreate, and recuperate. In Hardison, there was a marked absence of a "valid secular" purpose behind § 701(j). It was the absence of such a purpose that led the Court to its refusal to enforce the statute.
103. 432 U.S. at 94 n.10.
104. Id.
merely because one employee had been deprived of his livelihood for following the dictates of his conscience, but because of the impact the case would have on "thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God."  

The Supreme Court in *Trans World Airlines, Inc. v. Hardison* nullified Section 701(j) of the Act, i.e., the duty to make "reasonable accommodations" short of "undue hardship," without finding it unconstitutional. The Court accomplished this by merely refusing to enforce the law. Paradoxical as this decision might at first appear to be, it is perhaps understandable. Mr. Justice Marshall, in his two-pronged examination of the statutory language and the legislative history, argued convincingly that the only way to reconcile the statute and the facts in Hardison's situation would have been to find that TWA had not attempted to meet its duty of accommodation, and that it should, therefore, be required to take steps to do so. Marshall, however, overlooked a crucial factor that the Court recognized: the duty to consider and weigh the competing equities. In Hardison's case, to apply a statute that called for accommodation on the part of the employer would have resulted in an accommodation by Hardison's fellow employees. Except for the payment of premium wages by TWA, none of the proposed accommodations would have had the slightest impact on the employer, but they would have been fundamentally unfair to the other employees. To erode the expectations of many blameless workers, whose rights were based solely on satisfactory and often long service, would have been to ignore the practical realities and necessities of the business world.

Another justification for the Court's refusal to permit TWA to violate the agreement with the union is historical. At one time, employers were free to ignore the interests of their employees, if they so chose. Subsequently, the emergence of a strong labor movement in

105. 432 U.S. at 96-97.
107. *See* text accompanying notes 66-73, *supra*.
108. 432 U.S. at 79-81.
109. *See* H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968), where the author notes in the introduction:

"Until the fourth decade of this century, American workers often fought government as well as employers in their efforts to unionize. While there were earlier beginnings, it was in the 1930's that government changed sides and began to foster
this country successfully raised the public's conscience regarding the inequality of bargaining power between labor and management. Congress' reaction to this situation was the passage of legislation\textsuperscript{110} which placed pre-eminence upon unionization and the collective-bargaining agreement. It is not inconceivable, therefore, that the Court in \textit{Hardison} chose not to undermine the integrity of the collective-bargaining agreement and its seniority system.

But how this decision came about is not as significant as how far it will extend. Indeed, its application is more universal than its narrow holding that a collective-bargaining agreement's seniority system is not required to yield to an accommodation of a particular employee's religious observances. As Marshall predicted, members of minority religions\textsuperscript{111} whose rights are unprotected by typical collective-bargaining agreements are in at least theoretical danger of losing their jobs.\textsuperscript{112} Even in the absence of a union contract governing work-scheduling at a business, an employee observing the dictates of his religion will be entitled to no accommodation by his employer if the employer merely speculates that to accommodate him would cause a minor morale problem among the other employees. The language of the decision, which is at total

\begin{quote}
collective bargaining as a method for solving such problems as . . . working conditions . . . and the psychological frustration of the modern worker. Since the thirties, collective bargaining has come to occupy a position at the center of national labor policy.
\end{quote}

Wellington further contends that the courts stalwartly blocked the tides of reform legislation favoring unionization and employee bargaining power, by citing \textit{Final Report of the Commission on Industrial Relations}, S. Doc. No. 415, 64th Cong., 1st Sess., 1, 38-61 (1916); F. Frankfurter & N. Greene, \textit{The Labor Injunction} (New York, Macmillan, 1930), note 29 at 52053 n.19: “The growth and development of unions and of collective-bargaining was wrongly impeded, the courts were rightly viewed as instruments of the employer class. . . .” H. Wellington at 26.


111. Senator Jennings Randolph, in introducing Section 2000e(j) as an amendment to the Civil Rights Act of 1964, stated:

There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force. . . . There are an additional 425,000 men and women in the work force who are Seventh-Day Adventists. There are . . . 5,000 individuals within [the Seventh-Day Baptists] . . . denomination in the work force.

118 Cong. Rec. 705 (1972). This enumeration, of course, represents only a partial estimation of the number of persons whose jobs can be adversely affected by the decision in \textit{Hardison}.

112. 432 U.S. at 96-97.
variance with the language of the statute, indicates that, at least in the area of religious needs, if the rights of the majority are even indirectly adversely affected, the rights of the minority must yield.\textsuperscript{113}

At a time when white males are filing reverse discrimination cases against minority-weighted admissions practices in law\textsuperscript{114} and medical\textsuperscript{115} schools and are questioning the right of women and racial minorities to receive improved job and educational opportunities which are not made available to white males—\textit{e.g.}, “affirmative action”—the \textit{Hardison} decision must not be overlooked. The basic issue in all these cases, which will ultimately mold our society, is the same issue that was decided in \textit{Hardison}: To what extent can the law be applied to give preference to the rights of a minority group member over the rights of the majority? \textit{Hardison} established that, absent a valid secular purpose supporting a statute designed to implement an individual’s religious freedom, the rights of the minority will be subordinated to the rights of the majority if the latter’s interests are affected. The reverse discrimination cases mentioned above do not, of course, deal with statutes that lack valid secular purpose\textsuperscript{116} and, in that sense, they can be distinguished from \textit{Hardison}. However, the rationale behind the \textit{Hardison} opinion demonstrates that the Court is sensitive to the plight of white males who claim that their validly earned expectations of success in the fields of higher education and employment are being thwarted by “affirmative action.” Their plight is not very different from that of Hardison’s fellow employees at TWA who had labored diligently to attain their position in the seniority hierarchy. How the Court will ultimately resolve the reverse discrimination cases remains to be seen, but it is evident that preferential treatment for minorities to the exclusion of the majority is not an attractive proposition in the eyes of an equity-minded Supreme Court.

\textit{Marilyn R. Schwartz}

\textsuperscript{113} \textit{See} note 102, \textit{supra}.
\textsuperscript{114} DeFunis v. Odegaard, 416 U.S. 312 (1974).
\textsuperscript{116} The purpose of the “affirmative action” programs is to accomplish the integration of minority groups into the working force, the professions, and society as a whole. \textit{See} 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977) (Tobriner, J., dissenting).
Constitutional Law: First Amendment Guarantees
Lawyers Limited Right to Advertise Fees:
Bates v. State Bar of Arizona

The Supreme Court’s ruling in the case of Bates v. State Bar of Arizona involved the right of two young attorneys with impressive academic credentials to advertise their legal services in a local newspaper. The attorneys had sought to create what they termed a “legal clinic” which was, in fact, a low-budgeted law office handling exclusively low-cost, non-litigable legal matters such as uncontested divorces, changes of name, and adoptions. Their objective was to provide such services to moderate-income clients for a comparatively low fee. By cultivating and reaching a high volume of clientele through advertising, the attor-

2. Attorney John R. Bates was named the outstanding student of his class by his law school faculty, and attorney Van O’Steen graduated cum laude. Both are graduates of the Arizona State University College of Law class of 1972. Id. at 2693 n.2.
3. Id. at 2694. The attorneys claimed in their advertisement that they provided “legal services at very reasonable fees,” and went on to list their services as including:

—Divorce or legal separation—uncontested
   (both spouses sign papers)
   $175.00 plus $20.00 court filing fee

—Preparation of all court papers and instructions
   on how to do your own simple uncontested divorce
   $100.00

—Adoption—uncontested severance proceeding
   $225.00 plus approximately $10.00 publication cost

—Bankruptcy—non-business, no contested proceedings
   Individual—$250.00 plus $55.00 court filing fee
   Wife and Husband—$300.00 plus $110.00 court filing fee

—Change of name
   $95.00 plus $20.00 court filing fee.

Id. at 2710 app.
4. Id. at 2694.
5. Id.
ney could service their clients with a minimum amount of expense due to the lack of research and preparation required to fulfill their needs.6

The lawyers' advertisement appeared in the Arizona Republic newspaper on February 22, 1976, and included the quotation of fees for specified services.7 As a result, an action was brought against them by the President of the Arizona State Bar8 for violating the A.B.A. Code of Professional Responsibility Disciplinary Rule 2-101(B) as incorporated by Rule 29(a) of the Supreme Court of Arizona.9 It was the decision of the Special Local Committee, which originally heard the matter;10 of the Board of Governors of the State Bar, which reviewed the bar committee's action;11 and of the Arizona Supreme Court,12 that the attorneys were in violation of that rule.13 The attorneys petitioned for a writ of certiorari in the United States Supreme Court,14 which reversed the decision of the Arizona Supreme Court15 and HELD that the first amendment guarantee of freedom of speech precluded the State Bar from banning the appellants' limited type of legal advertising.16

6. Id.
7. Id.
8. Id. at 2695.
   A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.
10. At this hearing, pursuant to Arizona Supreme Court Rule 36, 17A Ariz. Rev. Stat. (West Cum. Supp. 1977-78), a three-member committee recommended that the attorneys be suspended from the practice of law for not less than six months. 97 S. Ct. at 2695.
13. Id. at 2695.
16. Id. at 2709.
Appellants' argument was based upon two contentions: (1) that the state court ruling violated the Sherman Act\textsuperscript{17} and (2) that the ruling infringed upon rights protected by the first amendment.\textsuperscript{18} The Court first considered, but rejected, the appellants' arguments—based on the Sherman Act—that they had a right to compete in the market place without undue governmental interference.\textsuperscript{19} In summarily dismissing this argument,\textsuperscript{20} the Court upheld the lower court's ruling that "[t]he regulation of the State Bar . . . is an activity of the [state] acting as sovereign,"\textsuperscript{21} and is therefore exempt from the Sherman Act.\textsuperscript{22} In support of its ruling the Court cited the case of \textit{Parker v. Brown},\textsuperscript{23} which held that the State of California could regulate competition among the state's raisin growers, as this regulation by the State, as sovereign, was a restraint "which the Sherman Act did not undertake to prohibit."\textsuperscript{24} In aligning itself with the \textit{Parker} holding, the Court distinguished the case before it from previous cases in which provisions of the Sherman Act were determined to have been violated by the state.\textsuperscript{25} Those cases

\begin{itemize}
\item\textsuperscript{17} Sherman Antitrust Act of 1890, §§ 1 & 2, 15 U.S.C. §§ 1 & 2 (1976).
\item\textsuperscript{18} 97 S. Ct. at 2695, 2698.
\item\textsuperscript{19} Sections 1 & 2 of the Sherman Act provide:
\item \textsuperscript{\small § 1} Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
\item \textsuperscript{\small § 2} Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
\item Sherman Antitrust Act, \textit{supra} note 17.
\item\textsuperscript{20} 97 S. Ct. at 2696-98. The Court was in fact unanimous in its ruling on this aspect of the case, as all the dissenting opinions were directed at other issues. \textit{Id.} at 2710 (Burger, C.J.); 2711-12 (Powell, Stewart, JJ.); 2719 (Rehnquist, J.).
\item\textsuperscript{21} Matter of Bates, 113 Ariz. 394, ———, 555 P.2d 640, 643 (1976).
\item\textsuperscript{22} 97 S. Ct. at 2698.
\item\textsuperscript{23} 317 U.S. 341 (1943).
\item\textsuperscript{24} \textit{Id.} at 352.
\item\textsuperscript{25} 97 S. Ct. at 2696.
\end{itemize}
involved either outright "price fixing" by the state or instances where the state had no "independent regulatory interest" in the matters affected by state regulation; i.e., the measures taken had not been based upon correcting "flaws in the competitive market," nor did they arise out of concerns about public health or safety.27

Turning to the only other argument of the appellants, the Court, through the majority opinion of Mr. Justice Blackmun, ruled that the attorneys' rights of free speech under the first amendment were preeminent over the constraints imposed on them by the State Bar's Disciplinary Rule.28 In so ruling, the Court analogized the present case to that of another, Virginia Pharmacy Board v. Virginia Consumer Council, involving the right of a pharmacist to advertise the price of prescription drugs.29 The Court recalled that in Virginia Pharmacy it had ruled that the first amendment guaranteed the pharmacist the right to advertise his wares, even though the advertisement had not reported "any particularly newsworthy fact" or commented upon "any cultural, philosophical or political subject."30 Such speech was deemed to be commercial in that its sole purpose was to attract business.31 The Court then cited a list of its prior analogous decisions holding this type of speech to be protected.32 It continued that "such speech should not be withdrawn

26. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), involved a minimum fee schedule for attorneys that was enforced by the State Bar.
27. 97 S. Ct. at 2697. The case involved is Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), in which defendant, a private electric utility regulated by a state agency, distributed light bulbs to its customers as part of its service. The Court held that the mere fact that a state regulatory agency approved of such practice did not provide "a sufficient basis for implying an exemption from the federal antitrust laws for that program." Id. at 592-93, 598.
28. 97 S. Ct. at 2698-709 (full discussion of first amendment claims).
30. 97 S. Ct. at 2698. The pharmacist had been accused of "unprofessional conduct" in violation of a Virginia statute. Id.
31. Id.
32. Id.
33. Id. Buckley v. Valeo, 424 U.S. 1 (1976) (Court struck down, on the basis of the first amendment, the portion of the Federal Election Campaign Act of 1971, as amended in 1974, which imposed a ceiling on expenditures by political candidates); New York Times v. Sullivan, 376 U.S. 254 (1964) (Court held, inter alia, that an expression did not lose constitutional protection, under the first amendment, because it appeared in the form of a paid advertisement); Smith v. California, 361 U.S. 147 (1959) (Court struck down a city ordinance which made a bookstore owner absolutely criminally liable for possessing material which was judicially determined to be obscene; the statute was held to violate the freedom of the press as guaranteed by the fourteenth amendment);
from protection merely because it proposed a mundane commercial transaction."

Aside from the right of the speaker to advertise for purely commercial purposes, the Court also found a concurrent first amendment right on the part of the public to be informed. Just as with the pharmaceutical regulation statute contained in Virginia Pharmacy, the Court found that the Arizona disciplinary rule "serves to inhibit the free flow of commercial information and to keep the public in ignorance." By upholding the right of the public to know, in addition to that of the lawyer to inform, the Court effectively disarmed the Bar's argument that the ban on lawyer advertising protected both the interests of the public and the image of the legal profession. The Bar contended that the public would lose respect for the legal profession, because if advertising were permitted the profession would appear over-commercialized. The Court responded that the appellants were accomplishing the desire of the American Bar Association that attorneys should discuss fee arrangements with clients as a first order of business. The Court added that since neither bankers nor engineers have suffered any discernible loss of dignity as a result of price advertising, there seemed to be no valid reason why the legal profession should suffer. Moreover, the Court held that to "condemn the candid revelation of the same information" by an attorney to a prospective client before he enters his office that he would be ethically bound to give him afterwards is equally invalid. Indeed, the Court expressed the view that the lack of information on the part of the public as to legal fees may actually deter people from

Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ordinance was struck down which required Jehovah's Witnesses to procure a city license before they could solicit people to purchase religious books and pamphlets); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute struck down which required a prior determination by the secretary of the public welfare council that people seeking to solicit support for their cause were truly representing a religious cause).

34. 97 S. Ct. at 2699.
35. Id.
36. Id. at 2700.
37. 97 S. Ct. at 2701.
38. Id. The Court stated: "[T]he American Bar Association advises that an attorney should reach 'a clear agreement with his client as to the basis of the fee charges to be made,' and that this is to be done '[a]s soon as feasible after a lawyer has been employed.' Code of Professional Responsibility, EC 2-19 (1976)."
39. 97 S. Ct. at 2701-2.
40. Id. at 2701.
seeking legal assistance out of fear that an exhorbitant fee will be extracted from them.\textsuperscript{41}

As to the Bar's contention that the advertising of a fee is misleading because fees are determined by the particular facts of each client's case, the Court held that those services advertised by the appellants were all routine matters and, therefore, subject to a set fee schedule which could be honestly advertised prior to individual consultation with a client.\textsuperscript{42} The Bar also argued that advertising would not advance the role of the attorney as a diagnostician;\textsuperscript{43} that it would leave potential customers with a less than complete picture from which to choose a lawyer;\textsuperscript{44} and that it would stir up fraudulent claims.\textsuperscript{45} The Court, however, thought that the benefits of advertising outweighed whatever merit these arguments contained. It concluded that permitting a limited type of advertising, such as that put out by Bates and O'Steen, would serve to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.\textsuperscript{46}"

Ironically, the Court took these very words directly from the American Bar Association's Code of Professional Responsibility.\textsuperscript{47}

The Court also rejected the argument of the Bar that overhead expenses will necessarily rise to cover the added costs of advertising, resulting in higher legal fees for the consumer.\textsuperscript{48} Instead, the Court opted for the counter-argument that a healthy competition for clients, increased by advertising fees, will probably lower legal fees and provide the public with the opportunity to compare advertised prices.\textsuperscript{49}

Regarding a possible second consequence of the added costs of advertising, the Court also disagreed with the argument that new attorneys would have an economically difficult time penetrating the estab-

\textsuperscript{41} Id. at 2702. The Court then referred to a footnote in a report which found that middle-class consumers have overestimated lawyers' fees for drawing up a simple will by 91%, for reading and advising on a two-page installment sales contract by 340%, and for a thirty-minute consultation by 123%. Id. at n.22.

\textsuperscript{42} Id. at 2703. The Court noted that the Arizona Bar itself sponsored a Legal Services Program in which participating attorneys performed services like those advertised by Bates and O'Steen at standardized rates. Id.

\textsuperscript{43} Id. at 2704.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 2704-5.

\textsuperscript{46} Id. at 2705.

\textsuperscript{47} EC 2-1 (1976).

\textsuperscript{48} 97 S. Ct. at 2705-6.

\textsuperscript{49} Id. at 2706.
lished market. The Court said, in fact, that advertising would probably serve to aid young lawyers who are seeking to make themselves known in the market place.\(^{50}\)

Finally, the Court considered and rejected arguments that the quality of legal services would decline\(^{51}\) and that enforcement difficulties would increase if any relaxation of the present advertising ban were allowed.\(^{52}\) The Court stated that “[r]estraints on advertising . . . are an ineffective way of deterring shoddy work.”\(^{53}\) The Court refuted the Bar’s argument that “an attorney who advertises a standard fee will cut quality” by pointing out that the Bar itself had set standard fee schedules in its own Legal Services Program.\(^{54}\) As to the enforcement problems, the Court indicated that it was confident most lawyers would continue to conduct themselves honorably.\(^{55}\) For those who did not, the Court felt that the desire of the members of the legal profession, as a whole, to preserve their good name would cause them to join together in “weeding out those few who abuse their trust.”\(^{56}\)

Understandably, the Court sought to base its decision on the narrowest possible ground and to preserve partially the State Bar’s goal of preventing the defrauding of the public and the concomitant degradation of the legal profession. It was, therefore, carefully pointed out in the opinion that misstatements of fact, or deceptively-worded advertise-

\(^{50}\) Id. The Court compared the plight of a new attorney who would have to pay some additional advertisement costs to that of an attorney who would have to rely on the more traditional methods, such as contacts and social connections. It found that a ban on advertising would serve “to perpetuate the market position of established attorneys. Consideration of [market place] entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.” Id. The Court did not consider, on the other hand, the potentially negative impact of advertising upon those new attorneys who each year seek clerkships with established firms. Such positions, as a result of increased costs due to advertising, could become a luxury that law firms can no longer so easily afford.

\(^{51}\) Id. The Bar argued that advertising would cause the offering of a legal “package” at a set price, and that lawyers would “be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client’s needs.” Id.

\(^{52}\) Id. The Bar claimed that a public which “lacks sophistication in legal matters . . . may be particularly susceptible to misleading or deceptive advertising by lawyers.” It feared that no regulatory agency would be able to shoulder the burden of monitoring the advertised services and comparing them to those actually rendered. Id. at 2706-7.

\(^{53}\) Id. at 2706.

\(^{54}\) Id.

\(^{55}\) Id. at 2707.

\(^{56}\) Id.
ments, could in no way be sanctioned by the Court's ruling.\textsuperscript{57} As the Court concluded:

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.\textsuperscript{58}

In separate dissenting opinions, both Mr. Chief Justice Burger and Mr. Justice Powell\textsuperscript{59} agreed that the price of certain routine legal matters may safely be advertised without foreseeable detriment. Nevertheless, they found that the majority had failed to define adequately what type of legal services could be considered routine. Specifically, the Chief Justice took the majority to task for failing to acknowledge that an uncontested divorce, which was one of the advertised items involved in this case, could easily cost a great deal more than the $195 ($175 fee plus $20 court cost) claimed by the attorneys-appellants in their newspaper advertisement.\textsuperscript{60} As the Chief Justice explained, the cost of a divorce could vary drastically depending upon whether alimony, child support, or a property settlement were involved.\textsuperscript{61} For this reason, Mr. Chief Justice Burger found that the task of enforcing the ruling of the Court permitting certain unspecified types of legal advertising is an impossible one to perform.\textsuperscript{62} As a corrective measure, the Chief Justice would have required qualifying statements in legal advertisements to the effect that fees for such non-litigable matters could vary over a broad range, depending upon individual circumstances, so as to "insure that the expectations of clients are not unduly inflated."\textsuperscript{63}

The dissent of Mr. Justice Powell echoed the Chief Justice's concern that the parameters of legitimate legal advertising, based on routineness, were ambiguous and arbitrary. Mr. Justice Powell felt that if lawyers were to be allowed to advertise their services and prices, "the

\textsuperscript{57} Id. at 2709.
\textsuperscript{58} Id.
\textsuperscript{59} The latter was joined in his opinion by Mr. Justice Stewart.
\textsuperscript{60} 97 S. Ct. at 2710.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 2711.
\textsuperscript{63} Id.
public interest [would] require the most particularized regulation." He hinted at the danger that attorneys would view the decision as conferring a license to wage a potentially deceiving campaign for clients. He envisioned that the majority's opinion would result in lawyers using such adjectives as "fair," "moderate," "low-cost," or "lowest in town." He also feared that the Court's failure to pronounce more definitive guidelines would unduly inhibit states from carrying out their proper function of regulating legal advertising.

Nor did Mr. Justice Powell agree with the Court's primary assumption that the Arizona disciplinary rule and rules similar to it from other states are inconsistent with first amendment guarantees. He distinguished away the Court's finding in *Virginia Pharmacy*, as did the Chief Justice, that the ban on advertising of a pharmaceutical product is unconstitutional. The distinction between pharmaceutical products and legal services is significant to Mr. Justice Powell for two reasons: first, there is a greater risk of deception in the selling of a service; and, second, there is a much greater difficulty in monitoring and regulating the sale of a service which is required by the public interest.

The proposition that there is no constitutional right to advertise a legal service was picked up by Mr. Justice Rehnquist in his separate dissent, in which he described the free-speech provision of the first amendment as "a sanctuary for expressions of public importance or intellectual interest." Not even the advertisement of goods should be included in its protection, let alone that of services, according to Mr. Justice Rehnquist, for to invoke the first amendment on those grounds is to demean its very importance. He considered the majority opinion in the instant case, following *Virginia Pharmacy* by only a year, as a further step down a "slippery slope," which he viewed as threatening dire consequences for the sanctity of the first amendment itself.

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64. *Id.* at 2718.

65. *Id.* at 2715. Mr. Justice Powell wrote: "The Court seriously understates the difficulties, and overestimates the capabilities of the Bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful." *Id.* at 2715 (emphasis added).

66. *Id.* at 2712-13.

67. *Id.* at 2713.

68. *Id.* at 2719.

69. *Id.*

70. *Id.* at 2719-20.
This is, of course, in direct opposition to the majority view that *Virginia Pharmacy* is controlling. Although a distinction can be made on the grounds that *Virginia Pharmacy* involved the sale of goods and the instant case the sale of services, the Court held the distinction to be superficial, in view of the fact that the services in question were routine and readily identifiable. The Court, taking the stance that routine legal services can be freely advertised in the market place, apparently perceives that they can be judged and evaluated by the consuming public as easily as can a tangible product, with the result that inaccurate or misleading statements will be discovered and dealt with accordingly.

In an effort to carry out the subtle mandate of the Court, the House of Delegates of the American Bar Association has adopted a recommendation to allow radio and print advertising of twenty-five enumerated facts which pertain to an attorney's professional back-

71. *Id.* at 2703.

72. *Id.* at 2699. The Court reviewed its opinion in *Virginia Pharmacy*, where it had closely examined the question as to whether a state necessarily furthers its goal of maintaining high professional standards by prohibiting advertising. It found a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."


73. 97 S. Ct. at 2709.


75. 46 U.S.L.W. 5 (Aug. 23, 1977). Those facts which may be advertised in a "dignified manner" under DR 2-101 are (Proposal A):

1. Name, including name of law firm and names of professional associates; addresses and telephone numbers;
2. One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
3. Date and place of birth;
4. Date and place of admission to the bar of state and federal courts;
5. Schools attended, with dates of graduation, degrees and other scholastic distinctions;
6. Public or quasi-public offices;
7. Military service;
8. Legal authorships;
9. Legal teaching position;
ground and current legal practices. The ABA points out that it is improper for an attorney to imply through advertising that "the ingenuity or prior record of a lawyer rather than the justice of the claim are the

(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for an initial consultation;
(21) Availability upon request for a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR2-106(C) provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information:

1. The agency having jurisdiction under state law may desire to issue appropriate guidelines defining "specific legal services."

_Id_.

John H. Shenefield, assistant attorney general for the Antitrust Division in the Department of Justice, however, has called these recommendations "narrow changes" which "fail to meet the needs of the public and the dictates of the Supreme Court." He has described the Bar's response to _Bates_ as one of "fatuous debate, endless word games, and glacial change." 63 A.B.A. J. 1703 (Dec. 1977).
principal factors likely to determine the result."76 Nor may the attorney advertise as a specialist in fields other than admiralty, trademark, and patent law where, the ABA contends, "holding out as a specialist historically has been permitted."77

Although permitting radio broadcasts after a thorough screening by the attorney, the ABA does not intend to make any change in its Code of Professional Responsibility's ban against television advertising.78 Of course the Bar is under no obligation to make any such change, as the Court's ruling considered only newspaper advertising. This is further evidence that the ABA will revise its Code only to the extent absolutely necessary to comply with the Court's ruling.

Despite these attempts to establish guidelines, it remains to be seen whether the Court is correct in its assumption that so-called routine legal services can be advertised at a particular price without misleading the public and without further eroding public confidence in the legal profession. If the minority is correct, and there is no effective way to regulate the advertisement of legal fee requirements, due to the myriad of unforeseeable factors involved in every legal transaction, then a damaging blow will have been dealt to the profession at a time when it has already suffered a marked decline in public approbation. On the other hand, if the practitioners in the profession accept their new-found liberty responsibly, it is entirely possible that the legal community will be greatly benefited. This will result not only in increased public esteem for lawyers, but—more important—in greater opportunities to provide better and more diversified legal services to the American public.

Gary E. Guy

77. Id. at 5. See also DR 2-105, 46 U.S.L.W. at 7.
78. 46 U.S.L.W. 2 (Aug. 23, 1977). The stated reason for this ABA policy is that "[t]he problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media." Id. at 3. However, the new code provisions go on to state that "[i]f the interests of laypersons in receiving relevant lawyer advertising are not adequately secured by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest." Id.

On May 8, 1973, Amtrack officials in San Diego observed Gregory Machado and Bridget Leary loading a brown footlocker onto a Boston-bound train. The trunk was unusually heavy and leaking talcum powder, a substance often used to disguise the odors of marihuana and hashish. Their suspicions aroused, the railroad officials reported the circumstances to federal authorities who in turn relayed the information to their counterparts in Boston. Two days later, when the train reached Boston, federal narcotics agents were waiting at the station. While they had not obtained arrest or search warrants, they had with them a police dog trained to detect marihuana. The agents released the dog near the footlocker and, without alerting Machado and Leary, the dog signaled the presence of a controlled substance inside. Joseph Chadwick then joined Machado and Leary and they moved the footlocker into the


2. Agents also sent detailed personal descriptions of the two suspects and the footlocker. 97 S. Ct. at 2479.

3. Id. The courts are unsure as to whether the use of a canine's olfactory sense constitutes a search. In United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), a canine was used to detect marihuana in defendant's suitcase at an airline terminal. The Second Circuit held that the canine's "sniffing, nipping and biting at the defendant's luggage" did not constitute a search. Id. at 461. A California case, United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975), rev'd, 536 F.2d 880 (9th Cir. 1976), originally held the use of a canine to be a search, but was reversed by the Ninth Circuit. The cases purport to speak to the reasonableness of the defendants' expectations of privacy, i.e., whether the defendants had taken steps to protect their privacy, and also the degree of intrusion involved by the use of the canine. See generally Comment, 42 Mo. L. REV. 331 (1977); Note, Constitutional Limitations on the Use of Canines to Detect Evidence of Crime, 44 FORDHAM L. REV. 973 (1976).
trunk of Chadwick's waiting automobile. While the trunk of the car was still open and before the car engine had been started, the officers arrested all three.

Chadwick, Machado, and Leary, together with the footlocker and car, were taken to the federal building. One and one-half hours after the arrests, the agents opened the footlocker and found in it a large quantity of marihuana. The three suspects were subsequently charged in a two-count indictment with possessing marihuana with intent to distribute, and with conspiring to possess with intent to distribute. Prior to their trial, the defendants moved to suppress evidence of marihuana seized from the footlocker. After an evidentiary hearing, the district court ruled in the defendants' favor. It later reaffirmed and amplified its ruling after hearing the Government's motion for reconsideration.

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4. 97 S. Ct. at 2479. The dissent noted that "[p]robable cause for the arrest was present from the time . . . the agents' dog signalled the presence of marihuana." Id. at 2489 (Blackmun, J., dissenting).

5. Id. at 2480. 21 U.S.C. § 841(a)(1)(1970) provides: "Except as authorized . . . it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

6. 97 S. Ct. at 2480. 21 U.S.C. § 846(1970) provides: "Any person who attempts or conspires to commit any offense . . . is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

7. 97 S. Ct. at 2480. Marihuana was also found in suitcases carried by the respondents. Id. at n.1. The federal authorities sought to justify the search of the locked suitcases as "inventory searches" according to established DEA procedure. United States v. Chadwick, 532 F.2d 773, 782-83 (1st Cir. 1976). The court of appeals suppressed the evidence, finding no justification for the warrantless suitcase search. Id. The petition for certiorari was framed only on the question of the footlocker search, i.e., whether a search warrant was required before federal agents could open a lawfully seized footlocker when there was probable cause to believe that the footlocker contained contraband. Therefore, the Court did not discuss the legality of Chadwick's arrest or the search of the suitcases. 97 S. Ct. at 2480 n.1.

8. United States v. Chadwick, 393 F. Supp. 763 (D. Mass. 1975), noting that "[w]arrantless searches are per se unreasonable, subject to a few carefully delineated and limited exceptions." Id. at 771. The court rejected the automobile exception analogy as well as the exception applicable to a search incident to an arrest, saying that the footlocker was not part of the area from which the respondents might gain possession of a weapon or destructible evidence. Id. at 771-75.

9. Id. at 773. "The Government's original opposition to defendant's motion to suppress the fruits of the footlocker search was based exclusively on the automobile exception to the search warrant requirement. (See [Id. at] 767-68). The Government now asserts that [the] search should be justified as one incident to arrest." Id. at 774.
A divided First Circuit Court of Appeals affirmed the suppression of the seized marihuana.\textsuperscript{10} While the court agreed that the agents had probable cause to believe that the footlocker contained a controlled substance, it held that probable cause alone was insufficient to sustain a warrantless search.\textsuperscript{11} On the premise that warrantless searches are per se unreasonable unless they fall within some established exception to the warrant requirement, the court of appeals agreed with the district court that the footlocker search was justified neither as an automobile search nor as a search incident to a lawful arrest.\textsuperscript{12}

The United States Supreme Court affirmed and HELD: (1) the warrant clause does not protect only dwellings and other specifically designated locales; (2) by placing personal effects inside a footlocker, the defendants manifested an expectation that the contents would remain private; (3) the footlocker's mobility did not justify the application of the warrant exception which applies in cases involving automobiles; and (4) a warrantless search of luggage or other property confiscated at the time of arrest cannot be based on the exception which applies to a search incident to an arrest if the search is remote in time or place from the arrest or if no exigency exists.\textsuperscript{13}

There is no constitutional rule under the fourth amendment more basic than that which makes a warrantless search unreasonable except in a few "jealously and carefully drawn" unique circumstances.\textsuperscript{14} The first clause of the fourth amendment requires that all searches and seizures—even without a warrant—be reasonable. Reasonableness

\textsuperscript{10} United States v. Chadwick, 532 F.2d 773 (1st Cir. 1976).
\textsuperscript{11} Id. at 778-82.
\textsuperscript{12} Id. at 782. The court of appeals conceded that personalty shared some characteristics of mobility which support warrantless automobile searches, but felt that a rule permitting a search of personalty on probable cause alone had not "received sufficient recognition by the Supreme Court outside the automobile area . . . for us to recognize it as a valid exception to the fourth amendment warrant requirement." Id. at 781.
\textsuperscript{13} 97 S. Ct. 2476.
\textsuperscript{14} The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. amend. IV.
implies a weighing of the interests presented in each case. The fourth amendment's second clause provides for the issuance of warrants only upon probable cause. The Supreme Court has rejected the argument that a law enforcement officer's own determination of probable cause to search a private place for contraband or evidence of a crime should excuse his failure to procure a warrant beforehand. Mr. Justice Jackson explained this principle in Johnson v. United States:

"Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers... When the right of privacy must reasonably yield to the right of a search is, as a rule, to be decided by a judicial officer, not by a policeman or a government agent."

While a warrant from a "neutral and detached" magistrate is preferred, there are a few well-recognized exceptions permitting warrantless intrusions where circumstances make it impossible or impractical to obtain a warrant. The Chadwick decision discusses several of these exceptions to the warrant requirement, but, more important, it generally traces the extensive history of search and seizure. The majority opinion can be readily divided into three areas: (1) the reasonable expectation of privacy; (2) the automobile exception; and (3) the search incident to an arrest analogy. The latter two areas are also directed to issues of privacy.

The Court first turned its attention to the question of whether the

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17. The Court has not attempted a definition of probable cause more precise than the one in Carroll v. United States, 267 U.S. 132, 161 (1925), where the standard was defined as "facts and circumstances... such as to warrant a man of [reasonable] prudence and caution in believing that the offense has been committed."
20. Id.
warrantless search of the footlocker was reasonable. The Government contended that the fourth amendment "protects only [those] interests traditionally identified with the home," and in this context, "the determination [of] whether a search or seizure is reasonable should turn on whether a warrant has been obtained." According to this argument, the Government asserted that seizures of personal effects outside the home, based on probable cause but without a warrant, are not "unreasonable." The Court disputed the Government's claim by noting language in *Katz v. United States:* "[T]he Fourth Amendment protects people, not places." Stating that the warrant clause does not protect only dwellings and other specifically designated locales, the Court wrote:

[T]he Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment which draws no distinctions among "persons, houses, papers, and effects" in guarding against unreasonable searches and seizures.

22. 97 S. Ct. at 2481.
23. *Id.*
24. 389 U.S. 347 (1967). The landmark case of *Katz* established the reasonable-expectation-of-privacy test to determine whether a particular intrusion comes within the fourth amendment. In *Katz*, the petitioner was convicted of transmitting wagering information by telephone across state lines. The conversations were overheard by FBI agents who had attached an electronic listening and recording device to the telephone booth from which the calls were made. The Court held that the Government's activities violated the petitioner's privacy and thus constituted a search and seizure within the meaning of the fourth amendment. *Id.* at 350-53. However, *Katz* stated that the fourth amendment could not be translated into a general constitutional right to privacy. While people, not places, are protected under the fourth amendment, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection." *Id.* at 351. "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.
25. 97 S. Ct. at 2481. The *Chadwick* Court accentuated the fact that the fourth amendment protects people from unreasonable governmental intrusions into their legitimate expectations of privacy and that the warrant clause contributes to that protection. *Id.* See Cardwell v. Lewis, 417 U.S. 583, 589 (1974), citing Jones v. United States, 357 U.S. 493, 498 (1958). No concise definition of "expectation of privacy" was offered, nor has the Court concretely defined it in the past. Long ago, the Court in Boyd v. United States, 116 U.S. 616, 635 (1886), did say that "constitutional provisions for the security of person and property should be liberally construed."
26. 97 S. Ct. at 2482.
Analysis of past decisions involving search and seizure situations reveals that "[t]he ultimate standard set forth is reasonableness." And in examining the fourth amendment, the Court has considered whether a search and seizure is reasonable under the circumstances. In *Camara v. Municipal Court* it stated: "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Further, "[t]he test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts." Justice Frankfurter wrote in his vigorous dissent in *United States v. Rabinowitz*:

To tear "unreasonable" from the content and history and purpose of the Fourth Amendment . . . is to disregard the reason to which reference must be made when a question arises under the Fourth Amendment. . . . The test by which searches and seizures must be judged is whether conduct is consonant with the aim of the Fourth Amendment. The main aim . . . is against invasion of the right of privacy to one's effects and papers without regard to the result of such invasion."

The Court in *Cady v. Dombrowski* said:

In construing this command [for reasonableness], there has been general agreement that "except in certain carefully defined classes of cases a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."  

29. 387 U.S. 523, 536-37. In *Camara*, the appellant was charged with violating the San Francisco Housing Code for refusing, after efforts to secure his consent, to allow a warrantless inspection of the ground-floor quarters which were used for residential purposes. The Court held that warrantless administrative searches cannot be justified on the grounds that they make demands on occupants; that warrants in such cases are unfeasible; or that area inspection programs could not function under reasonable search warrant requirements. The Court wrote: "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable public interest. . . . [R]easonableness is still the ultimate standard. . . . It [the warrant] merely gives full recognition to the competing government and private interests . . . and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy." *Id.* at 539.  
32. Cady v. Dombrowski, 413 U.S. at 439, quoting language from *Camara v.*
In this context, the Chadwick Court looked to the role of the judicial warrant and the safeguards that a neutral magistrate provides. The Court has always emphasized the preference for a warrant issued by a "neutral and detached" magistrate. It wrote in *McDonald v. United States*:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . The right of privacy was deemed to be too precious to entrust to the discretion of those whose job is the detection of crime and arrest of criminals. . .

In Chadwick, the Court stressed that the judicial warrant protections are effective whether applied in or out of the home. As such, judicial warrants have been required for searches in areas other than the home. These instances "reflect the settled constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home."

In recognizing that a citizen's privacy interests extend beyond the home, the Court pointed out that by placing their personal property inside a double-locked footlocker, the defendants had "manifested an expectation that the contents would remain free from public examina-
The Court wrote: "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause." Since the Government could find no exigency calling for an immediate search, the Court felt "it was unreasonable for the Government to conduct [the] search without the safeguards a judicial warrant provides."

While examining the warrantless search of the footlocker, the Court also looked at the issue of whether the warrantless search fit within one of the exceptions to the constitutional requirement of a warrant. The Court has held on numerous occasions that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," requiring "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."

In Chadwick the Government sought to justify the warrantless search of the footlocker under the so-called automobile exception and alternatively as a search incident to arrest. It argued that since the

39. 97 S. Ct. at 2483.
40. Id.
41. Id.
42. A search without a warrant can be justified if it meets the criteria of some exception to the warrant requirement: (1) hot pursuit or exigent circumstances; (2) plain view; (3) stop and frisk; (4) automobile search; (5) consent; and (6) search incident to lawful arrest. See note 21, supra.
46. 97 S. Ct. at 2483-84. The lower courts noted that there was no nexus between the search and the automobile, merely a coincidence. Both courts emphasized that the search was of a footlocker, not an automobile; and the search itself did not take place in the automobile. 393 F. Supp. at 772; 532 F.2d at 778. After finding no exigency that would justify the search based on the automobile exception requirement, the district court wrote: "To rule otherwise would be to establish a per se rule permitting a warrantless search any time an automobile was even remotely involved in an arrest." 393 F. Supp. at 773.
47. 97 S. Ct. at 2485. In dealing with the Government's argument that the footlocker could be searched as incident to arrest, both lower courts found that the 200-
vehicle itself could have been searched without a warrant, so could the footlocker, as it was "analogous to motor vehicles for Fourth Amendment purposes." The Government drew this analogy by arguing to the Court that both automobiles and footlockers are mobile "effects." The Government's other argument was that since "the footlocker was seized contemporaneously with the defendants' arrests and searched shortly thereafter, such a search should be viewed as falling within the exception of a search incident to arrest."

In examining the Government's two contentions, the Court first focused on the automobile exception analogy. The history of the automobile exception cases is intricate and extensive. Beginning with Carroll and the exigent circumstances of mobility, the Court has

pound footlocker could not be encompassed in the phrase "area within his immediate control." The courts pointed out that (1) the footlocker was not hand-carried luggage and (2) at the time of arrest the defendants had been handcuffed and surrounded by law enforcement officials. 393 F. Supp. at 775; 532 F.2d at 780.

48. 97 S. Ct. at 2484.
49. Id.
50. Id. at 2485.
51. The automobile exception is one of the six exceptions to the warrant requirement. See Note, Warrantless Searches and Seizures of Automobiles, 87 HARV. L. REV. 835 (1974).
52. The "automobile exception" was specifically established in 1925 in Carroll v. United States, 267 U.S. 132 (1925). In this case, George Carroll and John Kiro were stopped by federal prohibition agents on a road between Detroit and Grand Rapids, having been suspected of carrying contraband liquor. They had been seen traveling the same road before, and two of the agents had previously tried to buy liquor from the two suspects. Having stopped the car, the agents searched it and found bottles of gin and whiskey stashed inside the seats. The Court held that the "facts and circumstances within [the agents'] knowledge and of which they had reasonable trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." Id. at 162.
53. In Carroll, the moving car on an open highway created exigent circumstances justifying a warrantless search and seizure. Id. at 153. The "automobile exception" has since been well-delineated in Chambers v. Maroney, 399 U.S. 42 (1970) and Coolidge v. New Hampshire, 403 U.S. 443. Coolidge, citing Chambers, mentioned the established Carroll doctrine: exigent circumstances justify the warrantless search of an automobile stopped on the highway, where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." The Court emphasized that the "opportunity to search is fleeting." Id. at 460.

In Chambers, the Court seemed to expand Carroll by implying that potential mobility of the car was sufficient to create exigent circumstances. The petitioner was
continued to expand the area of automobile search and seizure in the recent cases involving state forfeiture statutes and automobile inventory situations.

arrested after the auto in which he was riding was stopped by the police shortly after the robbery of a service station. The car was driven to the police station and was later searched. The Court validated the search, saying that exigent circumstances existed because the car was readily movable. 399 U.S. at 51. Mr. Justice White claimed that “[t]he probable cause factor still obtained at the station house and so did the mobility of the car. . . .” Id. at 52.

In Coolidge, which also established the doctrine of plain view and the requirement of inadvertent discovery, the decision asserted that there had to be some real possibility of the car’s being moved in order for Carroll to apply. The Court wrote: “The word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.” 403 U.S. at 461-62. In Coolidge, the petitioner was being held in jail on a first-degree murder charge and his car, suspected of being an instrumentality of the crime, was parked in the driveway of his home. The Court felt that no amount of probable cause could justify a warrantless search or seizure in the absence of exigent circumstances. Since the petitioner had no access to his car and the police had ample opportunity to obtain a warrant, the seizure was held unconstitutional, as was the search of the car at the station house. Id. at 472-73. In this case, contraband, stolen goods, or objects dangerous in themselves were not involved.

54. In Cooper v. California, 386 U.S. 58 (1967), the Court held legitimate a search conducted long after any exigency had passed on the basis that the police had a possessory interest in the vehicle under a state forfeiture statute. The defendant was arrested for violation of narcotics laws, and his automobile was seized by police officers pursuant to a California statute authorizing any state officer making an arrest for a narcotics violation to seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal, transport, or facilitate the possession of narcotics. The vehicle was then to be held as evidence until a forfeiture had been declared or a release ordered. The Court held that in the particular circumstances involved, the police did not violate the fourth amendment by conducting a search of a car which they validly held for use as evidence in a forfeiture proceeding. Id. at 61-62.

55. In an inventory search, the contents of the car are thoroughly cataloged and criminal evidence is seized, if discovered, without a warrant. The police seek to justify their intrusion as based on a benign purpose, i.e., the protection of public safety, protection of the driver’s property, or the protection of the police from danger against theft. See Lawfulness of “Inventory Search” of Motor Vehicle Impounded by Police, 48 A.L.R. 3d 537 (1973); and Moylan, The Inventory Search of an Automobile: A Willing Suspension of Disbelief, 5 U. OF BALTIMORE L. REV. 203 (1976).

The Court held in Cady v. Dombrowski, 413 U.S. 433, that warrantless searches are permissible to “discharge community caretaking functions” and found the search of the car justified by reason of concern for the safety of the general public. Id. at 447-48.

In this case, the police arrested an off-duty policeman for drunken driving, after a late-night accident. The vehicle was towed to a private garage at the police’s direction, and the trunk was searched pursuant to standard procedures of that police department.
Throughout the automobile exception cases, the Court has drawn a distinction between automobiles, homes, and offices. Although automobiles are "effects" and thus within the reach of the fourth amendment, warrantless examinations have been upheld in circumstances where a search of a home or office would not be. The reason for this

While no probable cause existed to indicate that the vehicle contained fruits of a crime, the protective search was instituted because the local police were under the impression that the incapacitated Chicago police officer was required to carry his service revolver at all times; the police had reasonable ground to believe a weapon might be in the car and thus susceptible to vandals. In the process of the search, the police uncovered bloodstained objects which led to Dombrowski's conviction for murder.

The Court in South Dakota v. Opperman, 428 U.S. 364 (1976), divided 5-4 on the issue of whether an inventory of a car towed in for multiple parking violations was a search. The opinion indicated that even if the inventory was a search, it was reasonable. Id. at 376. The Court's determination of the reasonableness of the search was predicated on the assumption that inventories were standard procedure in the police community. Id.

In a concurring opinion, Mr. Justice Powell indicated that "routine inventories of automobiles intrude upon an area in which the private citizen has a 'reasonable expectation of privacy'; thus despite their benign purpose when conducted by government officials they constitute 'searches' for the purpose of the Fourth Amendment." Id. at 377 n.1.

In Opperman, the Court upheld the warrantless seizure of an item from an unlocked glove compartment. The search occurred while the police were inventorying the personal items in an automobile which they had impounded because it was illegally parked. The inventory was prompted by the presence of a number of valuables inside the car which were in plain view. The Court addressed itself only to the inventory of the unlocked glove compartment and did not deal with the question of inventorying locked or closed containers found in the vehicle. (This unsettled question came back to haunt the Court in the Chadwick decision. Mr. Justice Brennan briefly discusses it in the concurring opinion, 97 S. Ct. at 2486 n.1.) However, the reasoning applied by the majority and Mr. Justice Powell would permit inventories of locked or closed containers for security purposes if the vehicle was to be impounded for a significant period of time.


57. Cardwell v. Lewis, 417 U.S. 583, 589 (1974) (plurality opinion). See Cady v. Dombrowski, 413 U.S. at 439-40; Chambers v. Maroney, 399 U.S. 48. In Cooper v. California, 386 U.S. 58 (1967), the Court read Preston v. United States, 376 U.S. 364 (1964), as dealing primarily with a search incident to arrest and cited that case for the proposition that the mobility of a car may make the search of a car without a warrant reasonable "although the result might be the opposite in a search of a home, a store, or other fixed piece of property." 386 U.S. at 59.

In Cardwell, law enforcement officers interviewed the respondent in connection with a murder and viewed his automobile, which was thought to have been used in the commission of a crime. Several months later he was questioned again at the office of investigating authorities. At this time, he had parked his car at a nearby public commercial parking lot. After his arrest his car was impounded and later examined.
distinction is two-fold. First, the inherent mobility of automobiles creates exigent circumstances which, as a practical necessity, make strict adherence to the warrant requirement impossible.\textsuperscript{58} The Court has also sustained warrantless searches where no immediate danger existed that the car would be removed from the jurisdiction.\textsuperscript{59} Besides the exigency of mobility, other reasons exist to justify the application of less rigorous warrant requirements to automobile searches. For one thing, the expectation of privacy in a car is significantly less than in one's home or office.\textsuperscript{60} Automobiles, unlike homes, are subjected to governmental regulations such as licensing and inspections.\textsuperscript{61} In the interest of public safety and as part of what the Court has called "community care-taking functions," automobiles are frequently taken into police custody.\textsuperscript{62} Police will also remove and impound automobiles which violate parking ordinances, thereby jeopardizing both public safety and the efficient movement of traffic.\textsuperscript{63} The expectation of privacy is further diminished by the public nature of automobile travel.\textsuperscript{64} The Court noted in Cardwell

The warrantless search revealed that tire-prints taken from the scene of the crime and paint samples from the victim's car matched those found on respondent's car. While there was only a remote possibility of anyone's destroying the evidence or moving the car, the Court reasoned that the automobile was located in a "public place where access was not meaningfully restricted." 417 U.S. at 593, following Chambers but distinguishing Coolidge. Citing from Warden v. Hayden, 387 U.S. 294 (1967), the Court said that the primary object of the fourth amendment is the protection of privacy, but the search in this case, made on the basis of probable cause, infringed no expectation of privacy. 417 U.S. at 591-92.


60. Cardwell v. Lewis, 417 U.S. at 590-91.

61. "In Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), the Court held that a warrant was required to effect an unconsented administrative entry and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes." South Dakota v. Opperman, 428 U.S. at 367-68 n.2.


63. South Dakota v. Opperman, 428 U.S. 364. See Harris v. United States, 390 U.S. 234 (1968) (inventory situation), where the Court held that an intrusion was justifiable since it was "taken to protect the car while it was in police custody." \textit{Id.} at 236.

64. Cardwell v. Lewis, 417 U.S. at 591.
"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." 66

In the present case, the Court would not analogize luggage to motor vehicles, even though both automobiles and the footlocker could be termed "effects" under the fourth amendment. 67 In stating that a "person's expectations of privacy in personal luggage are substantially greater than in an automobile," 68 the Court distinguished between the diminished expectations of privacy in an automobile and the fact that luggage contents are not generally open to public view (except as a condition to border entry); nor is luggage required to be regularly inspected; and finally, luggage (unlike a car) is intended as a "repository of personal effects." 69

The Court also rejected the argument that by "analogy to the automobile exception" the footlocker's mobility justified dispensing with the need for a search warrant. 70 While the Court noted that the size

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65. 417 U.S. 583.
66. 97 S. Ct. at 2484.
67. Id. The Court would not broaden the moving vehicle exception to include other mobile chattels. It noted that automobiles are typically subject to wide regulation but that locked trunks are not.
68. 97 S. Ct. at 2484. In its reasoning, the Court cited to many "automobile exception" cases which illustrate the various factors and situations wherein the expectation of privacy in automobiles is diminished. However, the Court did not specifically analyze any particular case in relation to the situation presented in Chadwick.
69. "[The defendants'] principal privacy interest in the footlocker was of course not in the container itself, which was exposed to public view, but in its contents." Id. at 2485 n.8.
70. Id. at 2484. The First Circuit Court of Appeals examined the mobility of luggage and wrote: "Admittedly baggage or goods in transit present some of the same characteristics as automobiles." United States v. Chadwick, 532 F.2d at 781. The court of appeals noted that other circuits had liberalized luggage search rules, drawing heavily on the rationale underlying the automobile search exception in Chambers v. Maroney, 399 U.S. 42. Those courts would allow the warrantless search of luggage for contraband upon the individual officer's determination of probable cause. (The Chambers automobile search exception itself is of a somewhat broader character than other exceptions; it does not, for example, require an accompanying arrest.)

However, the First Circuit argued that Carroll and its progeny had not mentioned baggage as being comparable to vehicles and further noted that exceptions to the warrant rule are "specially established" and "well-delineated." 532 F.2d at 781.
and inherent mobility of a vehicle make it susceptible to theft or intrusion by vandals, it wrote in *Chadwick*:

>[O]nce the federal agents had seized it [the footlocker] at the railroad station and had safely transferred it to the Boston federal building under their exclusive control there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. . . . With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.72

Secondly, the Court examined whether the footlocker search in *Chadwick* could be viewed as being a search incident to arrest. A search incident to a custodial arrest has long been recognized as an exception to the warrant requirement.73 *Chimel v. California*,74 overruling the earlier decisions of *Harris v. United States*75 and *United States v.*

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71. 97 S. Ct. at 2484 n.7.
72. Id. at 2484-85. *See also* n.8, distinguishing *Chadwick* from *Chambers*.
73. Approval of a warrantless search incident to a lawful arrest seems to have been first articulated by the Court in 1914 as dictum in *Weeks v. United States*, 232 U.S. 383, 392 (1914). *Weeks* made no reference to any right to search the place where the arrest occurs, but was limited to a right to search the person.

In *Agnello v. United States*, 269 U.S. 20 (1925), citing to dicta in *Carroll* and *Weeks*, the Court wrote:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.


74. 395 U.S. 752 (1969). In *Chimel*, the petitioner was arrested at his home for the burglary of a coin shop. While the police had a valid arrest warrant, no search warrant had been issued. The officers looked through the three-bedroom house, directing Chimel’s wife to open drawers in the master bedroom and sewing room. After they completed the search they seized numerous items—primarily coins, but also medals, tokens, and other objects. The Court held that the scope of the search was unreasonable under the fourth and fourteenth amendments, as it “went far beyond petitioner’s person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him.” Id. at 768. *Chimel* pointed out that what is “reasonable” in a particular situation “must be viewed in the light of established fourth amendment principles.” Id. at 765.

75. 331 U.S. 145 (1947). Harris was arrested in his apartment, having allegedly been involved with the cashing and interstate transportation of a forged check. The
Rabinowitz, held that an arresting officer may search the arrested person and the area "within his immediate control"—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.

In Chimel the majority sought to establish guidelines for a search incident to an arrest. In doing so the Court used two previous decisions, Terry v. Ohio and a companion case, Sibron v. New York, conclud-

officers, in an attempt to recover two cancelled checks thought to have been used in effecting the forgery, undertook a thorough search of the apartment. In the course of the search, the officers found altered Selective Service documents, and Harris was later convicted for violating the Selective Service Act of 1940. The Court rejected Harris's fourth amendment claim, sustaining the search as "incident to arrest." Id. at 150-51.

76. 339 U.S. 56 (1950). This case introduced the "broad scope" search incident phase which replaced the "narrow scope" phase of Trupiano v. United States, 334 U.S. 699 (1948). The theory formerly espoused by the Court held that a search warrant must always be obtained, unless it was impractical to do so. Trupiano set forth the "necessity" rationale.

Rabinowitz was arrested at his office by federal authorities who had been informed that the defendant was dealing in stamps bearing forged overprints. At the time of the arrest the officers searched the desk, file cabinets, and safe in the office, seizing a large number of stamps with forged overprints. The Court held that the search in its entirety fell within the principle giving law enforcement authorities "[t]he right to search the place where the arrest is made in order to find and seize things connected with the crime. . . ." 339 U.S. at 61 (quoting Weeks, 232 U.S. at 392). According to the language of Rabinowitz, the ultimate fourth amendment test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Id. at 66. Chimel defined Rabinowitz as standing for the proposition that "a warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the possession or under the control of the person arrested." 395 U.S. at 760.

77. Id. at 762-63. The Court applied the basic rule that the "search incident to arrest" is an exception to the warrant requirement and that its scope must be strictly confined in terms of the "justifying" exigent circumstances. The exigency in question arises from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee.

78. 392 U.S. 1 (1968). In Terry, the Court upheld a protective "stop and search" of the petitioner where it was limited to a pat-down of the defendant's outer clothing. Id. at 29-30. Terry dealt with a permissible "frisk" incident to an investigative stop based on less than probable cause to arrest. A police officer stopped Terry and his companions because they had been behaving "suspiciously." The officer questioned the men and, believing them to be carrying weapons, engaged in a pat-down of their outer garments. The Court held that the search is reasonable if the officer concludes that the person may be armed and dangerous and that preventive action is necessary to protect himself and others. Under these conditions, the officer is entitled to conduct a carefully limited search of the outer clothing for weapons. Such a search is constitutionally privileged, even though the officer does not have probable cause to effect a search.
ing that a search incident to a custodial arrest must be related to the purpose for which the arrest was effected.\(^7\)

The *Chimel* opinion also addressed itself to the issue of contemporaneity,\(^8\) meaning the search should occur at the time and place of the arrest. The Court had previously discussed the contemporaneous requirement in *Preston v. United States*,\(^9\) where a parked car in which the defendants were arrested was later towed to the police garage and subsequently searched. There the Court noted that the justifications for a seizure in accordance with a search incident to an arrest are "absent where a search is remote in time or place from the arrest."\(^10\)

Several years after *Chimel*, the trend became somewhat different. As evidenced by the recent case of *United States v. Robinson*\(^11\) and its companion case, *Gustafson v. Florida*,\(^12\) the Burger Court seems to have retreated from *Chimel*. In the *Gustafson* and *Robinson* cases, illegal drugs were seized during a full search of the defendants following an arrest for a traffic violation.\(^13\) These two cases seemed to reduce the requirements for a search incident to an arrest.

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\(^7\) 392 U.S. 40 (1968). In *Sibron*, the Court invalidated a seizure of heroin resulting from a police officer's going beyond an exterior pat-down and thrusting his hand into defendant's pocket when the officer had no probable cause to arrest and no reason to believe defendant was armed and dangerous. *Id.* at 63-65.

\(^8\) The *Chimel* Court wrote: "Only last term in *Terry v. Ohio* . . . we emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure' . . . and that 'the scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" 395 U.S. at 762.

\(^9\) 395 U.S. at 764.


\(^11\) *Id.* at 367. In the same term as *Preston*, the Court noted in *Stoner v. California*, 376 U.S. 483, *reh. denied*, 377 U.S. 940 (1964), that "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." 376 U.S. at 486.

\(^12\) 414 U.S. 218 (1973).


\(^14\) In *Robinson*, a police officer, having probable cause to arrest the respondent for driving while his license was revoked (as a result of his having previously checked respondent's operator permit, made a full custodial arrest). In the pat-down search of defendant's body, the officer found a crumpled cigarette package containing heroin in his coat pocket.

In *Gustafson*, the defendant, driving a car with out-of-state license tags, was observed by a policeman on a routine patrol. It appeared to the officer that the car was weaving back and forth across the center lines of the road. After being stopped, the petitioner could not produce his driver's license, explaining that he was a college student and that his license was in his dormitory room. The officer took the petitioner into...
Terry rationale that a search must be related to the circumstances surrounding the arrest, since the searches in Gustafson and Robinson were unrelated to the circumstances of the arrests, and the officers had no reason to believe the defendants were armed and dangerous. The Court in Robinson relied upon a "reasonableness test," not unlike the one used earlier in the Rabinowitz decision, and found that a custodial arrest is a "reasonable intrusion under the Fourth Amendment [and] that intrusion being lawful, a search incident to the arrest requires no additional justification."

The Court again broadened the scope of the search-incident exception in United States v. Edwards, where it loosely interpreted the requirement that a search and seizure be contemporaneous with the arrest. In Edwards the clothing worn by the defendant was seized ten hours after his arrest and incarceration. Mr. Justice White, writing for the majority, said that "[a] reasonable delay in effectuating [the seizure] does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention."

In Chadwick, the Government argued that the Constitution permits a warrantless search of any property in the possession of a person arrested in public as long as there is probable cause to believe that the property contains contraband or evidence of a crime. The Court rejected this argument by finding no exigencies which would have justified custody for further questioning and engaged in a pat-down search of the defendant, placing his hand inside the defendant's belt and pockets. A cigarette box containing marihuana was found in the petitioner's left front coat pocket.

87. 414 U.S. at 228; 414 U.S. at 264.
89. 414 U.S. at 235. Mr. Justice Rehnquist stated:
   It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under the Amendment.
91. The defendant was arrested and charged with the attempted breaking and entering of a United States Post Office. He and a companion were seen walking near the Post Office after police had been notified that a secret alarm had been activated. Edwards was arrested, and ten hours after his incarceration his clothes were seized without a warrant and paint chips were found on the clothing which matched those samples taken from the Post Office.
92. 415 U.S. at 805.
93. 97 S. Ct. at 2485.
an immediate search. Chief Justice Burger, writing for the Court, distin-
guished searches incident to an arrest (as in custodial arrest) and those
searches where items are seized contemporaneously with the arrest.\textsuperscript{94}
Referring to Robinson and Terry, the majority opinion stated: "The
potential dangers lurking in all custodial arrests make warrantless
searches of items within the 'immediate control' area reasonable with-
out requiring the arresting officer to calculate the probability that weap-
ons or destructible evidence may be involved."\textsuperscript{95}

The Court pointed out that the situation in Chadwick was different
from that of Robinson and Terry. Since the luggage was in the exclusive
control of the law enforcement officers and no danger existed that the
arrestee might gain access to the property to seize a weapon or destroy
evidence, a search of that property was no longer incident to the arrest.\textsuperscript{96}
Expanding its reasoning further, the Court cited Preston v. United
States\textsuperscript{97} and said: "Warrantless searches of luggage or other property
seized at time of an arrest cannot be justified as incident to that arrest
either if the 'search is remote in time or place from the arrest.'\textsuperscript{98}

The Court emphasized the fact in Chadwick that the search was
conducted more than an hour after the agents had gained exclusive
control of the footlocker.\textsuperscript{99} As a consequence, the Court could not view
the search "as incidental to the arrest or as justified by any other exi-
gency."\textsuperscript{100} Because there was no exigency which would have supported
the need for an immediate search, the Court reasoned that the defend-
ants were entitled to the protection of the warrant clause.\textsuperscript{101} In conclu-
sion, the Court said that in this case an evaluation by a neutral magis-
trate was needed before the defendants' privacy interests in the contents
of the footlocker could be invaded.\textsuperscript{102}

\textsuperscript{94} Id.
\textsuperscript{95} Id. at 2485. The Court mentioned justifications for a warrantless search of
luggage taken from a suspect at the time of his arrest; for example, if the officers have
reason to believe that the luggage contains some immediately dangerous instrumentality
such as explosives. Id. at 2485 n.9.
\textsuperscript{96} Id. at 2485.
\textsuperscript{97} 376 U.S. at 367.
\textsuperscript{98} 97 S. Ct. at 2485.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 2485-86.
\textsuperscript{101} Id.
\textsuperscript{102} Id. The Court distinguished searches of possessions within an arrestee's
immediate control and searches of the person. The Court said that the defendants' expec-
tation of privacy in possessions (contents of the footlocker) was not reduced or
The dissenting members, applying the rationale of the warrant exceptions concerning automobiles and searches incident to custodial arrests, would hold generally that "a [search] warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place." The dissent distinguished Camara v. Municipal Court and United States v. Watson by saying: "A search warrant serves additional functions where an arrest takes place in a home or office. . . . But a warrant would serve none of these functions where the arrest takes place in a public area and the authorities are admittedly empowered to seize the objects in question."

The dissent then suggested that a clear-cut rule be adopted permitting property (seized in conjunction with a valid arrest in a public place) to be searched without a warrant.

While the dissenting members agreed with the majority in their discussion of the privacy interest generally, they were critical of the opinion's failure to define explicitly the narrow line between searches of possessions and searches of the person in relation to expectations of privacy. As a possible limitation to the impact of the decision, the dissent pointed out that other doctrines are frequently available to sustain warrantless searches of objects in police custody.

103. Mr. Justice Blackmun, with whom Mr. Justice Rehnquist joined, dissenting.
104. 97 S. Ct. at 2487. The dissent relies particularly on United States v. Robinson (no warrant is required for the arresting officer to search the clothing and effects of one placed in custodial arrest); and United States v. Edwards (search of personal effects need not be contemporaneous with the arrest). The dissent also paid close attention to the cases where a car may be impounded and, with probable cause, the contents (including locked compartments) may be examined without a warrant. See, e.g., Cady v. Dombrowski, 413 U.S. at 439-48; Chambers v. Maroney, 399 U.S. at 47-52; Texas v. White, 423 U.S. 67 (1975). See also South Dakota v. Opperman, 428 U.S. 364 (1976) (police may follow standard procedures of inventorying contents of an impounded vehicle without any showing of probable cause).
105. 387 U.S. 523.
106. 423 U.S. 411.
107. 97 S. Ct. at 2488 n.1.
108. Id. at 2489.
109. Id. at 2488.
110. Id.
111. Id. at 2488-89. The dissent speaks of the routine inventory established by South Dakota v. Opperman, and also of instances where the impounded object has dangerous contents. Id. at 2485 n.9. Citing to Warden v. Hayden, 387 U.S. 294, 298-300 ("hot pursuit" exception case), the Court wrote: "[E]xigent circumstances may often justify an immediate search of property seized in conjunction with an arrest, in
Part II of the dissenting opinion suggested a number of alternative courses of action that the agents could have followed without violating the Constitution. For example, if the agents had waited until the respondents started driving away before seizing the car, all of its contents could have been searched without a warrant under the automobile exception. "Alternatively, [the dissent said that] the agents could have made a search of the footlocker at the time and place of the arrests, [since] Machado and Leary were standing next to an open automobile trunk containing the footlocker, and thus it was within the area of 'their immediate control.'"

The concurring opinion, written by Mr. Justice Brennan to comment on the two points made by Mr. Justice Blackmun's dissent, stated: "In my view, it is not at all obvious that the agents could legally have searched the footlocker had they seized it after [the defendants] had driven away with it in their car or 'at the time and place of the arrests.'"

Mr. Justice Brennan argued that it is not clear that "the contents of locked containers found inside a car are subject to search under [the automobile] exception." Secondly, he wrote: "I would think that the footlocker in this case hardly was 'within [defendants'] immediate control'—construing that phrase to mean the area from within which they might gain possession of a weapon or destructible evidence."

order to facilitate the apprehension of confederates or the termination of continuing criminal activity." 97 S. Ct. at 2489.

112. Id. at 2489-90. No decision of the Court is cited directly to support these conclusions; but the dissent does cite some decisions from the courts of appeals.

113. Id. at 2489. The dissent relies on the fact that "[the scope of the 'automobile search' exception extends to the contents of locked compartments, including glove compartments and trunks. . . . The courts of appeals have construed this doctrine to include briefcases, suitcases and footlockers inside automobiles." 97 S. Ct. at 2489 n.4.

114. Id. at 2489-90. Here, the dissent gathers its argument from several viewpoints. First, Draper v. United States, 358 U.S. 307, 310-11 (1959) emphasized the established principle that an immediate search of packages or luggage carried by the arrested person is proper. Such searches have been sustained by the courts of appeals, even if they occurred after the arrested person has been handcuffed. Finally, searches under Chimel have also been upheld when a suitcase or briefcase was nearby, but not touching the arrested person. 97 S. Ct. at 2490 n.5. See United States v. French, 545 F.2d 1021 (5th Cir. 1977) (suitcase within arm's length); United States v. Frick, 490 F.2d 666 (5th Cir. 1973), cert. denied, 419 U.S. 831 (1974) (briefcase lying on seat of automobile next to which person was arrested).

115. 97 S. Ct. at 2486 (Brennan, J., concurring).

116. Id. at n.1.

117. Id. at n.2, citing from Chimel v. California, 395 U.S. at 763.
While the Burger Court has been gradually strengthening the hands of law enforcement officials, especially in the warrantless searches of automobiles pursuant to arrest, it is significant to note one case in which the Court finally applied the "brakes" to warrantless searches and seizures. The Burger Court has, in the last several years, changed and lowered the perception and expectation of the right of privacy. In the past, the Court has failed to furnish or articulate guidelines applicable to fourth amendment concerns. Again, as the dissent points out in the Chadwick case, the Court has failed to accept the challenge to develop an unequivocal doctrine regarding the permissible consequences of a custodial arrest.

The Court's opinion in Chadwick merely skims the issues. It fails to show in any significant way how the Court reached its conclusion. Rather, it cites to numerous cases in the applicable areas of search and seizure and leaves it to the reader to determine how these prior opinions apply to the circumstances in Chadwick. On examining the opinions of both the district court and the court of appeals, it would appear that the lower courts did a far better job of analyzing and clarifying the issues, raising subtle questions which the Supreme Court ignored.

Unfortunately, by failing to write a concise, direct opinion, the Court left many questions unanswered. The Court did not discuss in any great detail the problem of luggage mobility. The First Circuit pointed out that luggage searches have raised many queries in the various circuits. It hinted that it should be left to the Supreme Court to determine whether this could ever be a valid exception to the warrant requirement. Secondly, under the search incident to an arrest exception, the Court was afforded an opportunity to discuss further, as the courts of appeal have done, when it is proper for the police to seize a suitcase, briefcase, or package in a suspect's possession at the time of arrest and, subsequently, to search the property without a warrant after the person has been taken into custody. The Court does not explain in its opinion why a possession carried in a person's clothing is subject to "reduced expectations of privacy"—but not the footlocker. Further, as in South Dakota v. Opperman, the Court did not deal with a solution to the problems of searches of locked containers found in automobiles. Perhaps the Court found it easier to ignore these issues by rationalizing that these questions were not directly on appeal. However, these unanswered

questions appear to detract from the strength of the opinion, since they underlie some of the basic premises that the Court does examine.

The Chadwick decision seems to take a step backward in time by attempting again to refuel the fires under the expectation of privacy doctrine. Like the dissent, one wonders how effective this holding will be in different circumstances, since so many other doctrines are used to sustain warrantless searches of objects in police custody.

Robin K. Williams
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