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CHILD ABUSE: HISTORY,
LEGISLATION AND ISSUES

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I. CHILD ABUSE IN THE UNITED STATES

Ironically, it may very well be the abhorrence of child abuse which has made it such a slow-moving area of both Federal and State legislation. The very idea that a parent, who is supposed to love and protect his offspring, could be responsible for his or her child's physical injury, or even death, is so repulsive that many are reluctant to believe it. Our courts and legislatures have also been reluctant to get involved in internal family government, preferring to let the families determine their own laws and punishments. The implied "hands-off" policy followed by the government owes much to our close association with English Common Law. Under this Common Law, the right of the father to custody and control of his children was considered virtually absolute, even where this was at odds with the welfare of the child. This has carried over to some extent in our own legal system.

A. Early History of Child Abuse in the U.S.

In Colonial America, the father ruled both his wife and his children. Parental discipline was severe, and parents, teachers and ministers found justification for stern disciplinary measures in the Bible.

Legally speaking, the early American child was, in fact, little more than the property of his parents. It was not unusual for a child to be bound out to other households as an indentured servant or apprentice. The shortage of labor in Colonial America, as well as the strongly pervasive Puritan work ethic, was reflected in early laws. In 1642, a Massachusetts statute required parents and masters to provide for the "calling and employment [sic] of their children."^{1/}

Early laws made a distinction between apprenticeship and servitude (the former requiring training in a trade) but this was not always followed.

^{1/} Order of the General Court of Massachusetts, 1642, Massachusetts Records, II (1853): 8-10.

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. As time went on, laws were passed prohibiting the binding out of infants, but the practice of binding out children beyond infancy continued.

The earliest recorded trial case of child abuse involved a master and his apprentice.^{2/} In Salem, Massachusetts, in 1639, a man by the 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. However, the boy's own charge that his master had been responsible for the fracture of his skull (which ultimately resulted in his death) was called to question by testimony that he had told someone else that the injury was the result of falling from a tree. The defendant was acquitted.

In 1643, a master was executed for causing the death of his servant boy,^{3/} and in 1655 in Plymouth, a master was tried and "was subsequently found guilty of manslaughter and ordered 'burned in the hand' and all his goods confiscated."^{4/} Other early recorded cases show the masters of servant children being admonished for abuse and in some cases the children being freed from indenture because of ill-treatment. In 1700, Virginia issued specific laws for the protection of servants against mistreatment.

^{2/} Winthrop, John. The History of New England from 1630-1649. J. Savage, ed. Boston, v. 1, 1853: 318-319.

^{3/} Rev. John Eliot's Records of the First Church in Roxbury, Massachusetts. Sixth Report of Boston Record Commissioners, Boston, 1881: 187.

^{4/} Children and Youth in America: a Documentary History 1600-1865. R. Brenner, ed. Cambridge, Massachusetts, Harvard University Press, v. 1, 1970: 123.

As can be seen, most of the early recorded cases of child abuse were specifically related to offenses committed by masters upon servants and did not reflect any movement toward protecting children from abuse by their own parents. Whatever court action there was involving family matters was limited to the removal of children from "unsuitable" home environments. "Unsuitable" usually referred to the parents not providing their children with a good religious upbringing, or refusing to instill in them the value of the work ethic. There were two cases in Massachusetts in 1675 and 1678 in which children were removed because of "unsuitable" homes.^{5/} In the first case, the children were removed 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 the children, with that offense being compounded by the refusal of the father to attend church services.

The removal of children from such "unsuitable" home environments did not reflect any concern about the physical abuse of children and, in fact, may have been responsible for putting them into a more potentially dangerous environment. It was a common practice for children who were dependent upon public support to be bound out. These children would be auctioned off to the lowest bidder, who would then accept his payment from public funds and take the child as a servant or apprentice.

In the larger cities where the problem of poverty was greater, dependent children were put into alms houses. Conditions in these public poorhouses where children were thrown in with adult beggars, thieves, and paupers were deplorable. It was not until the beginning of the nineteenth century that major

^{5/} Ibid, p. 41-42.

^{6/} Ibid, p. 41.

efforts were made to provide separate residences for children, and it was not until then that public recognition of the abuse of these children in institutions was noted.

The dearth of recorded family child abuse cases in early American history suggests the general tendency of the courts to allow parents their own discretion in determining the kind and degrees of home discipline. Parents were considered immune from prosecution unless the punishment was beyond the bound of "reasonable-^{7/}ness" in relation to the offense, or excessive, or the child injured permanently.

In 1840, there was a criminal case in Tennessee which involved parental prosecution for excessive punishment. "The evidence showed that the mother struck the child with her fists, and had pushed her head against a wall, and that the parents had whipped her with a cowskin, tied her to a bedpost with a rope for two hours, and switched her. The court reversed the parents conviction holding that whether punishment was excessive was a question of fact for the jury to decide rather than a question of law."^{8/}

B. Early Reform Movements -- Children as Animals

It was not until the second decade of the nineteenth century that public authorities began to intervene in cases of parental neglect. Most of the reform movements were directed toward children in institutions, however, and were aimed at preventing a neglected child from entering a life of crime.

Probably the most significant and helpful of all reform campaigns for child protection was that launched by the American Society for the Prevention of Cruelty to Animals (ASPCA). In 1874, a church worker sought the help of the President of

^{7/} Thomas, Mason P. Child Abuse and Neglect. Part I: Historical Overview, Legal Matrix and Social Perspectives. North Carolina Law Review, v. 50, 1972: 305.

^{8/} Ibid. p. 305.

the ASPCA on behalf of an abused child. The case concerned a ten-year-old foster child named Mary Ellen Wilson who was the victim of child abuse. At that time there were laws which protected animals but no local, State or Federal laws to protect children. The case was presented to the court on the theory that the child was a member of the animal kingdom, and therefore entitled to the same protection which the law gave to animals.^{9/}

In the aftermath of public indignation over the case, Elbridge T. Gerry, the lawyer who represented the ASPCA, founded the New York Society for the Prevention of Cruelty to Children. It was originally organized as a private group and later incorporated. Legislation was soon passed in New York and cruelty societies were authorized to file complaints for the violation of any laws relating to children, and law enforcement and court officials were required to aid the societies.

Similar societies were soon organized in other cities throughout the country and by 1922 there were 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 child welfare the number of these societies has declined.

C. Technological Advances

One of the main reasons for the lack of prosecution in child abuse cases has always been the difficulty in determining whether the physical injury was, in fact, a case of deliberate assault or an accident. In recent years, however, doctors in the area of pediatric radiology have been able to determine the incidence of repeated child abuse through more sophisticated developments in x-ray technology. These advances have allowed radiologists to see more clearly such things as subdural

^{9/} New York Times, April 10, 11, 1874, and December 27, 1875.

hematomas (blood clots around the brain resulting from blows to the head) and abnormal fractures. This has brought about more recognition of the widespread incidence of child abuse and public reaction has been on the rise.

D. State Legislation

The discovery of the bruised and weighted down body of three-year old Roxanne Felumero in the East River in 1969 set off particular furor when it was discovered that just two months prior to her death her parents had been brought before the New York Family Court for alleged neglect and abuse, and the judge had released the child back to their custody. The inability of the State to prove conclusively the criminal act of child abuse can lead to just this kind of tragic situation.

The problem of protecting a child from abuse is a particularly difficult one, for it involves a victim who often will not, or cannot testify against his or her attacker; it is usually committed in the privacy of the home, and even when it is reported, it is difficult to prove in the absence of eyewitnesses.

All fifty States now have some form of child abuse laws. These are basically concerned with reporting laws which encourage or require the reporting of suspected child abuse (usually by doctors and other professional persons); criminal law provisions to punish those who abuse children; juvenile court acts, and State legislation to establish or authorize protective services for children.

Between 1963 and 1969, all fifty State legislatures passed some kind of child abuse reporting statute, and all but four had mandatory requirements for reporting. It is estimated that there are thousands of cases of child abuse which remain unreported every year. The problem is difficult to solve through legislation. The reluctance of people to get involved, and the possibility of civil suits against

them if they do, seems to remain a deterrent, despite the fact that all but one of the States have passed some form of immunity legislation. Part of the problem may also lie in the lack of information about the subject. The first studies which appeared in the early 1960's were often more sensational than informative. Since that time more substantive studies have been conducted.

The degree of immunity given and laws making the reporting of child abuse mandatory vary from State to State. In many States there are penal sanctions for failure to report. Most of these involve financial penalties, but there are a few States which have criminal penalties. Because of the variance of reporting laws, legislative models have recently been proposed by such groups as the United States Children's Bureau, the Council of State Governments, the American Humane Association, and the American Medical Association.

E. Federal Legislation

The Federal Government did not get involved in child welfare until 1912, when after considerable debate, Congress passed a bill to create the United States Children's Bureau. This bill was signed into law by President Taft on April 9, 1912, and authorized the creation of a special bureau to do research and provide information about children. In 1935, with the passage of the Social Security Act, the Federal Government became more directly involved in child welfare services. Grants were to be used for "...the protection and care of homeless, dependent, and neglected children and children in danger of becoming delinquent." (Now title IV-B)

The 1962 Social Security Amendments required each State to make child welfare services available throughout the State to all children and provide coordination

between current child welfare services (title IV-B) and the social services under the Aid to Families with Dependent Children (now title XX) program. This latter requirement was to be accomplished by making maximum use of child welfare staff in providing consultation and services for children in families receiving public assistance. The 1962 amendments also revised the definition of "child welfare services" to include specific reference to the prevention or remedying of child abuse.^{10/}

Since 1962, most of the funds for services for child protection have been spent under the Social Services Program (title IV-A and the later title XX, effective October 1, 1975) which provides services primarily for families on welfare and under the Child Welfare Services Program (Title IV B) with the major portion of funds under this latter program being spent on foster care (which is often considered a protective source).

Funds have also been granted under title V (Maternal and Child Health) for research studies on the subject of child abuse and neglect.

Thus, Federal legislative activity in the area of child abuse (with the exception of legislation for the District of Columbia) has been concentrated on financial assistance to the States for child welfare and social services and in research grants. Traditionally, the Federal Government has stayed away from specific legislation regarding child abuse, considering it under the jurisdiction of the States. In the last few years, however, perhaps because of increasing awareness of the incidence of child abuse, and the resulting public outcry, a number of bills were introduced in Congress concerning mandatory reporting requirements and the creation of a National Center on Child Abuse and Neglect.

^{10/} U.S. Congress. Senate. Committee on Finance. Report on H.R. 10606 - Welfare Amendments of 1962. 87th Congress, 2nd Session, Washington, D. C. U.S. Govt. Print. Off., 1962: 15.

On January 31, 1974, one of these bills (S. 1191), entitled The Child Abuse Prevention and Treatment Act was enacted (P.L. 93-247).

FEDERAL PROGRAMS PROVIDING FINANCIAL ASSISTANCE FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT

Authorizing Legislation

Type of Assistance

Social Security Act

a. Title IV A

Provides financial assistance to children in low-income families meeting the eligibility requirements under the Act. Includes provision for financial assistance to children removed from such families as a result of a court determination that continued residence in the home of such a family would be contrary to the welfare of the child (AFDC-Foster Care).

b. Title IV B

Provides grants to the States for child welfare services. Defines child welfare services to include "preventing, remedying, or assisting in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children." No income eligibility requirement.

c. Title XX

Provides financial assistance to the States for services to low-income persons or families which are aimed at 5 specific goals, one of which is "preventing, or remedying neglect, abuse or exploitation of children or adults unable to protect their own interests or preserving, rehabilitating or reuniting families."

Child Abuse Prevention and Treatment Act

Provides Federal financial assistance for the identification, prevention and treatment of child abuse and neglect. Provides for the establishment of a National Center on Child Abuse and Neglect to gather information, conduct research, provide technical assistance, develop a clearinghouse on all programs for the prevention, identification, and treatment of child abuse and neglect, and make a full and complete study of the incidence of child abuse and neglect. Includes provision of grants for programs and projects which are directed at research, treatment, identification or prevention of child abuse and neglect.

II. CHILD ABUSE PREVENTION AND TREATMENT ACT (P.L. 93-247)

A. Brief Description

On January 31, 1974, the Child Abuse Prevention and Treatment Act (P.L. 93-247) was enacted to provide Federal financial assistance for the identification, prevention, and treatment of child abuse and neglect. The Act provided for the establishment of a National Center on Child Abuse and Neglect to collect and disseminate information on the subject as well as the incidence of child abuse and neglect. In addition, it mandated the creation of an Advisory Board on Child Abuse and Neglect to assist the Secretary in coordinating Federal programs relating to child abuse and neglect and in developing Federal standards for programs dealing in this area. Funding is available for project grants and research contracts designed to assist in the identification, prevention, and treatment of child abuse and neglect. These are available for: technical assistance to public and nonprofit private agencies and organizations, research; and demonstration programs and projects to develop multi-disciplinary training programs, establish and maintain centers to provide support services, provide technical and other assistance to professionals, and support other innovative programs designed to identify and treat child abuse and neglect. Grants are also available to States which meet the requirements under Sec. 4(b)(2) of the Act. Requirements for eligibility under the State grant program include implementation of a State program which provides for reporting of known or suspected instances of child abuse and neglect; investigation of such reports by properly constituted authorities; provision of protective and treatment services to endangered children; effective administrative procedures and personnel to deal with child abuse and neglect; immunity

provisions for persons reporting suspected instances of abuse or neglect in good faith; preservation of confidentiality of records with criminal sanctions for those illegally disseminating such records; cooperation between agencies dealing with child abuse and neglect cases; appointment of a guardian ad litem to represent an abused or neglected child in a judicial proceeding; and public dissemination of information on the problems, incidence, and other related information assisting in the identification, prevention, and treatment of child abuse and neglect. The States are also required to give special preference in providing funds to parental self-help organizations dealing with child abuse and neglect.

This program is administered through the Office of the Secretary, Department of Health, Education, and Welfare, Administration on Children, Youth, and Families by the Director of the National Center for Child Abuse and Neglect, which is located in the Children's Bureau. Total funding authorized under the Act for the period 1974 through 1977 was \$85 million while appropriations have totalled \$57.3 million for that same period.

Appropriation and Authorization Levels for the
Child Abuse Prevention and Treatment Act

	<u>Appropriation Levels (in 000s)</u>	<u>Authorizations (in 000s)</u>
FY 1974	\$ 4,500	\$15,000
FY 1975	15,000	20,000
FY 1976	18,928	25,000
FY 1977	18,928	25,000
FY 1978	18,928	*

*Bill extending legislation not yet enacted.

B. Summary of Activities Under P.L. 93-247

In FY 1975, 16 States had met the requirements of P.L. 93-247 Sec. 4(b) (2) and were eligible to receive Federal funds. Grants for programs relating to child abuse and neglect prevention in these States amounted to an estimated \$902,251 for that year (see listing of States and amount each received under this Act below). In FY 1976, the number of States eligible for grants under the Act had grown to 29 and in FY 1977 38 States and the District of Columbia, Puerto Rico, Virgin Islands and American Samoa were eligible for funds under this Act. HEW budget justifications for FY 1978 include eligibility for 43 States as an objective for this fiscal year. It should be noted that as the number of States meeting eligibility criteria for funding under this program grows, the amount of funding for each State program may diminish unless additional funds are authorized and appropriated, or unless the percentage of funds appropriated for State grants is increased. The reason for this is that the current law requires that no less than 5% or more than 20% of the funds appropriated be used for State grants. For FY 77 and 78 HEW has budgeted the full 20% of the appropriation allowed, for a grant total of \$3.785 million for each year to 42 States and territories in FY 77 and 43 States and territories in FY 1978. In FY 1977 funds within the 20% which were not distributed to States were reallocated to other eligible States applying for such funds. It is not clear what will happen if more States than anticipated become eligible for grants. The amount of funding available to States is based on criteria established by the Secretary to achieve an equitable distribution of funds among the States and localities. No formula for allocation is specified in the law although the law requires, that to the extent possible, each State should receive some assistance.

Child Abuse Prevention and Treatment Act - State Grant ProgramState Grants FY 1974 - FY 1978 (est.)

FY 1974	\$ 19,335	(3 States)
FY 1975	902,251	(16 States)
FY 1976 (includes transition quarter funds)	3,821,604	(29 States)
FY 1977	3,785,000	(42 States & territories - est.)
FY 1978	3,785,000	(43 States - est.)

CHILD ABUSE PREVENTION AND TREATMENT ACT
STATE GRANT AWARDS FY 1974 - 1977

State Grant Awards

<u>State</u>	<u>FY 1974</u>	<u>FY 1975</u>	<u>FY 1976</u>	<u>Transition Quarter</u>	<u>FY 1977</u> ^{2/}
Alabama			\$ 66,187	\$ 47,818	\$ 82,093
Arkansas		\$ 36,800	45,659	35,971	56,736
California			269,283	170,215	332,835
Colorado					63,874
Connecticut		44,700	56,934	41,875	70,339
Delaware			27,309	1/	33,989
Dist. of Col.					34,795
Florida					136,560
Georgia			84,265	58,613	104,188
Hawaii	2,514	27,200	30,963	26,676	38,574
Illinois		112,800	158,443	102,648	195,437
Kansas			46,826	35,980	58,059
Kentucky					77,334
Louisiana			71,940	51,156	89,121
Maine		28,600	33,180	27,955	41,257
Massachusetts		65,800	88,775	60,981	109,371
Michigan			139,316	58,613	171,396
Minnesota		53,400	70,309	49,877	86,870
Mississippi					64,886
Missouri		58,100	77,462	39,579	95,575
Nebraska					48,460
New Hampshire		26,600	30,148	26,108	37,500
New Jersey			108,331	72,416	133,427
New Mexico					44,781
New York	12,422	161,700	231,806	146,575	285,198
North Carolina					107,634
North Dakota		25,500	28,243	24,901	35,130
Ohio					190,905
Oklahoma		41,100	52,192	39,318	64,821
Puerto Rico			65,643	51,819	83,445
Rhode Island			31,042	26,487	38,498
South Carolina					70,638
South Dakota			28,748	25,232	35,790
Tennessee	4,399	53,600	70,581	50,635	87,400
Texas			139,316	91,284	219,090
Utah		31,200	37,224	30,677	46,439
Vermont		23,900	25,988	23,528	32,358
Virgin Islands					26,399
Virginia		59,700	80,572	56,411	99,667
Washington			62,339	45,663	77,400
West Virginia					51,619
American Samoa					25,712

1/ Applied too late for transition quarter.

2/ Represents the FY 1977 basic grant plus a supplemental grant provided by redistributing funds not awarded.

Research and Demonstration

The 1975 report^{11/} on federally funded Child Abuse and Neglect projects and programs showed 63 various research and project grants awarded through the National Center for Child Abuse and Neglect (this does not include State grants). Seventeen of these provided funding for demonstration centers which were involved in management of child abuse and neglect cases and which included investigation, assessment, treatment, referral, public education, 24 hour hot-lines, supportive services and coordination with other agencies. Other research grants included funding for research, training development, technical assistance, evaluations, curricula development, innovative demonstration projects and information contracts directed at preventing, detecting, and treating child abuse and neglect. The National Center has continued to support these kinds of efforts.

The following table represents a breakdown of how Federal funds for child abuse and neglect prevention under P.L. 93-247 were budgeted for FY 77 and are estimated for FY 78 (from Budget Justification for FY 78).

Summary Table

Activity	FY 1977		FY 1978	
	Number of Projects	Estimated Cost	Number of Projects	Estimated Cost
Research and Demonstration	48	\$ 9,425,000	78	\$10,194,000
Evaluation	5	926,000	9	1,300,000
Incidence Studies	2	1,198,000	1	350,000
Technical Assistance	43	2,576,000	43	2,500,000
Clearinghouse	2	592,000	2	574,000
Publications	25	426,000	15	225,000
State Grants	42	3,785,000	43	3,785,000
Total		<u>\$18,928,000</u>		<u>\$18,928,000</u>
New Projects		2,111,000		15,504,000
Continuations		16,817,000		3,424,000
		<u>\$18,928,000</u>		<u>\$18,928,000</u>

11/ Report of the U.S. Department of HEW to the President and Congress of the United States on the implementation of Public Law 93-247. The Child Abuse Prevention and Treatment Act. August 1975.

C. Issues Relating to Child Abuse Prevention and Treatment Act

The Select Education Subcommittee of the House Education and Labor Committee held hearings on extending the Child Abuse Prevention and Treatment Act on February 25 and March 11, 1977. In addition, the Subcommittee of the Senate Human Development Committee held hearings on April 6 and 7, 1977, to discuss extension and proposed amendments to this Act. The testimony presented indicated support for the continuation of this program, although problems and suggestions for change were discussed.

State Grant Program

Representatives from several States (Illinois, Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island) testified during the hearings that an increased proportion of funds should be available for the State grant programs (currently funds for grants to States are limited to between 5% and 20% of total). There is some concern that as more and more States become eligible for grants under the State grant program, less money will be available to States already receiving grants, and as amounts diminish less incentive will be provided for the States to conform to the requirements of the Act to develop their own programs. While funding has been available through the State grant program to all States meeting the requirements of the Act, not all States have been able to meet these requirements, and have cited various problem areas which make conformity difficult. Among these are: the requirement for a court-appointed guardian ad litem for children involved in abuse and neglect cases is costly and time-consuming in terms of the demands it puts on State judicial systems; and, that there are difficulties with the definition of "child abuse",

particularly the lack of definition of "mental abuse" which some States are having trouble defining. There are also general problems with the time-consuming process of making the considerable administrative and legislative changes necessary for conformance.

The testimony of the New England States in hearings held by the Subcommittee on Select Education indicated that they felt the requirements of the Act did not cause undue problems and that the removal of the requirement for a court-appointed guardian for children involved in such cases would represent a step backward.

Research and Demonstration Grants

The issue of duplication of effort in the research and demonstration area of grant awards was raised during the hearings as was the issue of awarding grants to private profit-making groups with no expertise in the subject area. In general, those testifying felt that more priority should be given to funding for programs which provide actual treatment and services to children and their families and that research efforts should be geared toward those which would have practical application.

Some criticism was directed at the National Center for Child Abuse and Neglect for poor coordination of research and demonstration activities (citing examples of different grants being given for similar research efforts) and lack of leadership.

Confidentiality and Privacy

There has been some concern raised with regard to confidentiality and violations of privacy as a result of the establishment of central registries to keep track of incidents of child abuse and neglect. While the Act specifically

includes a requirement that States preserve the confidentiality of all records, there is some concern that this may be difficult to achieve. Dangers may occur in computerized systems where despite the fact that invalid reports of suspected child abuse or neglect are supposed to be expunged from the system, computer or human error may result in such reports not being expunged. Some experts believe that a tracking system of some kind is essential in order to gauge the actual incidence of child abuse and neglect, as well as to make sure that appropriate treatment and services are being provided to children and families in need.

Other Issues

Another concern which has been expressed about the Child Abuse Prevention and Treatment Act is that it is too narrowly aimed and should include an overall focus on violence in the family which would include research and assistance to victims of spouse abuse. Currently, there is very little known about the incidence or cause of spouse abuse (although it is thought to be widespread) or about the relationship between spouse and child abuse.

Recent reports about the use of children in pornography have given rise to several legislative proposals to amend the current Act or other Federal statutes to make sexual exploitation of children illegal. While the Child Abuse Prevention and Treatment Act includes sexual abuse under the definition of child abuse this particular aspect of violence against children has not been given much attention in research and related projects. Some experts believe that our state of knowledge about the sexual abuse of children (not only through pornography but also in the home) is dangerously inadequate, and while we know a great deal about physical abuse and neglect of children we still have a great deal to learn about sexual abuse of children.

III. INCIDENCE OF CHILD ABUSE AND NEGLECT

The most recent national data available on child abuse and neglect are for 1975, and were compiled by the National Clearinghouse on Child Neglect and Abuse of the American Humane Association. It should be noted that the actual incidence of child abuse and neglect is difficult to ascertain because of the reliance on reporting. The following "Highlights of the 1975 National Data" provides information on reported cases only. Some experts assert that "as many as 10,000 children are severely battered each year, at least 50,000 to 70,000 are sexually abused, 100,000 are emotionally neglected, and another 100,000 are physically, morally, and educationally neglected."^{12/}

^{12/} Fontana, Vincent J. Somewhere a child is crying. New York, New York, McMillan Publishing Co., Inc., 1973: 35.

National Study on Child Neglect and Abuse Reporting

Children's Division, American Humane Association

HIGHLIGHTS OF 1975 NATIONAL DATA

These highlights are compiled to reflect the national experience with the phenomena of child neglect and abuse during calendar year 1975.

This report contains the best available data on national experience and provides the only documentation on national incidence and characteristics of reported cases of child neglect and abuse.

There is a caveat. These highlights are a composite of information drawn from data submitted by states participating with the National Study project and from states not currently included in the project. By year-end 1975, 29 states and territories were incorporated into the National Study system. Data from this source was more detailed and specific; was comparable in form and substance because it was largely furnished on a standard form; and was error edited by Study staff.

Data from non-participating states was furnished in cumulative form, was less detailed and specific, and was not subject to error check by Study staff. Additionally, it was not always as fully comparable because of differing state patterns and definitions.

It is important to make clear that production of this data is a bonus and a by-product of the present stage of development of the National Study. This project was created to demonstrate the feasibility of a data-gathering method for systematically counting reported cases of neglect and abuse. The ultimate goal and product was intended to be the creation of a system which utilized data centers or registers in each state as the primary source for the national bank. Concentration of effort, therefore, has been on: 1) encouraging voluntary entry into the National Study system; 2) stimulating states to establish patterns for central storing of information in each state; and 3) the use of a standard and universal form to produce comparable data.

Refinement of process within states to assure maximum accuracy and completeness of information gathering and recording was seen as phase II of the National Study operation—a step best taken after a substantial majority of the states had voluntarily entered the system. To have implemented and imposed quality controls and measures in phase I of the operation—the present stage—would have created additional resistance and blocks to voluntary participation by states not already enrolled in the system, and would have tended to discourage states in the early stages of participation. The reality of these assumptions was tested by National Study staff, and the hard knowledge was gained through the experience of trial and error.

In light of the above, data on which these highlights are based may be subject to question on the issue of finite accuracy. If anything, however, it may err on the side of understatement and in failing to provide additional detail or more sophisticated breakdowns, a condition which will be corrected as more states enter the system and their input is refined.

I. Reporting: Neglect and Abuse

Total number of reports of neglect and abuse	294,796	
Number of cases investigated	233,724	(79.3%)
Status undetermined	61,072	(20.7%)
Of investigated cases of neglect and abuse (233,724):		
Found to be valid	139,267	(59.6%)
Found not valid	94,457	(40.4%)

Thus the validation rate for neglect and abuse cases was found to be a ratio of 60-40:

II. Neglect Versus Abuse

Number of neglect cases reported	70,046	(60.9%)
Number of abuse cases reported	44,913	(39.1%)
Ratio of neglect to abuse reporting was found to be about 2 neglect to 1 abuse case.		
Number of neglect/abuse cases (i.e. undifferentiated neglect and abuse)	<u>179,837</u>	
TOTAL	294,796	

Comment:

The near 2-1 ratio of neglect over abuse reporting is biased to show a lower than true ratio because:

- (1) Seven states reported only abuse cases and made no count of neglect reports;
- (2) No state reported neglect only;
- (3) All reporting laws made reporting of abuse mandatory—not all make neglect reporting mandatory;
- (4) Eleven states reported abuse and neglect together, with no differentiation.

III. Involved Children in Reported Cases

A total of 307,778 children were reported as being involved in reported cases during the year. There was no significant difference between the sexes of the children involved.

IV: Sources of Reports

Sources	Percentage of all Reports
<i>Agency Sources</i> Public and private social agencies, schools, and school personnel, law enforcement, courts, hotlines	39.6%
<i>Individuals</i> Neighbors, friends, relatives, siblings, self-referrals	40.0%
<i>Medical Sources</i> Hospitals, physicians, nurses, coroners, medical examiners	10.2%
<i>Others, (unspecified)</i>	10.2%

V. Who Were Alleged Abusers-Neglecters?

This summary of results indicates that the natural parents are identified as the principal abusers-neglecters.

Relationship	Percentage of Total
<i>Natural Parents</i>	82.47%
Mothers	56.70%
Fathers	25.77%
<i>Step-parents</i>	5.31%
Step-fathers	4.42%
Step-mothers	.89%
<i>Adoptive Parents</i>	.25%
Fathers	.14%
Mothers	.11%
<i>Other Relatives</i>	3.49%
Siblings	.39%
Others	3.10%
<i>Baby Sitters</i>	.49%

Other categories with miniscule percentages included foster parents, institutional staff, and neighbors. The percentages are rounded out by "unknowns."

VI. Types of Abuse Reported*

These statistics relate to types of abuse identified in validated cases of abuse or neglect and abuse.

<i>Physical Injuries—Minor</i> (contusions, abrasions, unspecified, no visible injuries)	32,142	51.3%
<i>Sexual Abuse</i>	6,696	10.7%
<i>Physical Injuries—Major</i> (bone fractures, subdural hematomas, internal injuries, brain damage, skull fractures)	1,516	2.4%
<i>Burns, Scalding</i>	1,680	2.7%
<i>Congenital and Environmental Drug Addiction</i>	33	.1%
<i>Physical Abuse (unspecified)</i>	20,557	32.8%

* More than one category may have been reported for each child.

VII. Types of Neglect Reported*

These statistics relate to types of neglect identified in validated cases of neglect or neglect and abuse.

<i>Physical Neglects,</i> (unspecified, gross household neglect, lack of supervision, abandonment, exposure to elements, inadequate shelter, clothing, hygiene, etc.)	100,544	78.1%
<i>Medical Neglect</i> (lack of medical diagnosis and treatment, malnutrition, etc.)	12,396	9.6%
<i>Emotional Neglect</i> (Psychological impairment, failure to thrive)	10,045	7.8%
<i>Education Neglect</i>	5,714	4.5%

* More than one category may have been reported for each child.

Type of abuse or neglect was not recorded for 29,740 children.



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IV. CHILD PORNOGRAPHY

A. Background

Early in 1977, New York Psychiatrist and head of the Odyssey Institute (a drug rehabilitation and child abuse center) Dr. Judianne Densen-Gerber held a press conference in which she publicized a growing phenomena in the United States, the use of young children engaged in sexually explicit acts in pornographic films and photographs. As public awareness of child pornography and prostitution has grown, so too, has public outrage. Several States have begun to reexamine their State laws to see if more can be done to protect children from this sort of abuse. In New York, State legislation was introduced to provide long prison terms for parents or other persons producing, profiting from, or promoting pornographic performances by children. The problem is that it is very difficult for police to find out who is responsible for such films. In addition, complexities involved in the issue of first amendment freedoms and obscenity serve to make it difficult for investigators and prosecutors to stop the sale of such material. Arrests for distribution of pornographic material using children do not result in any stiffer penalties than ordinary obscenity cases, while a complex and hidden network of publishers and producers remains hidden from sight. In many States the charge for distributing obscene material is a misdemeanor and the use of children in those films does not change such charges.

On the Federal level, some 25 bills were introduced in the first session of the 95th Congress prohibiting the participation of children under sixteen in pornographic films, photographs and the transportation and dissemination of such films and photographs (see Section V for legislative status and description of major bills). These bills have been sponsored and co-sponsored

by more than 100 Members of Congress and hearings have been held by committees with jurisdiction over child welfare matters and by those with jurisdiction over the criminal code.

B. Federal Approaches for Intervention

The issue of child pornography is a dual one. It is basically related to the protection of children (generally considered to be a State or local matter of concern), but it is also related to the question of obscenity and the First Amendment freedoms. Because of the generally accepted authority of State and local governments over matters of child welfare and because of the continuing controversy over the power of the Federal Government to legislate with respect to obscenity, dealing with this issue is more complex than otherwise might be expected.

The most obvious approach which can be taken, and one with which there does not appear to be any jurisdictional dispute is in amending the current Child Abuse Prevention and Treatment Act to provide specific research and program operating funds for the treatment and prevention of sexual abuse of children.

Another approach would be to amend the current Federal obscenity statutes to add a prohibition against the use of children in pornographic films and literature. These laws involve the mailing, broadcasting and interstate transport of obscene material. (See Appendix - Federal and State Statutes Regulating Use of Children in Pornographic Material for a more detailed discussion.)

A third area in which the Federal Government exerts authority relating to the issue of sexual exploitation of children is through the regulation of child labor practices. While the Federal Fair Labor Standards Act provides for protection of children employed in the manufacture of products which travel through interstate and foreign commerce, there is an exception from the Child Labor Standards for "any child employed as an actor or performer in motion pictures, or theatrical productions, or in radio or television productions" (CFR Sec. 570.125). This means that the use of children under the age of sixteen in pornographic films does not in itself constitute a violation of the Federal Fair Labor Standards Act. It is not clear whether the Department of Labor would have authority to exclude participation of children in pornographic productions from this exception by way of regulation or if legislation would be required to prohibit such activity. If such a change were effected, penalties would include a fine and/or imprisonment. (The penalty under the Fair Labor Standards Act is a fine of not more than \$10,000 and imprisonment for not more than six years or both.)

The first two approaches have been included in legislation considered in the first session of the 95th Congress. (See Section V for Summary of Legislation in the 95th Congress.)

V. SUMMARY OF MAJOR LEGISLATION IN THE 1ST SESSION OF THE 95TH CONGRESS

Authorization for funding under the Child Abuse Prevention and Treatment Act expired at the end of FY 1977. Two bills (H.R. 6693 and S. 961) would amend and extend the current Act, while two other related bills (H.R. 8059 and S. 1585) would amend the U.S. Code to prohibit the sexual exploitation

of children. All four bills include provisions relating to sexual exploitation of children. The following provides a brief description of these bills and their status.

H.R. 6693 - Child Abuse Prevention and Treatment Amendments of 1977

ACTION: Passed the House, September 26, 1977.

Passed the Senate after amendments to insert provisions of S. 961 in lieu of House-passed version, October 27, 1977.

Conference not yet scheduled.

SUMMARY: Extends authorization for the Child Abuse Prevention and Treatment Act through fiscal year 1982, with appropriation levels of \$25 million in FY 1978, \$27.5 million in FY 1979 and \$30 million each for FY 1980, 1981, and 1982. Adds dissemination of information to the responsibilities of the National Center on Child Abuse and Neglect and requires that the Secretary of HEW establish research priorities and provide for a system of peer review of research funded by the Center. Expands the definition of child abuse and neglect to include the sexual exploitation of children. Increases from 20 to 30 percent the maximum amount of appropriated funds which can be used for the State grant program. Adds a new section to the Act which provides legal sanctions against any person permitting a child to be sexually exploited, as well as any person who manufactures, reproduces or duplicates any film depicting a child engaging in sexually prohibited acts or who knowingly transports or receives or makes available for profit such materials shipped through interstate and foreign commerce. In addition the bill allows the Secretary to make grants to private nonprofit organizations for the support

of at least nine centers to provide treatment and services to sexually abused children and persons committing acts of sexual abuse against children.

S. 961 - Opportunities for Adoption Act of 1977, Includes Title II, Amendments to the Child Abuse Prevention and Treatment Act

ACTION: Passed the Senate October 27, 1977 as H.R. 6693 (see above H.R. 6693) by striking out all after the enacting clause and substituting the provisions of S. 961 in lieu thereof.

Conference not yet scheduled.

SUMMARY: Title I of the bill covers the adoption assistance portion of the legislation. It would create a panel of experts in HEW to develop a model State adoption law which would include an adoption assistance program and the reduction of current barriers to interstate adoptions. In addition, it would establish an adoption information exchange system to assist in matching eligible children with prospective adoptive parents and would require HEW to gather data nationally on adoption and foster care programs. HEW would also be required to provide for an information clearinghouse, education and training programs, and for a study of so-called black market adoptions.

Title II of the bill would provide for an extension of the authorizations for the Child Abuse Prevention and Treatment Act for two years at the existing \$25 million level. In addition it would include grants for research under a 50% earmark of funds for demonstration and resource projects so that more funds would be available for basic research. It would change the limitation on funds for State grant programs from "no more than" to "not less than" 20% of the appropriated funds. In addition, the bill would authorize an additional \$2 million each in FY 1978 and FY 1979 for programs specifically aimed at preventing and treating cases of sexual child abuse.

S. 1585 (and H.R. 8059) - Protection of Children Against Sexual Exploitation Act of 1977

ACTION: S. 1585 passed the Senate, October 10, 1977.

H.R. 8059 passed the House with instruction to conferees to agree with S. 1585 provisions relating to transport and distribution of materials, October 25, 1977.

Conference on S. 1585, October 27, 1977.

Senate agreed to Conference report, November 3, 1977.

House - Conference report filed, November 4, 1977.

SUMMARY OF CONFERENCE REPORT:

S. 1585 "Protection of Children Against Sexual Exploitation Act of 1977" would make three changes in Title 18 of the U.S. Code:

1. Would add a new section making it a Federal crime for anyone to cause any child under 16 to engage in sexually explicit conduct for the purpose of producing materials that are to be transported in interstate commerce.
2. Would add a companion section which would prohibit the sale or distribution of any obscene materials that depict children engaging in sexually explicit conduct if such materials have been mailed or transported in interstate commerce.
3. Would amend Section 2423 (Mann Act) of title 18 to prohibit the transportation of both males and females under the age of eighteen for the purpose of engaging in prostitution or other sexually explicit conduct for commercial purposes.

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APPENDIX

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FEDERAL AND STATE STATUTES REGULATING USE OF
CHILDREN IN PORNOGRAPHIC MATERIAL

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March 1, 1977

APPENDIX

I. FEDERAL AND STATE STATUTES REGULATING USE OF
CHILDREN IN PORNOGRAPHIC MATERIAL

There are presently five Federal laws which prohibit distribution of "obscene" materials in the United States. One prohibits any mailing of such material (18 U.S.C. § 1461); another prohibits the importation of obscene materials into the United States (19 U.S.C. § 1305); another prohibits the broadcast of obscenity (18 U.S.C. § 1464); and two laws prohibit the interstate transportation of obscene materials or the use of common carriers to transport such materials (18 U.S.C. §§ 1462 and 1465). In addition, the 1968 Federal Anti-Pandering Act (39 U.S.C. § 3008) authorizes postal patrons to request no further mailings of unsolicited advertisements from mailers who have previously sent them advertisements which they deem sexually offensive in their sole judgment, and it further prohibits mailers from ignoring such requests. There is no present Federal statute specifically regulating the distribution of sexual materials to children.

Five Federal agencies are responsible for the enforcement of the foregoing statutes. The Post Office Department, the Customs Bureau, and the Federal Communications Commission investigate violations within their jurisdictions. The F.B.I. investigates violations of the statutes dealing with transportation and common carriers. The Department of Justice is responsible for prosecution or other judicial enforcement.

It has long been recognized that the State has a valid special interest in the well-being of its children. Prince v. Com. of Massachusetts, 321 U.S. 158 (1944). A State may regulate the materials that juveniles view and read even if they could not be proscribed for adults.

In Ginsberg v. New York, 390 U.S. 629 (1968), the U.S. Supreme Court upheld a New York criminal statute that makes it unlawful to knowingly sell harmful material to a minor. The defendant in Ginsberg contended that the State statute violated the First Amendment. In response, the Court stated that the statute applied only to sexually oriented material that was found obscene under a constitutionally acceptable definition of obscenity. There was no first Amendment violation since, as the Court had noted in prior decisions involving "general" (adult) obscenity statutes, obscene material is not protected speech under the First Amendment. The Ginsberg opinion also noted that the State had ample justification to sustain its regulation of an activity that was not protected by the First Amendment. The Court noted two State interests that justify the New York limitations on the commercial dissemination of obscene material to minors. First, the legislature could properly conclude that those primarily responsible for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Second, the State has an independent interest in protecting the welfare of children and safeguarding them from abuses.

Forty-seven States and the District of Columbia have some type of special prohibition against the dissemination of obscene material to minors. However, our research revealed that only six of these States have provisions prohibiting the participation of minors in an obscene performance which could be harmful to them. These States are:

Connecticut General Statutes Annotated

§ 53-25. Unlawful exhibition or employment of child

Any person who exhibits, uses, employs, apprentices, gives away, lets out or otherwise disposes of any child under the age of sixteen years, in or for the vocation, occupation, service or purpose of rope or wire walking, dancing, skating, bicycling or peddling or as a gymnast, contortionist, rider or acrobat, in any place or for any obscene, indecent or immoral purpose, exhibition or practice or for or in any business, exhibition or vocation injurious to the health or dangerous to the life or limb of such child or causes, procures or encourages any such child to engage therein, shall be fined not more than two hundred and fifty dollars or imprisoned not more than one year or both. (1949 Rev., § 8373.)

North Carolina General Statutes

§ 14-150.1. Obscene literature and exhibitions. -- (a) It shall be unlawful for any person or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

- (1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or
 - (2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or
 - (3) Publishes, exhibits or otherwise makes available anything obscene; or
 - (4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide, any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.
- (b) For purposes of this Article any material is obscene if:
- (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
 - (2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
 - (3) The material lacks serious literary, artistic, political, education or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

- (1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, and or oral;
- (2) Patently offensive representations or descriptions of excretion in the context of sexual activity or lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences. In any prosecution for any offense involving dissemination of obscenity under this Article, evidence shall be admissible to show:

- (1) The character of the audience for which the material was designed or to which it was directed;
- (2) Whether the material is published in such a manner that an unwilling adult could not escape it;
- (3) Whether the material is exploited so as to amount to pandering;
- (4) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;
- (5) Literary, artistic, political, educational, scientific, or other social value, if any, of the material;
- (6) The degree of public acceptance of the material throughout the State of North Carolina.
- (7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material.

Expert testimony and testimony of the auditor, creator or publisher relating to factors entering into the determination of the issue of obscenity shall also be admissible.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and, unless a greater penalty is expressly provided for in this Article, shall be fined or imprisoned in the discretion of the court. (1971, c. 405, s. 1; 1973, c. 1434, s.1.)

§ 14-190.6. Employing or permitting minor to assist in offense under article. -- Every person 18 years of age or older who intentionally in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the Court. (1971, c. 405, s. 1).

North Dakota Century Code

§ 12.1-27.1-03. Promoting obscenity to minors--Minor performing in obscene performance--Classification of offenses.--1. It shall be a class C felony for a person to knowingly promote to a minor any material or performance which is harmful to minors, or to admit a minor to premises where a performance harmful to minors is exhibited or takes place.

2. It shall be a class C felony to permit a minor to participate in a performance which is harmful to minors.

Code of Laws of South Carolina

§ 16-141.1. Distribution, etc., of obscene matter; definitions.-- For the purposes of §§ 16-414.1 to 16-414.9:

(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest among which is a shameful or morbid interest in nudity, sex or excretion, and which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is to be distributed to minors under sixteen years of age, predominant appeal shall be judged with reference to such class of minors.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other article, equipment, machine or material.

(c) "Distribute" means to transfer possession of, whether with or without consideration.

(d) The word "knowingly" as used herein means having knowledge of the contents of the subject matter or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of such subject matter. (1965 (54) 4760; 1966 (54) 2273.)

§ 16-414.4. Same; employment of minor under sixteen.--It shall be unlawful for any person who, with knowledge that a person is a minor under sixteen years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under sixteen years of age, to hire, employ, or to use such minor to do or assist in doing any of the acts prohibited by §§ 16-414.1 to 16-414.9. (1965 (54) 470.)

Tennessee Code Annotated

39-3013. Importing, preparing, distributing, possessing or appearing in obscene material or exhibition--Distribution to or employment of minors--Penalties.--(A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

(B) Notwithstanding any of the provisions of §§ 39-3010--39-3022, the distribution of obscene matter to minors shall be governed by §39-1012 et seq. In case of any conflict between the provisions of §§ 39-2010--39-3022 and § 39-1012 et seq., the provisions of the latter shall prevail as to minors.

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in subsection (A) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under eighteen (18) years of age.

(D) (1) Every person who violates subsection (A) is punishable by a fine of not less than two hundred fifty dollars (\$250) nor more than five thousand dollars (\$5,000), or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has previously been convicted of a violation of §§ 39-3010--39-3022, a violation of subsection (A) is punishable as a felony by a fine of not less than five hundred dollars (\$500) nor more than ten thousand dollars (\$10,000), or by imprisonment in the state penitentiary for a term of not less than two (2) nor more than five (5) years or by both fine and imprisonment.

(2) Every person who violates subsection (C) is punishable by a fine of not less than two hundred fifty dollars (\$250) nor more than five thousand dollars (\$5,000) or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has been previously convicted of a violation of §§ 39-3010-39-3022, a violation of subsection (C) is punishable as a felony and by a fine of not less than five hundred

dollars (\$500) nor more than ten thousand dollars (\$10,000), or by imprisonment in the state penitentiary for a term of not less than two (2) years nor more than five (5) years. [Acts 1974 (Adj. S.), ch. 510, §3; 1975, ch. 306, §1.]

Vernon's Texas Code Annotated

§ 43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) For purposes of this section:

(1) "Minor" means an individual younger than 17 years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) is utterly without redeeming social value for minors.

(b) A person commits an offense if, knowing that the material is harmful:

(1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material;

(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or

(3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or (b)(2) of this section.

(c) It is a defense to prosecution under this section that:

(1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or

(2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

(d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.

The power of the Federal Government to legislate with respect to obscenity per se is not expressly granted to Congress in Article I, or elsewhere, in the United States Constitution. Therefore, in enacting Federal laws seeking to deal with the obscenity problem, Congress has traditionally invoked its power to legislate under the commerce clause (Art. I, Sec. 8, cl. 3) and under the postal power (Art. I, Sec. 8, cl. 7). As interpreted by the United States Supreme Court, even though Congress' power to legislate under the commerce and postal powers is undisputed, nevertheless the manner of exercising these constitutional powers may be subject to some limitations.

The right of a sovereign State to limit, regulate and prohibit the labor of its minor children in employment prejudicial to their life, health or safety has never been denied. Nearly all of the States have undertaken to regulate child labor. However, in the presence of a great diversity of child labor standards in the different States, the Federal Government undertook to remedy to some degree the lack of uniformity and insufficiency in State standards for child labor.

The Congress of the United States, after much agitation on the subject, enacted the Fair Labor Standards Act which, in part, provides that no goods shall be shipped or delivered in commerce where such goods were the results of oppressive child labor employment. 29 U.S.C. § 212(1970). This law is based upon the power of Congress to regulate interstate commerce. The net general effect of the law places restrictions upon interstate traffic in the products of child labor. Prior Federal child labor laws were declared unconstitutional

on the grounds that Congress had exceeded the proper exercise of its power to regulate interstate commerce, and had invaded powers reserved to the States. Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey, Collector of Internal Revenue v. Drexel Furniture Co., 259 U.S. 20 (1922).

The Dagenhart case represents an era when the Supreme Court had a narrow view of commerce. Since that time, the whole concept of commerce has changed. Under the more recent decisions, the power of Congress is recognized to be broad enough to reach all phases of the vast operations of our national industrial system. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. South-Eastern Underwriters Assn. 322 U.S. 533 (1944). Therefore, it would appear that Federal legislation could be proposed which would operate similarly to the child labor provision of the F.L.S.A. This law could have the effect of prohibiting the shipment into commerce any motion picture or photograph in which children under a certain age have appeared in the nude or depicted in some other objectionable manner.

In United States v. Darby, supra, the U.S. Supreme Court stated that "while manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power 'to prescribe the rule by which commerce is governed.'" 312 U.S. at 113. The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledge no limitation other than are prescribed in the Constitution." Ibid., at 114. This power can neither be enlarged nor diminished by the exercise or non-exercise

of State power." Ibid. "Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the State for which they are destined it may conceive to be injurious to the public health, moral or welfare, even though the State has not sought to regulate their use." Ibid.

It has also been established that Congress may by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. Maryland v. Wirtz, 392 U.S. 183 (1968). In Atlanta Motel v. United States, 379 U.S. 241, 251-252 (1964), the Court stated that in those cases where commerce is involved, "Congress is clothed with direct and plenary powers of legislation over the whole subject" and therefore it "has the power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof."

Consequently, it would appear that legislation could also be proposed which would have the effect of prohibiting the act itself (use of children in production of sexually explicit motion or still pictures) regardless of whether the material will enter into commerce inasmuch as it can be expected to "affect commerce." As Mr. Justice Clark stated in Atlanta Motel v. United States, supra:

[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. 379 U.S. at 258. See Maryland v. Wirtz, 392 U.S. 183 (1968); Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964).

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March 1, 1977